COURT MARTIAL

Citation: *R. v. Normand-Therrien*, 2017 CM 4010

Date: 20170503
Docket: 201610

Standing Court Martial

2nd Canadian Division Support Base Valcartier, Quebec
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private J.J. Normand-Therrien, Offender

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

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Private Normand-Therrien, having accepted and recorded your plea of guilty in respect of the first and third charges on the charge sheet, the Court finds you guilty of the two charges under sections 83 and 85 of the *National Defence Act* (*NDA*), for having disobeyed a command from Chief Warrant Officer Boucher on 17 March 2016 (1st charge), and for having behaved with contempt toward him (3rd charge).

Joint submission made to the Court

[2] It is now my duty to impose the sentence. The prosecution and the defence have made a joint submission on sentencing to the Court. Counsel recommend that this Court impose a sentence consisting of detention for a period of 21 days and a fine in the

amount of $800. Counsel jointly recommend that the Court suspend the execution of the punishment of detention under section 215 of the *NDA*.

[3] The military judge who is given a joint submission on sentencing is severely limited when exercising his sentencing discretion. Although ultimately I alone must exercise the discretionary power to determine the sentence, I cannot depart from a joint submission on sentencing unless I have serious reasons for doing so. The Supreme Court recently stated in *R. v. Anthony-Cook*, 2016 SCC 43 that a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[4] This undeniably high threshold for rejecting the joint submission has been established on the basis of multiple public interest considerations in favour of imposing a sentence recommended in the joint submission. In fact, in these cases, the prosecution agrees to recommend a sentence that the accused is prepared to accept, thus minimizing the stress and costs associated with a trial. In addition, for those who feel genuine remorse, a guilty plea provides an opportunity to begin to acknowledge their wrongdoing. The most important gain is the certainty offered by an agreement leading to joint submissions, both for the accused and for the prosecution, which wishes to obtain what the prosecutor concludes is an appropriate resolution of the case in the public interest.

[5] That said, even though the certainty of the result is important to both parties, it is not the ultimate goal of the sentencing process. In discharging my duty to assess whether the joint submission made to me is acceptable, I must also bear in mind the disciplinary objectives of the Code of Service Discipline. As stated by the Supreme Court in *R. v. Généreux*, [1992] 1 S.C.R. 259, one of the purposes of a court martial as a military tribunal is to allow the Canadian Armed Forces (CAF) to deal with matters that pertain directly to the maintenance of discipline, efficiency and morale of the military. Courts martial ensure effectively respect for discipline. The sentence is the ultimate outcome of the disciplinary process following a trial or a plea. It is the only opportunity for the Court to deal with the disciplinary requirements generated by the offender's conduct, on a military establishment, in public, in the presence of several members of the offender's current or previous unit, as well as, increasingly, in the presence of victims.

[6] Therefore, sentencing in the context of a court martial proceeding involves a significant disciplinary aspect. When a joint submission is made to the Court on sentencing, the military judge must ensure, at a minimum, that the facts relevant to the offender and the offence are not only considered, but also adequately explained in his or her reasons for the sentence, to an extent that may not always be necessary for a civilian criminal court in an urban centre of the country. The requirements specific to sentencing do not deviate from the benchmarks set by the Supreme Court on joint submissions, as indicated in paragraph 54 of *R. v. Anthony-Cook*.

Evidence and arguments considered

[7] Unfortunately, during the sentencing hearing in this case, the prosecution initially presented incomplete evidence and arguments, as though the Court's role were simply to stamp "approved" on the joint submission the parties prepared outside the courtroom. I understand that the parties had initially intended to present testimony from several witnesses, including two experts, at the sentencing hearing, in what was expected to be a hotly contested debate. A few minutes before the scheduled time, the parties informed the Court that they had reached an agreement on sentencing and asked for more time to prepare for this new situation. The Court agreed to more than what had been requested, adjourning the hearing to the following morning and instructing the parties to properly prepare.

[8] When the hearing resumed, instead of witness testimony, the prosecution filed Exhibit 8, an agreed statement of facts that was intended to close the filing of evidence required for sentencing, since the defence had no additional evidence to adduce. However, it became obvious during the prosecution's submissions that some considerations necessary for sentencing were not on the record, and that nothing in the evidence or the case law supported imposing a sentence of detention, and especially suspending that sentence, which requires exercising discretion subject to a two-stage test applied by most courts martial since 2010, further to the decision in *R. v. Paradis*, 2010 CM 3025.

[9] Given this situation, the Court stated its concerns to counsel and invited them to respond by allowing a reopening of the evidence on sentencing after an additional adjournment. On returning from this enforced recess, the prosecution filed Exhibit 9, a new agreed statement of facts that included paragraphs added to address the Court's concerns. Furthermore, in their arguments, the parties identified two precedents from case law that allowed for a better understanding of the suggested sentence's place within the range of potential sentences, a somewhat poor but sufficient example, considering the test in *Anthony-Cook*, which prioritizes considering the public interest first and not the fitness of a joint submission.

[10] I am of the opinion that the second agreed statement of facts makes up for the shortcomings identified initially. Combined with the documents filed as required in the *Queen's Regulations and Orders for the Canadian Forces*, article 112.51 and with the statement of circumstances read by the prosecutor and accepted as true by Private Normand-Therrien at the start of the sentencing hearing, I am of the view that the evidence is sufficient to allow me to exercise my duty to assess whether the joint submission made to me is acceptable.

The offences

[11] My analysis begins with the offences. To assess the acceptability of the joint submission, the Court has considered the objective seriousness of the offences based on the maximum punishment that can be imposed. Offences under section 85 of the *NDA* are punishable by dismissal with disgrace from Her Majesty's service. The offence of

disobeying a lawful command under section 83 of the *NDA* is objectively more serious, as it is punishable by imprisonment for life. It is one of the most severely punished offences in the Code of Service Discipline.

[12] The facts related to the commission of the offences are revealed by the statement of circumstances and facts read by the prosecution, and to a certain extent, by the second agreed statement of facts adduced in evidence. The circumstances of the offences are as follows:

(a) On 17 March 2016, Private Normand-Therrien was tried by summary trial and found guilty and sentenced to a fine of $200 and eight days of confinement to quarters. Chief Warrant Officer Boucher, the Regimental Sergeant Major of his unit, was present at the time.

(b) Private Normand-Therrien was anxious that day. Visibly upset, he politely asked several times to be granted a moment to calm down. The requests were refused. During the recess between the conviction and the sentence, he told Chief Warrant Officer Boucher that he was going to break down.

(c) After the sentence was imposed, Chief Warrant Officer Boucher ordered Private Normand-Therrien to march as they were leaving and then ordered him to stand at ease. When Chief Warrant Officer Boucher started to state the list of military materiel that Private Normand-Therrien would need during his confinement to quarters, the latter broke rank, shouting that he could not take it any longer and that he needed some air.

(d) Following Private Normand-Therrien's reaction, Chief Warrant Officer Boucher ordered him to come back and stand at ease immediately. Private Normand-Therrien replied, [TRANSLATION] "No, I won't stand at ease again. My life is over. I've been asking for help for a year and a half. The army is shit. You're all against me". The order was repeated twice, and Private Normand-Therrien said, several times, [TRANSLATION] "What if I don't?" while moving toward a door leading outside.

(e) On his way, Private Normand-Therrien struck a ventilation box without causing damage. Chief Warrant Officer Boucher then said to him, [TRANSLATION] "That's enough" and approached Private Normand-Therrien to try to bring him back in line. Consequently, Private Normand-Therrien turned around, pushed Chief Warrant Officer Boucher in the chest and told him to let him go. Following the push, Private Normand-Therrien, still in crisis, was immediately controlled by Chief Warrant Officer Boucher and Warrant Officer Chevrette, one of the unit members present at the scene.

(f) Throughout the event, Private Normand-Therrien had difficulty remaining calm, which resulted in particular in him shouting at Chief Warrant Officer Boucher several times while exhibiting inappropriate behaviour towards him. In contrast, when Private Normand-Therrien pushed Chief Warrant Officer Boucher, it involved a low level of violence and was not premeditated. No one was injured in the altercation, during which Chief Warrant Officer Boucher remained calm. Private Normand-Therrien apologized to Chief Warrant Officer Boucher shortly after the altercation.

