COURT MARTIAL

Citation: *R. v. Conway*, 2017 CM 4006

Date: 20170324
Docket: 201716

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant M.M. Conway, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Sergeant Conway, having accepted and recorded your guilty plea in respect of charge one, the lesser included offence of absence without leave (AWOL) in relation to charge two, charges three and five on the charge sheet, the Court now finds you guilty of those charges under sections 83, 90, 129 and 101.1 of the *National Defence Act* (*NDA*) for disobedience of a lawful command, AWOL, conduct to the prejudice of good order and discipline and failure to comply with a condition, respectively.

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 detention for a period of one day to take into account 39 days of pre-trial custody, a reduction in rank and a fine of $1000. The joint

submission also includes a recommendation that the proposed sentence of detention be suspended.

[3] The joint submission 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 in avoiding the expenses 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 and resources 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. An Agreed Statement of Facts and Admissions was also introduced on consent to inform the Court as to facts pertaining to Sergeant Conway's medical condition, his conduct in custody and the administrative measures taken by his unit in relation to him. I have also received in evidence letters highlighting the views of the acting commandant on the impact of Sergeant Conway's conduct on the unit. A letter from the superior commander was introduced, reflecting his views on the importance of addressing his disciplinary shortcomings. Those views have obviously been favourably accepted by the Director of Military Prosecutions given that charges were preferred for trial by court martial but they are of limited relevance to me as military judge.

[8] The defence produced, with the consent of the prosecution, a letter from a flight surgeon confirming the medical condition of Sergeant Conway. Most importantly, Sergeant Conway took the stand to deliver the content of a letter of apology, a copy of which was admitted as an exhibit.

[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.

Circumstances of the offender and the offences

[10] Sergeant Conway is a 37-year-old army communication and information systems specialist who has been employed at the Canadian Forces School of Communications and Electronics (CFSCE) in Kingston since July 2013, upon being promoted to his current rank. In June 2016, Sergeant Conway was placed on a reduced work schedule as a result of medical employment limitations (MEL) due to a diagnosis of Major Depressive Episode, which symptoms first surfaced in 2015 and reappeared in April 2016 after a marital breakdown. In September 2016 Sergeant Conway was diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of events experienced on a tour of duty outside of the country.

[11] