



COURT MARTIAL

Citation: *R. v. Lévesque*, 2016 CM 4018

Date: 20161117

Docket: 201630

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal A.P.M. Lévesque, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Corporal Lévesque was found guilty at this trial of the charge he faced under section 85 of the *National Defence Act*, for behaving with contempt towards a superior officer. The Court found that on the morning of 26 February 2016, during a course at Petawawa Garrison, Master Corporal Lévesque expressed his refusal to get a helmet as requested and uttered the words “fuck off” at his instructor, Sergeant Sullivan. I now need to impose the sentence.

A joint submission is being proposed

[2] Following the Court’s finding yesterday, counsel requested an adjournment to discuss sentence. At the subsequent sentencing hearing, both the prosecutor and defence counsel jointly recommended that this Court impose a sentence composed of the punishments of a reprimand and a fine of \$850.

[3] This joint submission does not oblige me to go along with whatever is being proposed. Indeed, a military judge, as any other trial judge, may depart from a joint submission if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This is the test promulgated on 21 October 2016 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 undeniably high as joint submissions respond to important public interest considerations. 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 the prosecutor concludes is an appropriate resolution of the case in the public interest.

[5] Yet, even if certainty of outcome is important for the parties, it 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 of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, 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 accused unit.

[6] The imposition of a sentence at the end of court martial proceedings, therefore, performs a disciplinary function. *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) article 112.48 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 to an extent that may not always be necessary in many busy downtown criminal justice courts. These particular requirements of sentencing at courts martial do not detract from the guidance provided by the Supreme Court of Canada on joint submissions. (*Anthony-Cook*, paragraph 54)

Matters considered

[7] In this case, the Court is aware of the circumstances of the offence as a result of the trial. As for the circumstances of the offender, the Court obtained the documents provided by the prosecutor under QR&O article 112.51. The Court also obtained documents from the defence, highlighting the offender’s work performance previous to, at the time and since the commission of the offence. Documentation was also obtained on the actions taken by the offender’s chain of command in relation to the conduct that was the subject of the charge. Those documents consist in a recorded warning imposed on the offender on the afternoon of the offence, as well as periodic reviews throughout a six-month monitoring period. The defence also produced two personnel evaluation

reports and one personnel development review covering the period of 1 April 2014 to 31 March 2016.

[8] Finally, the Court also benefitted from the submissions of counsel that provide justification for their joint position on sentence, on the basis of the facts and considerations relevant to the case. These submissions and the evidence allow me to be sufficiently informed to meet the requirement of the QR&O to consider any indirect consequence of the sentence, and impose a sentence that is adapted to the individual offender and the offence committed.

The offender

[9] Master Corporal Lévesque is a 27-year-old infantryman. He has joined the Army Reserve in July 2007, with the Royal Montreal Regiment. He performed significant periods of full-time service while serving with the Reserves, including a deployment to Afghanistan in 2010-2011. He transferred to the Regular Force in February 2012 and has served with the 1st Battalion of The Royal Canadian Regiment here in Petawawa since then. He intends to continue serving in the Regular Force, at least until his terms of service expire in February 2018.

[10] Master Corporal Lévesque's performance appears to have been entirely satisfactory up to the time of the offence. A letter from Sergeant Martin, as well as a formal personnel evaluation reports and a personnel development review for Fiscal Year 2014-15, reveal that his performance exceeded standards in all areas and was qualified as "excellent" as it relates to his employment as staff section second in command (2IC) on an infantry course. His formal evaluation for the next fiscal year, completed two months after the offence in April 2016, is however highly adverse. His performance rating for conduct was rated as "unacceptable" and his potential rating for leadership and communications skills went respectively from "outstanding" and "above average" the previous year to "low" in 2015-2016. His promotion recommendation went from "ready" to "no". The narrative of that report refers specifically to the events of 26 February 2016, for which the offender is being sentenced today.

[11] That having been said, the performance of Master Corporal Lévesque, since the commission of the offence, has been assessed from "satisfactory" to "excellent". The documents, related to a recorded warning imposed on the offender on the afternoon of the offence, show positive assessments in three periodic reviews throughout the six-month monitoring period. His company commander declared himself satisfied with Master Corporal Lévesque's progress and ended the recorded warning monitoring as of 29 August 2016. Master Corporal Lévesque's performance, in the summer of 2016, in support of cadet training, was assessed as excellent.