The offender

[13] With respect to the offender, the Court takes into consideration that Private Normand-Therrien is 26 years old. He began his current military service as an Army Communication and Information Systems Specialist in February 2013. After successfully completing basic military qualifications and army training, he received instruction in his trade at the Canadian Forces School of Communications and Electronics in Kingston until July 2015, and was then assigned to his current unit, the Headquarters and Signals Squadron, 5 Canadian Mechanized Brigade Group.

[14] Private Normand-Therrien's conduct sheet shows that he had disciplinary issues during his time in Kingston, having been tried by summary trial for behaving with contempt towards a superior officer in July 2015. The offences for which Private Normand-Therrien is being sentenced today are associated with his actions on 17 March 2016, immediately following a summary trial in which he was facing a charge of absence without leave and two charges of behaving with contempt resulting from an incident on the morning of 1 December 2015. Since then, he had another disciplinary episode, having been tried by summary trial on 20 September 2016 for absence without leave and behaving with contempt in connection with an incident on 22 June 2016. The most recent episode shows that the offender's disciplinary issues continued more recently and typically resulted from one-off conflict situations with superior officers. The Court is using this more recent conviction to better understand the offender's current situation and not as an aggravating factor, as the offender had not been sentenced for the 20 September 2016 conviction at the time he committed the offences for which he is being sentenced today.

[15] The evidence shows that Dr. Anne Labonté, psychiatrist, met with Private Normand-Therrien on 4 February 2017 for a psychiatric assessment at the request of his counsel, in preparation for this proceeding. According to Dr. Labonté, Private Normand-Therrien had been suffering from major depression and anxiety since 2014. She was of the opinion that the psychiatric care and treatment Private Normand-Therrien received were insufficient in light of this new diagnosis and that Private Normand-Therrien's mental disorders increased the likelihood of him committing the offences at issue. She even stated that, if Private Normand-Therrien had received appropriate care for his diagnosis of major depression and anxiety, he might have been able to remain calm during the episode of 17 March 2016.

[16] Private Normand-Therrien did not testify during the proceedings. In the agreed statement of facts filed by the prosecution, he acknowledges today that his behaviour was unacceptable and affected the heart of military discipline regarding respect for authority and instructions. He added that the current court martial proceeding was particularly stressful for him. He stated that he would be released from the CAF in 19 days, on 22 May 2017. In anticipation of his release, he is currently in the process of setting up a business that currently employs three people. This business's health depends on his presence.

[17] In the uncontradicted opinion of Dr. Labonté, detention in a military establishment would have a devastating effect on Private Normand-Therrien by risking the aggravation of his medical condition. Furthermore, Private Normand-Therrien requires care in his first language, which would be difficult for him to access if he is detained, according to Major Norbash, the psychiatrist providing health care at the detention centre in Edmonton, who was cited in the agreed statement of facts.

Aggravating factors

[18] The purpose of offences such as those set out in sections 83 and 85 of the *NDA* is to protect and preserve the fundamental values of military discipline, that quality that every military members must have which allows him or her to put the interests of Canada and the interests of the services before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged through military instruction, training and practice, it is something that must be internalized, as one of the fundamental prerequisites to operational effectiveness in any armed force.

[19] The prosecution asserted that the Court must take a number of aggravating factors into account, which can essentially be reduced to two key factors: the subjective seriousness of the offences in this context, and the offender's conduct sheet.

[20] In the circumstances of this case, the Court considers as aggravating factors the fact that the offences were committed immediately after the end of a summary trial, a formal disciplinary process held in public and in the workplace, presided over by an officer, in this case the unit deputy commanding officer. The disobedience and the contemptuous behaviour were directed at the unit's Regimental Sergeant Major, a key member of the command team and highest-ranking non-commissioned member, who has key disciplinary duties. Furthermore, the offences were committed in the presence of at least two senior non-commissioned officer and other unit members. The offences were acts of insubordination and words of contempt, as well as an attack, however minor, on the physical integrity of a superior. Such behaviour can only damage cohesion and morale within the unit, although no real impact was demonstrated by the evidence in this case.

