COURT MARTIAL

Citation: *R. v. Duhart*, 2015 CM 4023

Date: 20151211
Docket: 201544

Standing Court Martial

5th Canadian Division Support Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Sergeant D.C. Duhart, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

The Charges

[1] Sergeant Duhart has been found guilty of four charges under the Code of Service Discipline in relation to sexual harassment and ill-treatment of two subordinates who served under his direct supervision at the 42nd Canadian Forces Health Services Centre, on Gagetown Garrison, between August 2011 and March 2014. Two of the charges sanction conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act* for harassment contrary to Defence Administrative Orders and Directives (DAOD) 5012-0. These two charges relate to improper comments of a sexual nature, made to two subordinates, on several occasions. The two other charges are for ill-treatment of a person who by reason of rank was subordinate to him contrary to section 95 of the *National Defence Act*. Those two charges relate to one distinct incident of unwanted touching at the face and the waist of each complainant.

Matters considered

[2] It is now my duty as the military judge presiding at this Standing Court Martial to determine the sentence. In so doing, I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have also considered the facts relevant to this case, the three exhibits submitted by the prosecution in the course of the sentencing hearing and the submissions of counsel.

Purpose of the military justice system

[3] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Armed Forces, and a fundamental element of the military activity. The purpose of this system is the promotion of good conduct by allowing the proper sanction of misconduct. It is through discipline that an armed force ensures that its members will accomplish successful missions in a trusting and reliable manner.

OBJECTIVES AND PRINCIPLES OF SENTENCING

[4] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Armed Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society where necessary; and

(e) to rehabilitate and reform offenders.

[5] When deciding what sentence would be appropriate, a sentencing judge must also take into consideration the following principles:

(a) a sentence must be proportionate to the gravity of the offence;

(b) a sentence must be proportionate to the responsibility and previous character of the offender;

(c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate; and

(e) all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender.

[6] That being said, the punishment imposed by any tribunal should constitute the minimum necessary intervention that is adequate in the particular circumstances. For a court martial, this means imposing a sentence composed of the minimum punishment or combination of punishments necessary to maintain discipline.

[7] The *Queen's Regulations and Orders for the Canadian Forces* require that the judge imposing a sentence at a court martial considers "any indirect consequence of the finding or the sentence; and impose a sentence commensurate with the gravity of the offence and the previous character of the offender." The sentence imposed must be adapted to the individual offender and the offence he or she committed. As well, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

THE OFFENCES AND THE OFFENDER

The offences

[8] The circumstances of the offences were related to the Court by the two complainants and by three other prosecution witnesses who were each employed at Care Delivery Unit "A" (CDU "A") at the Health Centre in Gagetown. The two complainants were serving as medical technicians (med techs) under the direct supervision of Sergeant Duhart, along with approximately five other med techs. Sergeant Duhart was initially second in charge (2 i/c) as a master corporal, then in charge (i/c) of CDU "A" from his promotion to his current rank in 2013. Many of the remarks or gestures attributed to the offender by these witnesses were subsequently admitted by the offender in his testimony. The circumstances are as follows:

(a) In early February 2014, Corporal M was chatting with a colleague in the med tech room about not being keen to visiting the dentist when Sergeant Duhart interjected in the conversation. He inquired as to how she could hate going to the dentist when she had such white teeth, stating that "it must be because you have lots of cum in your mouth." He then said he was wondering "whose cum it might be" given that her husband was deployed at the time.

(b) Following the conversation, Corporal M was very upset that her supervisor would say something like that to her, she felt she had been taking these kinds of remarks for too long and felt the compounded effect of these kinds of remarks. Sometime later, Sergeant Duhart could

see she was upset and asked if she was in a bad mood due to her period. He also started poking her very annoyingly in the face and ear. She told him to stop but he continued until she said to stop or she would break his hand. The poking then stopped. This incident is the subject of the guilty finding on the second charge.

(c) Another incident occurred when Corporal M was discussing with a colleague about getting ready for her husband's imminent return from deployment. Sergeant Duhart interjected in the conversation to ask if she was "all shaved up" for her husband's return. She immediately assumed he was referring to the shaving of her vaginal area, given her previous experiences with Sergeant Duhart and his style of jokes. She said that she found these remarks to be gross and that it made her feel tense and uneasy, at a time when she was simply enjoying a relaxed discussion with a colleague.

(d) On several occasions at the workplace, Sergeant Duhart would hold a banana to his crotch area or in the zipper of his pants. On one occasion, he asked Corporal M if she wanted a bite of the banana, as he was standing a foot in front of the chair she was sitting in.

(e) On several occasions when Sergeant Duhart had to go to the bathroom, he would suggest to anyone present in the workplace that he needed some help in holding his penis, as it was "too heavy." He would ask if someone could hold "10 pounds" or words to that effect. Corporal M was asked on one occasion by Sergeant Duhart whether she would "hold [his] dick" while he went to the bathroom, as his back was sore.

(f) Upon coming to work in the mornings, Sergeant Duhart would ask whomever was present in the workplace whether they had dreamed about him last night or on the weekend. That question was asked directly to the two complainants a few times. Able Seaman C was asked that question softly to her ear. It was assumed that Sergeant Duhart referred to a sexual dream.

(g) One morning, Corporal M went to pick up a pair of combat boots in the room where she had forgotten them the previous afternoon. Her socks and underwear were folded into the boots. Sergeant Duhart remarked "Oh yeah, I thought something smelled awfully yeasty."

(h) At a time when Able Seaman C was visibly pregnant, Sergeant Duhart would walk in the workplace and ask, "How is my baby doing today?" She felt it implied he was the father of her child, which made her angry given that her husband was also a med tech employed at the 42nd Health Services Centre.

(i) Able Seaman C confided to Sergeant Duhart, her supervisor, that as a result of past incidents, she suffered from a mental illness for which she was obtaining regular treatment. Once Sergeant Duhart was aware of her condition, he performed what he described as "sensitivity checks" on her, consisting of coming from behind when she did not expect it and buckling her knees, grabbing her hair or grabbing her waist as she was sitting on a chair. He continued this practice after having been told to stop. He would do this to see how she would react. If she would not flinch much, he would say she is having a "good day", implying her condition was well controlled. She said this made her feel vulnerable and triggered some of the symptoms of her condition. This conduct is the subject of the guilty verdict on the fourth charge under section 95 of the *National Defence Act* for ill-treatment of a subordinate.

[9] As for the impacts that these incidents of unwelcome "jokes" and unwanted touching had on the victims, they both testified that they did not at all appreciate being treated that way by their superior. The remarks made towards them by Sergeant Duhart made them feel depressed. They both went to Sergeant Duhart's superiors directly, on multiple occasions, seeking their intervention. Unfortunately, they did not receive any assistance. One of the victims said she was told, "That's just how Sergeant Duhart is." implying she would have to live with that. Both victims felt hopelessness for their situation and, at times, did not want to go to work again, as they would be required to deal with Sergeant Duhart.

The offender

[10] Sergeant Duhart is a 38-year-old medical technician originally from Newfoundland, who has been serving with the 42nd Canadian Forces Health Services Centre in Gagetown since 2010. He joined the Canadian Armed Forces in April 2000 as a linesman. After basic and initial occupational training, he served with the 1 Canadian Field Hospital in Petawawa, the Health Services Centre in Halifax and its Detachment in St-John's as well as onboard ship. He deployed once on HMCS *Iroquois* with a NATO Naval Maritime Group for four months in 2006. He is currently on a temporary medical category which could jeopardize future service within the Canadian Armed Forces. He has a common law spouse since joining and an 11-year-old daughter.

