



COURT MARTIAL

Citation: *R. v. Funk*, 2017 CM 4002

Date: 20170118

Docket: 201562

Standing Court Martial

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

Between:

Her Majesty the Queen

- and -

Warrant Officer J.D. Funk, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Warrant Officer Funk, having accepted and recorded your guilty plea in respect of charges two and three on the charge sheet, the Court now finds you guilty of those charges under section 129 and subsection 116(a) of the *National Defence Act (NDA)* for respectively striking and damaging a weapon in the course of an inspection you conducted as an instructor with the Infantry School on 9 October 2015.

A joint submission is being proposed

[2] I now need to impose the sentence. This is a case where a joint submission is made to the court. Both prosecution and defence counsel recommended that I impose a sentence composed of the punishments of a reprimand and a fine of \$1750.

[3] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. I am not obliged to go along with what is

being proposed. However, as any other trial judge, I may depart from a joint submission only if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, as promulgated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[4] While it is my duty to assess the acceptability of the joint submission being made, the threshold to depart from it is high as joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for offenders who are remorseful to begin making amends. The benefits of joint submissions extend to victims, witnesses, the prosecution and the administration of justice generally; by saving time, resources and expenses which can be channelled into other matters. The most important gain to all participants is the certainty a joint submission brings, of course, to the accused, but also to the prosecution who wishes to obtain what a military prosecutor concludes is an appropriate resolution of the case in the public interest.

[5] Yet, certainty of outcome is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As noted by the Supreme Court in *R. v. Généreux*, [1992] 1 S.C.R. 259, the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces (CAF) but serves a public function as well by punishing specific conduct which threatens public order and welfare. Courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following trial or a guilty plea. The sentencing takes place on a military establishment, in public, in the presence of members of the offender's unit.

[6] The imposition of a sentence at a court martial, therefore, performs a disciplinary function. Article 112.48 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the previous character of the offender. When a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered but also adequately laid out in the sentencing decision. This requirement of sentencing at courts martial does not detract from the guidance provided by the Supreme Court on joint submissions, as laid out at paragraph 54 of *R. v. Anthony-Cook*.

Matters considered

[7] In this case, the prosecutor read a statement of circumstances and provided the documents required by QR&O 112.51. Pictures were introduced as exhibits to assist in understanding the damages done to the weapon and the layout of the inspection during which the offences were committed. The prosecution also entered an agreed statement

of facts as an exhibit to inform the Court as to the parameters applicable to the inspections of students, the actions taken following the incident, views of the commandant of the Infantry School and personal circumstances of Warrant Officer Funk.

[8] For its part, the defence produced, with the consent of the prosecution, three personal evaluation reports (PER) as well as an additional agreed statement of facts, at the court's request, providing details of Warrant Officer Funk's first period of service with the Regular Force.

[9] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their joint position on sentence on the basis of the facts and considerations relevant to this case, as well as by comparison with judicial precedents in other cases. These submissions and the evidence allow me to be sufficiently informed to meet the requirement to consider any indirect consequence of the sentence, and impose punishment adapted to the individual offender and the offences committed.

The offender

[10] Warrant Officer Funk is a 49-year-old infantryman who was, at the time of the offences, employed as an instructor with the Infantry School here in Gagetown. He first joined the Regular Force in November 1990 following some prior service with the Reserves. On completion of basic Infantry Training, he served with the 1 RCR in London and Petawawa. He deployed to Croatia in 1992 and released from the Regular Force in January 1994. He re-joined in 2001, this time with the Princess Patricia's Canadian Light Infantry (PPCLI), with which he served in Edmonton and Shilo as well as on three deployments, including twice in Afghanistan. He moved to Gagetown in 2014 for training and subsequently joined the Infantry School, the unit he is still a member of, although he is currently employed elsewhere on base as part of a return to work programme.

[11] Warrant Officer Funk was removed from his position of instructor at the Infantry School following the reporting of the incidents for which he is being sanctioned today. I am informed that he has been diagnosed last fall with three distinct mental disorders, including post-traumatic stress disorder (PTSD), although no link between these and the incident was established. He is currently undergoing counselling and has asked to be posted to the Joint Personal Support Unit (JPSU) to facilitate the delivery of needed care in light of his mental health condition. His records indicate that his terms of service expire in October 2017. Warrant Officer Funk has been married for 24 years and he is the father of two young adults.

[12] The defence produced three PER reflecting Warrant Officer Funk's past performance and potential as a member of the CAF. The two reports from 2011/2012 and 2014/2015 at the rank of sergeant are obviously positive as they lead to Warrant Officer Funk being promoted to his current rank in August 2015. His last PER, signed in July 2016, shows "skilled" to "exceeding standards" in performance, largely "normal

potential” and “developing” in terms of promotion recommendation. However, his conduct has been assessed as unacceptable due to the incident for which he is being sentenced today.

The offences

[13] To assess the acceptability of the joint submission, the Court has considered the objective seriousness of the offences as illustrated by the maximum punishment that can be imposed. Offences under section 129 of the *NDA* are punishable by dismissal with disgrace from Her Majesty’s service while offences under section 116 are punishable by imprisonment for less than two years or less punishment.