[21] The Court is also of the opinion that Private Normand-Therrien's conduct sheet, containing two previous convictions associated with two episodes of insubordination in July and December 2015, constitutes an aggravating factor that must be taken into consideration in assessing the sentence, taking into consideration the context, including the mental health issues that Private Normand-Therrien has been experiencing since 2014, according to Dr. Labonté.

Mitigating factors

[22] The Court also considered the following mitigating factors, as raised by counsel for the defence:

> a) First, the offender's guilty plea, which the Court considers an indication of his remorse, in accordance with the evidence that he accepts responsibility for his reprehensible conduct. The admission of responsibility was made in public, before members of his unit, in this Court.
>
> b) Second, despite my previous observations on the subjective seriousness of the offence, the evidence shows behaviour that is closely linked to what the offender considered unfair treatment on the part of his superiors, when he was experiencing significant stress concerning the summary trial and was refused a break so he could calm down. The pushing of Chief Warrant Officer Boucher was not premeditated and seemed to be the result of Private Normand-Therrien's strong desire to get away from the stressful situation he was experiencing so that he could calm down and get some fresh air. I consider that the circumstances were indeed difficult for the offender and the other individuals present. That being said, and despite Private Normand-Therrien's apology shortly after the incident, his behaviour cannot be excused: the offender had a duty to demonstrate self-control even in the difficult circumstances with which he was confronted.
>
> c) Third, I consider Private Normand-Therrien's medical condition a mitigating factor that, according to the evidence, could have affected his reaction on 17 March 2016, which might have been different if he had had the tools that a timely diagnosis of his condition could have provided him. Again, this is not an excuse.
>
> d) Finally, I consider that Private Normand-Therrien's rehabilitation has begun, and that at his young age, he has the potential to continue to contribute to Canadian society in a civilian capacity for many years.

Sentencing objectives to be prioritized

[23] I have come to the conclusion that, in the circumstances of this case, sentencing should target the objectives of denunciation and deterrence, and that the sentence should

not only deter the offender, but also other people who, in a similar situation, might think about committing the same type of offence. That being said, achieving these objectives must not compromise the offender's rehabilitation, especially when he is beginning a new career in the civilian world.

Assessing the joint submission

[24] As previously mentioned, in order to establish the appropriate punishment in this case, I must first assess counsel's joint submission and its impact by applying the criterion recently established by the Supreme Court, that a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[25] The issue I must determine is not whether I like the punishment that has been jointly recommended or whether I can arrive at something better. The threshold that this submission must reach for me to reject it means that any other opinion I could have on what would constitute an adequate sentence is not sufficient to allow me to reject the joint submission that has been made to me.

[26] The Supreme Court has set such a high threshold for setting aside joint submissions so that their undeniable advantages are not compromised. Counsel for the prosecution and defence are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. In principle, they are very well informed about the situation of the offender and the circumstances of the offences, and about the strengths and weaknesses of their respective positions. The military prosecutor is responsible for representing the interests of the military authorities and of the civilian community to ensure that justice is done. Defence counsel is required to act in the accused's best interests, including insuring that the accused's plea is voluntary and informed. 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.

[27] 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 criminal 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 CAF, to lose confidence in the institution of the courts, including courts martial.

[28] A reasonably informed person has expectations related to previously imposed sentences for similar crimes. In that sense, the Supreme Court, in rendering its decision in *Anthony-Cook*, did not completely eliminate the soundness of the proposed sentence

from the test to be used to assess joint submissions. This twofold consideration was present in the test used by the courts martial before the *Anthony-Cook* decision was issued, considering that in its decision in *R. v. Taylor,* 2008 CMAC 1, the Court Martial Appeal Court had mandated the use in courts martial of the test developed by the Quebec Court of Appeal in *R. v. Douglas* (2002), 162 C.C.C. (3d) 37. I find it revealing that at paragraph 31 of *Anthony-Cook,* Supreme Court Justice Moldaver does not seem able to explain how the assessment he proposes is different from the test in *Douglas*. I consider that these tests are similar, and I have difficulty seeing why counsel submitting joint submissions since *Anthony-Cook* are so hesitant to explain how the sentence recommended in the submission is consistent with sentences imposed in the past for similar offences in similar circumstances.