[11] The offender's commanding officer and unit chief testified on sentencing for the prosecution. They had limited personnel knowledge of Sergeant Duhart, having both been appointed recently. What I find important in their testimony, from the offender's perspective, is that administrative measures have been imposed as a result of the events, subject of the offences, and the monitoring period to which Sergeant Duhart was subject was successfully completed. Sergeant Duhart has not displayed any questionable behaviour since. I understand he will continue to be employed at the unit following sentencing and be under close supervision.

[12] More importantly, from the offender's perspective was the testimony of Warrant Officer Dickson, a physician assistant who has worked closely with Sergeant Duhart since August of this year. He said that Sergeant Duhart came to him early on and asked outright for mentorship that he said he needed. Sergeant Duhart has shown a willingness and capacity to accept advice and act upon it. From what Warrant Officer Dickson has seen from Sergeant Duhart, he believes he can be trusted to supervise subordinates adequately and appropriately. He assessed the clinical performance of Sergeant Duhart very frankly and said that his potential is average for a sergeant. Warrant Officer Dickson said it would be a "shame to underemploy" Sergeant Duhart as he has earned his rank and the responsibilities that go with it. As a result, the unit would lose significant expertise and an important contribution if he was to be let go or underemployed.

[13] Finally and most importantly, Sergeant Duhart testified on sentencing. Obviously shaken and short on words to describe how he felt, he did testify about the medical appointments he needs to attend as he struggles with depression. He said he is embarrassed by and ashamed of his actions. He apologized directly to one of the victims present in court, saying he did not mean to disrespect her or her husband and that he is terribly sorry for what he did and what he said. He also said he was sorry to be an embarrassment for his unit.

POSITION OF PARTIES ON THE SENTENCE

Prosecution

[14] In terms of the determination of an appropriate sentence, the prosecution stressed the objectives of denunciation and deterrence, asking this court to impose a sentence of detention between 5 and 10 days.

Defence

[15] In response to submissions by the prosecution, defence counsel submitted that a custodial sentence was not warranted. It is suggested that Sergeant Duhart has learned a lesson the hard way and I take these remarks to mean that defence suggests that the main sentencing objective to be met in this case is rehabilitation. The sentence suggested by defence is a severe reprimand, combined with a fine between 2000 and 2500 dollars.

ANALYSIS

Objective gravity of the offences

[16] In arriving at evaluating what would be a fair and appropriate sentence, the court has considered the objective seriousness of the two offences of conduct to the prejudice of good order and discipline and the two offences of ill-treatment of subordinates as illustrated by the maximum punishments that the court could impose. Offences under

section 129 of the *National Defence Act* are punishable by dismissal with disgrace from Her Majesty's service or less punishment and offences under section 95 of the *National Defence Act* are punishable by imprisonment for less than two years or to less punishment. Only one sentence can be imposed for all offences.

Aggravating factors

[17] The circumstances of the offences demonstrate to the court a pattern of sexually harassing behaviour and comments by a senior non-commissioned officer (NCO) occupying supervisory functions in the workplace, mostly directed at two female subordinates consisting of inappropriate and, at times, extremely crude comments of a sexual nature. This behaviour was repetitive and manifested itself for months on end. In the course of this sexual harassment, there were two instances of unwanted touching which, here in the context of psychologically vulnerable victims, constituted ill-treatment of subordinates, even if the degree of physical violence involved was minimal.

[18] I consider, for the purpose of sentencing, that this case is really about harassment in the workplace. This is serious. As found by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd*., [1989] 1 S.C.R. 1252 at paragraph 56:

> When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[19] This principle is not confined to Supreme Court jurisprudence; it is found in Canadian Armed Forces policy at DAOD 5012-0 on Harassment Prevention and Resolution which recognizes that"[a]ll CF members and DND employees have the right to be treated fairly, respectfully and with dignity in a workplace free of harassment, and they have the responsibility to treat others in the same manner." This is a standard which has been regularly enforced by the Canadian Armed Forces leadership, both administratively and through proceedings under the Code of Service Discipline, including at courts martial.