[14] The facts surrounding the commission of the offences in this case are disclosed in the statement of circumstances read by the prosecutor and formally admitted as accurate by Warrant Officer Funk. These circumstances can be summarized as follows:

- (a) At the time of the offences, Warrant Officer Funk was employed as the course warrant officer for a Basic Military Officer Qualification serial 1514 at the Infantry School on Canadian Forces Base (CFB) Galetown.
- (b) On 9 October 2015, he conducted an inspection in a room assigned to four students on the course which included an inspection of the students’ weapons, laid out on their respective beds.
- (c) Warrant Officer Funk was already angry when coming into the room. While inspecting the weapon belonging to a student who was not present, he angrily and verbally expressed to the students present that he had found rust on the weapon.
- (d) He then took the barrel of one of the weapons by one of its extremities in one of his hands and proceeded to hammer towards the layout of the weapon on the bed, with rage, for approximately five repetitions, while verbally ranting.
- (e) One of those hits was directly applied with maximum force to the body of the weapon, which resulted in damages in the form of a bend.
- (f) Warrant Officer Funk then grabbed the mattress on which the weapon was laid out and flipped it, thereby projecting the pieces of the dismantled weapon on the floor of the room. He then went on to inspect another weapon in the room. He expressed to the students present that he found rust on this weapon as well. He then proceeded to flip the mattress on which that weapon was laid out, thereby projecting the pieces of that other dismantled weapon on the floor of the room, resulting in the small parts of both weapons being mixed together.

- (g) Warrant Officer Funk's actions are incompatible with the purpose of, and the standard maintained at, the Infantry School. His actions instilled fear and led to a diminution of the trust that the students involved had in him as a leader. This situation has the potential to adversely impact the quality of the training.
- (h) Additionally, Warrant Officer Funk's behaviour during this inspection provided a negative example to the students and subordinate instructors present, or who were made aware of the situation. It wrongfully promoted the idea that such level of aggressivity is acceptable, while it is not.

Aggravating Factors

[15] The circumstances of the offences in this case reveal, in my view, a loss of control on the part of Warrant Officer Funk, who allowed his anger to take over his conduct during an inspection he was conducting as part of an important career course at the Infantry School. In behaving as he did, he breached the standard of conduct expected of him as an instructor, a standard understandably high as instructors, especially senior ones as he was, are not only expected to lead by example, they are expected to be role models for students who in turn will move on to increased levels of leadership and responsibilities within the army. There was more however, as this lack of control led to what could be characterized as a destructive rage when he used the barrel of a weapon to hit another part of a weapon, causing damage to that public property.

[16] The court has to be cautious in assessing what constitutes aggravating factors in given circumstances. Indeed, the impact of aggravating factors is to increase the sentence that would otherwise be warranted. Aggravating factors are not to be accepted lightly as indeed they must be determined on the highest standard of proof beyond a reasonable doubt if there are any disputes on the underlying facts. I may also add that the recognition of an aggravating factor in one case may influence the outcome of another case.

[17] It is especially important for me, as a judge, to be cautious about facts that are included in the elements of the offence. For instance in this case, the fact that Warrant Officer Funk was an instructor could not be aggravating in relation to the charge under section 129 as it is the violation of the standard of conduct applicable to instructors that constitutes the gravamen of the offence. Yet, I find that his status as instructor is aggravating in relation to the offence of wilfully damaging public property. Instructors are expected to show an example as to how to handle public property, especially in the presence of their students. Additionally, I agree with the suggestion that in the context of military service, damaging a weapon, as opposed to other things, is aggravating as weapons are basic tools of the trade for soldiers. Care of weapons is of the utmost importance given the negative consequences that may ensue if a weapon becomes unserviceable during operations and even training.

[18] Another pitfall to avoid in determining aggravating factors is the risk of allowing possibilities or perceptions to become uncontested facts aggravating the sentence. I welcome views allowing me to better understand why a certain standard of conduct is being imposed and the prejudice that may result from its breach. Yet, possibilities or speculations relating to consequences cannot transform into aggravating factors. Until specific negative outcomes are proven or admitted, they are part of the offence itself and neutral. For that reason, I cannot accept the suggestion to the effect that the fact the offences took place in the presence of junior officers as opposed to non-commissioned members is aggravating on the basis of the facts presented to me. The evidence does not allow me to conclude beyond a reasonable doubt that the negative impact of the actions of the offender on students was greater because of the fact they were officers.

[19] Having concluded that the offences committed here are the result of a loss of control on the part of Warrant Officer Funk, I also cannot accept as aggravating any suggestion to the effect that the offender should be punished more severely because his actions promoted aggression; rejected practices, directions and values promoted by superior authorities and/or reinforced negative belief relating to what has been described as “old school” approaches to training today’s soldiers. I have to assume this case made it to trial for the right reasons as charges were preferred by an independent prosecutor duty bound to promote the public interest, including the interest of the CAF, as described to the Director of Military Prosecution by competent authorities as part of the charging and referral processes. Any negative perception that may have been held in private, closed circles to the effect that instructors rely on “old school” practices has been more than compensated for by the conduct of this trial in open court, in the presence of interested members of the military community and of the general public including journalists. The fact is that Warrant Officer Funk is sentenced today for behaving in a manner that is considered incompatible with the standard set by the CAF and the Infantry School attests that the days of “old school” approaches are indeed over. This alone is a satisfactory consequence without having to increase the severity of the sentence imposed on the offender for any negative perceptions his actions may have caused.