[29] In this case, the Court obtained some references to previous decisions from counsel. Concerning the proposed punishment of detention, it is a punishment that has been imposed in the past for a similar offence, although the degree of violence used was much higher than the violence used in this case. In *R. v. Burton,* 2014 CM 2024, the offender was sentenced to detention for a period of 30 days for assaulting a superior after perceiving a reproach from the latter in an email sent the same day. The execution of the sentence was suspended. As for the fine, it is a punishment that has been imposed numerous times in similar circumstances, including in *R. v. Gagnon*, 2015 CM 4013, along with a reprimand. I am of the opinion that imposing a fine is particularly important when the parties' submission specifies that the execution of a sentence of incarceration should be suspended. On this point, see *R. v. Boire,* 2015 CM 4010, paragraphs 27 and 28.

[30] With respect to suspending the execution of the punishment of detention under section 215 of the *NDA*, the Court insisted that the parties discuss the two-step test that was initially stipulated by Military Judge d'Auteuil at paragraphs 74 to 89 in *Paradis*. I am the opinion that the parties have adequately demonstrated that in the circumstances, the requirements of this test have been met due to Private Normand-Therrien's medical condition and the exceptional impact that executing a punishment of detention would have on him because of this condition, especially given the difficulty of obtaining medical care in French if he were detained in Edmonton. I have also considered the impact of this detention on the plans he has already begun in anticipation of returning very soon to civilian life, especially given the attention required by a business start-up. I am also of the opinion that suspending the detention would not compromise the public's confidence in the administration of military justice in the circumstances of the offence, including the circumstances that justify the suspension. *Gagnon* decision shows that similar behaviour has been punished by sentences that did not include detention. A reasonable and informed observer would not be likely to lose confidence in the administration of justice, given the offender's difficult situation, his upcoming release, and the fact that he must pay a fine of $800, a real consequence of the sanctioned offences.

[31] Considering the nature of the offences, the circumstances in which they were committed, the applicable sentencing principles, and the aggravating factors and

mitigating factors previously mentioned, I cannot find that the sentence proposed jointly by counsel, that is, detention for 21 days, suspended, combined with a fine of $800, is likely to bring the administration of justice into disrepute or is otherwise contrary to the public interest. Therefore, I must agree to endorse it.

[32] Private Normand-Therrien, the circumstances of the commission of the offences to which you pleaded guilty denote a behaviour that is completely incompatible with service within the CAF. Despite the stress this trial has caused you, your misconduct must be sanctioned by charges. Now that you have paid your debt to the military justice system and that you will soon be rejoining the civilian world, I will advise you not to consider that the disciplinary issues you had in the army are irrelevant to your future life. Respect for others, especially those in authority, is not solely a CAF value. Your negative reactions to your superiors' exercise of authority are likely to be repeated if you do not learn to better manage your emotions. Furthermore, as an entrepreneur, you will have to earn your employees' respect and react calmly if they lose their temper with you. I can only hope that, one day, you will gain perspective on your shortcomings in terms of personal discipline, as it is a required quality for anyone who wants to contribute positively to society by respecting the law.

FOR THESE REASONS, THE COURT:

[33] **SENTENCES YOU** to detention for a period of 21 days and a fine of $800, payable immediately.

[34] **SUSPENDS** the carrying into effect of the punishment of detention pursuant to section 215 of the *NDA*. Should you be released from the CAF before the full payment of the fine, any outstanding sum will be payable at the date of your release.

Counsel:

The Director of Military Prosecutions, as represented by Lieutenant-Commander V. Pagé and Captain M.-A. Ferron

Major A. Gélinas-Proulx and Lieutenant-Commander M. Létourneau, Defence Counsel Services, Counsel for Private J. J. Normand-Therrien