[20] The behaviour displayed in this case by Sergeant Duhart was unwelcome and should have been seen as such on many occasions. Even if I was to accept that Sergeant Duhart intended many of his remarks as jokes, it remains that he should have realized that his jokes were not funny. It is even more so given that he was entrusted with supervisory responsibilities which obliged him to pay particular attention to and care for the well-being of his subordinates. The offences reveal a serious failure in leadership and an obvious aggravating factor.

[21] In addition, another aggravating factor in this case is the trauma caused to the two victims by the actions of Sergeant Duhart. One of these persons may have been

vulnerable due to circumstances beyond the control of the offender, yet it was his responsibility as a superior to assist her, not make her condition worse. Both victims were so fed up with the conduct of the offender that they no longer wanted to come to work and became depressed. Yet, I acknowledge that the sense of hopelessness they have come to feel was not entirely attributable to Sergeant Duhart. These persons went to Sergeant Duhart's superiors for help with the sexual harassment they were experiencing in their relation with him. From their point of view, they were denied assistance. I believe them. I find that the sense of hopelessness and despair they came to experience cannot be solely attributed to the misconduct of the offender but also involved inaction from those higher up in the chain of command. They, too, appear to have failed to meet the standard of conduct prescribed by DAOD 5012-0.

Mitigating factors

[22] The court has also considered the following mitigating factors, as mentioned in submissions by counsel and demonstrated by the evidence presented in mitigation, especially by defence counsel:

(a) First and foremost, the testimony of Sergeant Duhart during the sentencing hearing to the effect that he regretted his actions and his apology to one of the victims present. The court sees this as a genuine sign of remorse and an indication that he is taking full responsibility for what he has done. This admission of responsibility occurred in a very formal and public forum of this court martial, in the presence of members of his unit and chain of command.

(b) The fact that Sergeant Duhart has no conduct sheet and has served the Canadian Armed Forces honorably for over 15 years with increased responsibilities and, it can be assumed, significant accomplishments;

(c) Sergeant Duhart's admissions of some facts which allowed this trial to proceed more rapidly and efficiently even if it doesn't have the full mitigating fact of a guilty plea;

(d) The fact that Sergeant Duhart's conduct and attitude appears to have changed significantly since actions were taken against him by his chain of command, at which point he was finally confronted with the unacceptable nature of his conduct and the impact his actions had on his subordinates.

(e) The age and potential of Sergeant Duhart to contribute to the challenging mission entrusted to his unit. As mentioned by Warrant Officer Dickson, this contribution would be most effective if Sergeant Duhart was to be entrusted with responsibilities commensurate with his rank and experience. Regardless of his future in the Canadian Forces, it remains

> that Sergeant Duhart is on the road to rehabilitation and can still make a positive contribution to Canadian society in any capacity in the future.

Objectives of sentencing to be emphasized in this case

[23] I came to the conclusion that in the particular circumstances of this case, the focus in sentencing should be placed on the objectives of denunciation and deterrence. Given the nature of the offences, the court adopts the remarks made by Judge Lamont in the Standing Court Martial of *R. v. Corporal Priemus*, 2006 CM 2013 at paragraph 9 to the effect that victims of harassment have earned and are entitled to the respect of their peers, superiors and subordinates, adding that:

> the court must also be concerned with general deterrence. Members of the Canadian Forces and especially women members who are much more frequently the [victims] of this kind of behaviour, must have the assurance that their dignity is respected by fellow members.

[24] That being said, I also believe that rehabilitation is important in this case. The evidence reveals that once his chain of command finally acted in relation to his behaviour, Sergeant Duhart did not reoffend. He has been making a productive contribution since, despite the limitations due to his medical appointments. It is possible to infer from the evidence heard during the trial that Sergeant Duhart, at the time when he committed the offences, did not benefit from the mentorship and support that anyone suddenly thrusted in positions of leadership should have. He was placed in the position of i/c in the absence of the sergeant and upon promotion, appeared to work for someone who may not have been as sensitive as required to the need of ensuring a workplace free of inappropriate conduct which could constitute harassment.