Mitigating factors

[20] The Court also considered the following as mitigating facts arising either from the circumstances of the offences or the offender in this case:

- (a) First and foremost, Warrant Officer Funk’s guilty plea, which avoided the conduct of a trial, which I consider as a clear indication that the offender is taking full responsibility for his actions, in this public trial in the presence of members of his unit and of the broader military community. In the specific circumstances of this case, this plea has spared significant expenses as the conduct of this trial was scheduled for two weeks with several witnesses requiring translation and expert witnesses.

- (b) Second, the fact that Warrant Officer Funk has no criminal or disciplinary record and that his behaviour was out of character for him. In my view this is the only reasonable inference that can be drawn from the circumstances of the offences presented in the statement of circumstances.
- (c) Finally, Warrant Officer Funk's lengthy period of service with the CAF, including deployments overseas and what can be presumed as a valuable contribution on operations and training on the basis of the information available to me. It is clear that Warrant Officer Funk is facing mental health challenges not unlike many veterans of missions yet he has taken steps to get better and I have little doubt he has the potential to continue making a positive contribution to Canadian society in the future.

Objectives of sentencing to be emphasized in this case

[21] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation and general deterrence in sentencing the offender. At the same time, any sentence imposed should not compromise the rehabilitation of Warrant Officer Funk.

Assessing the joint submission

[22] There has been evidence heard and submissions made as to what would be an appropriate sentence to be imposed in this case. Yet, the first thing I need to do is to assess the joint submission and determine if it is acceptable. The prosecutor and defence counsel both recommended that this Court impose the punishments of a reprimand and a fine of \$1750 to meet justice requirements. I may depart from the joint submission only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[23] As a military judge, the issue for me to assess is not whether I like the sentence being jointly proposed or whether I would have come up with something better. Indeed, the threshold for departing from joint submissions is very high and any opinion I might have on an appropriate sentence is not sufficient for me to reverse the joint submission that was made.

[24] The Supreme Court has required such a high threshold as it is necessary to allow all of the benefits of joint submissions to be obtained. Prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. They are highly knowledgeable about the circumstances of the offender and the offences, as with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command. He or she is aware of the needs of the military and civilian communities and is charged with representing those interests in seeing that justice be done. Defence

counsel is required to act in the accused's best interests, including ensuring that the accused's plea is voluntary and informed. Both counsel are professionally and ethically bound not to mislead the court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[25] In determining whether a jointly proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, I must ask myself whether, despite the public interest considerations that support imposing it, the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system. Indeed, I have to avoid rendering a decision that causes an informed and reasonable public, including members of the CAF, to lose confidence in the institution of the courts.

[26] I do believe that a reasonable person aware of the circumstances of this case would expect that the offender would receive a sentence composed of punishments that both express disapprobation for the failure in discipline and leadership involved and have a personal impact on the offender. A sentence composed of a reprimand and a fine is aligned with these expectations.

[27] Considering all of these factors, as well as the circumstances of the offences and of the offender, the applicable sentencing principles and the aggravating and the mitigating factors mentioned previously, I am unable to conclude that the sentence jointly proposed by counsel would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. The Court must, therefore, accept it.

[28] Under section 145(2) of the *NDA*, the terms of payment of a fine are in the discretion of the service tribunal that imposes it. At the sentencing hearing, the prosecution did not object to the request made by defence that the fine be payable by instalments of \$250 per month unless the offender is released from the CAF.

[29] Warrant Officer Funk, the circumstances of the charges you pleaded guilty to reveal a lack of control that is clearly not acceptable, not only as an instructor, but also in any work environment. Yet, the most unfortunate aspect of your conduct is not so much the thing that you broke but it is rather the breakdown that your actions caused to the respect you enjoyed from colleagues, the trust you earned from your superiors at the Infantry School and, most importantly, the fact that your actions deprived your students of the role model and confidant you should have been for them. Students should be proud of their instructors. Unfortunately, it did not appear to be the case here because of your conduct. That being said, I do accept that this episode reflects a mistake on your part, for which you have now paid your debt to the military justice system. You are hopefully on a road to rehabilitation and most importantly to finding your health and balance back. Once that's done, I am certain you can look forward to many more years of positive contribution to your family, friends and colleagues as well as Canadian society in any capacity.

FOR THESE REASONS, THE COURT:

[30] **SENTENCES** you to a reprimand and a fine of \$1750 payable in 7 monthly instalments of \$250, commencing no later than 15 February 2017. In the event you are released from the CAF 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.G.J. Martin

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Warrant Officer D.J. Funk