[12] Master Corporal Lévesque has no conduct sheet and is, therefore, to be considered as a first-time offender. As for the offender's personal situation, Master Corporal Lévesque is considered officially single but has been, for about two years, in a

steady relationship with a girlfriend in Ottawa and provides financial support for her two children.

The offence

[13] In assessing the joint submission, the Court has considered the objective seriousness of the offence, as illustrated by the maximum punishment that the Court could impose. Offences under section 85 of the *National Defence Act* are punishable by dismissal with disgrace from Her Majesty's service or less punishment.

[14] The facts surrounding the commission of the offences in this case can be summarized as follows:

- a. The offence was committed in the context of a Light Armored Vehicle conversion course held at the Battalion on Garrison Petawawa. Sergeant Sullivan was senior instructor for Master Corporal Lévesque's section. Shortly after the activities had commenced on 26 February 2016, Sergeant Sullivan dismissed the students to allow time for them to obtain their helmets needed for an unscheduled training activity to be held later.
- b. Sergeant Sullivan then engaged in an informal conversation with Master Corporal Lévesque and Corporal Lowe, another student in his section. He realized Master Corporal Lévesque did not have a helmet and consequently told him that he needed to get a helmet to be able to partake in the upcoming training activity.
- c. Master Corporal Lévesque had left his helmet at home, a 20- to 30-minute drive away, and was preoccupied by his desire to return to his residence to attend a service call for a defective water heater. In response to Sergeant Sullivan's request, Master Corporal Lévesque stated that he was not going to get his helmet from home and that he should not have to go home twice that morning.
- d. Even if he was getting irritated by that reaction, Sergeant Sullivan remained cordial, explained the reason why a helmet was needed and insisted that Master Corporal Lévesque get a helmet. Master Corporal Lévesque showed no willingness to obtain a helmet from home or otherwise.
- e. As a consequence, Sergeant Sullivan announced that he had to report the situation to Sergeant Price, the course 2IC, to the effect that Master Corporal Lévesque was refusing training.
- f. As Sergeant Sullivan turned around to leave, Master Corporal Lévesque said, "Fuck off." Upon hearing those words, Sergeant Sullivan turned back to face Master Corporal Lévesque again and asked him whether he

had just said “fuck off” to a sergeant, to which Master Corporal Lévesque replied that he was just joking.

- g. Sergeant Sullivan was not kidding. He reported the situation immediately. Corporal Lowe witnessed the entire exchange.

Aggravating Factors

[15] The circumstances of the offences in this case reveal, in my view, two aggravating factors. First, the circumstances of the insubordinate conduct show a totally irrational reaction from Master Corporal Lévesque in contrast to what I find was a reasonable request from a superior. Sergeant Sullivan showed patience and appeared open to discussion. Yet, the response he obtained was a marked departure from what he was entitled to expect from a subordinate of the experience of Master Corporal Lévesque who, in the circumstances, showed a significant lack of respect.

[16] Second, I find aggravating the fact that this exchange and the contemptuous behaviour by Master Corporal Lévesque occurred in the presence of Corporal Lowe, a subordinate of the offender.

Mitigating factors

[17] The Court also considered a number of mitigating factors arising either from the circumstances of the offence or the offender in this case. Amongst those highlighted by defence counsel, I especially note the following:

- a. First, the fact that the offender has no criminal or disciplinary record.
- b. Second, the performance of the offender since the offence, indicating that he is well engaged on the path to rehabilitation as a productive member of his unit.
- c. I have also considered the fact that the offender was subjected to significant administrative measures as a result of the behaviour associated with the charges for which he is now being sentenced, starting within hours after the offence. As mentioned, he was placed on recorded warning on the afternoon of the offence. In his testimony at trial relating to the circumstances of the offence, Master Corporal Lévesque stated that he was admonished by a number of supervisors or superiors on the day of the offence and was ordered to stand duty as battalion orderly sergeant that same evening and on one other occasion later, in relation to the offence. His evaluation reports show potential career implications directly related to the offence, especially as it pertains to potential for promotion. I am not mentioning these facts to express any opinion on the propriety of those actions but because such consequence flowing directly from the offender's conduct necessarily have an impact on the deterrent

objective that a sentence needs to pursue. I believe it is fair to conclude that Master Corporal Lévesque has learned his lesson from the offence and that the need for specific deterrence of the sentence to be imposed is consequently reduced, as agreed by the prosecution.

- d. Finally, it is appropriate to consider as mitigating both Master Corporal Lévesque's past service with the Army for over nine years, including deployments abroad, as well as the capacity he has shown to continue contributing positively to the Canadian Armed Forces and to Canadian society in the future.

Objectives of sentencing to be emphasized in this case

[18] In light of these circumstances, I believe the focus of sentencing in this case should be placed on the objectives of denunciation and general deterrence.

The sentence to be imposed

[19] As alluded to earlier, my task of determining the appropriate sentence requires first that I assess the joint submission of counsel to the effect that this Court imposes punishment of a reprimand and a fine of \$850 to meet justice requirements.

[20] In determining the acceptability of the joint submission, I must apply the public interest test recently imposed by the Supreme Court of Canada. I may depart from the joint submission only if I consider that the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[21] 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 to reverse the joint submission that was made to me.

[22] The Supreme Court of Canada 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 offence and 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 the community's interest in seeing that justice is done. Defence counsel is required to act in the accused's best interests. Both counsel are bound professionally and ethically not to mislead the court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[23] 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 if, 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, as any judge assessing a joint submission, I have to avoid rendering a decision that causes an informed and reasonable public, including members of the Canadian Armed Forces, to lose confidence in the institution of the courts, including courts martial.

[24] I do believe that a reasonable person aware of the circumstances of this case would expect that an offender who had been found guilty of one charge of behaving with contempt face a sentence which expresses the disapprobation of authorities for the failure in discipline involved and has a personal impact on the offender. A sentence composed of a reprimand and a fine is aligned with these expectations.

[25] Counsel presented the Court with cases considered as useful precedents to illustrate the punishments that have been imposed for similar offences in the past at courts martial in support of their joint submission. Even if the test to be applied does not strictly consider fitness of sentence as a stand-alone reason to reject a joint submission, it remains that I must ask myself whether the joint submission is so markedly out of line with the expectations of reasonable persons. A reasonable person aware of the circumstances of this case is also an informed person about punishments imposed in the past for similar offences and offenders. In that sense, a proposed sentence that seems grossly unfit to a reasonable person aware of the circumstances of the case is likely to be markedly out of line with his or her expectations and would bring the administration of justice into disrepute.

[26] The precedents submitted to my attention are not exactly on point as it pertains to the circumstances of the offences and of the offender but are sufficient for me to conclude that the proposed sentence is within a range of punishments imposed in the past for similar conduct.

[27] Considering the nature of the offence, the circumstances in which it was committed, the applicable sentencing principles and the aggravating and the mitigating factors mentioned previously, I am of the view that the punishments of a reprimand and a fine of \$850 jointly proposed by counsel would not bring the administration of justice into disrepute and is not otherwise contrary to the public interest. The Court will, therefore, accept it.

[28] Subsection 145(2) of the *National Defence Act* provides that the terms of payment of a fine are in the discretion of the service tribunal that imposes the fine. I have been informed of a desire for payments over a period of six months, which I find reasonable.

[29] Master Corporal Lévesque, the circumstances, of the charges you pleaded guilty to, reveal a behaviour that is totally incompatible with the responsibilities of your appointment as master corporal serving in an infantry battalion. I am convinced that, by now, you know that. I also want you to know that from my perspective there is nothing wrong with believing in your innocence and pleading not guilty to obtain the opportunity to tell your side of the story to an independent arbiter, such as this court martial. I realize the outcome may not be what you had hoped for, but I can tell you that I have considered your points and the able arguments of your counsel. It is up to you now to decide whether you want to move on after taking the time to reflect on the process you have gone through. I trust that you will now be given an opportunity for a fresh start that will allow you to maximize your contribution to the Canadian Armed Forces in the years to come.

FOR THESE REASONS, THE COURT:

[30] **SENTENCES** you to a reprimand and a fine in the amount of \$850. The fine is payable in installments as follows: \$250 no later than 1 December 2016, then 5 payments of \$120 payable no later than 1 January, 1 February, 1 March, 1 April and 1 May 2017.

Counsel:

The Director of Military Prosecutions as represented by Captain L. Langlois

Major A.H. Bolik, Defence Counsel Services, Counsel for Master Corporal Lévesque