The sentence of detention proposed by the prosecution

[25] As mentioned previously, the prosecution requests that I impose a sentence of detention for a period of 5 to 10 days, a duration which in reality is symbolic as it is difficult to imagine that someone could undergo a proper process of reflection and re-education in such a short time. In support of this request, prosecutors brought four cases to my attention, presumably to indicate the range of sentences which would be applicable in similar cases. The only precedent dealing with a sentence of detention was the case of *R. v. Snow*, 2015 CM 4003 where, on 16 March of this year, I accepted a joint submission from counsel for detention for a period of seven days and a fine of $1,000. This is a case where a master corporal had ambushed a corporal in the parking lot of his unit to punch him, as he suspected the corporal had been intimate with his wife. The case of *Master Corporal Snow* has nothing to do with this case which, again, is about sexual harassment and associated ill-treatment by a supervisor towards two subordinates. Out of the three other cases submitted by the prosecution which resemble the circumstances of this case, the most severe sentence imposed was a severe reprimand and a fine of $4,000 in *R. v. McCabe and Gibson*, 2010 CM 2008. This is, of course, considering that the sentence in *R. v. LS Bernier*, 2002 CM 15 where a reduction in rank that was imposed at trial was reduced on appeal to a severe reprimand, a detail I

had to find out for myself on the bench yesterday. The other case submitted was *R. v. Whitten*, 2012 CM 4004, where the military judge accepted a joint submission for a severe reprimand and a $3,000 fine.

[26] At the end of his submissions, the prosecutor admitted before me that he was not aware of any case of sexual harassment or abuse of subordinates in circumstances similar as those here, where detention was imposed as a sentence. In fact, the prosecution was even unable to show the court any case where the next punishment down the scale, namely reduction in rank, was imposed for sexual harassment.

[27] What the prosecution is asking the court to do, therefore, is to expand the range of applicable sentences to include detention, a custodial sentence which the law says should be imposed only as a last resort.

[28] I wish to say that the court is not isolated from society nor from the Canadian Armed Forces. I am aware that the Canadian Armed Forces has received heightened attention lately in relation to sexual misconduct. Although no evidence was introduced to explain what Operation (Op) HONOUR is, CANFORGEN 130/15 representing the order from the current Chief of the Defence Staff to the entire Canadian Armed Forces can be taken under judicial notice under Rule 15 of the *Military Rules of Evidence*, given its extraordinary nature. That message was about sexual misconduct and Op HONOUR. I would be receptive to consider evidence and arguments substantiated by doctrine and case law to justify why it would be appropriate for the sentencing range for offences of sexual misconduct to be increased. None of that was offered to me at the sentencing hearing yesterday. In the circumstances, I am forced to conclude that the prosecution's submission for detention is an exercise in lip service that is entirely devoid of substance. If the sanction of sexual misconduct is important for the Canadian Armed Forces, I would expect military prosecutors to treat it that way and prepare evidence and sentencing submissions that would justify a judge, acting judicially, to move the sentencing range up or at least justify imposing a sentence outside of the range due to particularly aggravating circumstances.

[29] Some may suggest that, as the sentencing judge, I could complement the prosecution's failings, conduct my own research and substantiate a sentence that I could impose outside of the usual range. Such a suggestion would ignore the fact that, as a judge, I am bound to act judicially, on the basis of evidence and law submitted to me. I cannot be a prosecutor and a judge at the same time. That would be unfair for Sergeant Duhart and, indeed, would do disservice to the administration of justice.

[30] Therefore, given the total absence of justification for a sentence of detention in this case, I will not consider it. That is so, even in consideration of the offer made by defence counsel in response to my question to the effect that the accused would prefer detention for a short period instead of imprisonment. A sentence that is inappropriate cannot be made acceptable by consent of counsel.

Determination of the appropriate sentence

[31] It is an important principle that the court should impose the least severe punishment that will maintain discipline. As I just mentioned, the punishment of detention is off the table. The next punishment in the order of severity is reduction in rank. I believe that punishment is within the range of sentences which can be imposed in cases such as this one on the basis of *R. v. Sergeant A. Quinn*, 2000 CM 65, a decision that was not mentioned by the prosecution in the sentencing hearing but was brought to my attention in arguments on findings on the scope of section 95 earlier in the trial. This is a precedent I cannot ignore. In that case, Military Judge Menard found the accused guilty of three charges of ill-treatment under section 95 and imposed a reduction in rank to rank of corporal. This was, however, a second similar offence for Sergeant Quinn, a significant aggravating factor that's not present here.

[32] Having identified the maximum punishment I could impose, I have to avoid making the mistake of starting my analysis with that punishment. Instead, I must start my analysis by the less severe punishment being proposed by defence and ask myself if that punishment or combination punishments would be sufficient to meet the objectives of sentencing I identified above, namely denunciation, deterrence and rehabilitation. I will then proceed up the scale of section 139, if I need to.

[33] Is the punishment of a severe reprimand combined with a fine, proposed as a starting point by the defence, sufficient to meet these objectives of sentencing? It was deemed so in the past and I was not given any substantive arguments as to why it would be inadequate now. It is clear to me, however, that the impact of such a punishment on the objectives of denouncing the behaviour of the offender is more limited than a reduction in rank. Yet, I cannot ignore the impact that the conduct of this trial had, not only on the offender, but also on the unit and the broader military community here on Gagetown Garrison. It indicates that the behaviour of the offender has not been tolerated. It is being sanctioned and the conduct of that process in public has a deterrent effect and serves both the objectives of general and specific, as any one of the numerous persons who attended the proceedings could attest.

[34] This is a close case. I have balanced the degree of misconduct that this case highlights and the impact on victims attributable to the conduct of the offender with the significant impact a sentence of reduction in rank would have on Sergeant Duhart and on his unit. Indeed, according to Warrant Officer Dickson, who impressed me as worthy of trust, the unit would be disadvantaged by losing the contribution the offender can make, in the rank of sergeant. On the basis of the evidence and authorities submitted to me in sentencing, as well as the representations of counsel, I feel I have not been provided with enough substance to conclude that a severe reprimand and a significant fine would not serve the objectives of sentencing in this case. I find that the minimum sentence that will meet the interests of justice for a first time offender like Sergeant Duhart is the maximum sentence presented to me in the relevant case law submitted by the prosecution on sentencing, namely a severe reprimand and a fine of $4,000.

[35] Sergeant Duhart, the circumstances of the four charges I have found you guilty of reveal a behaviour that is shocking and utterly unacceptable on the part of anyone in the service. You realize that by now. I believe the regrets you expressed in this courtroom yesterday and the apology you made directly to one of the victims and to the senior leadership of your unit are sincere. However, the gravity of what you have done and the effects of your conduct on others cannot be overstated. Had it not been for the testimony of Warrant Officer Dickson yesterday, you would have walked out of this courtroom as a corporal. His words, together with the sincerity you displayed yesterday convinced me that your attitude has changed and you are on the road to rehabilitation. It is a long road and you will have to deal with mistrust and judgemental attitudes for a while. For what it is worth, you should know that I, who have judged and sentenced you, think that you can walk out of this room with your head up, having faced the music and demonstrated you are engaged in becoming a better person who has learned and will not reoffend. The rest of your life starts now, try to move on.

FOR THESE REASONS, THE COURT:

[36] **SENTENCES** you to a severe reprimand and a fine of $4,000, payable in 10 monthly installments of $400, commencing no later than 1 February 2016. In the event you are released from the Canadian Armed Forces for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to your release.

Counsel:

The Director of Military Prosecutions as represented by Major D. Martin

Major D. Hodson, Defence Counsel Services, Counsel for Sergeant Duhart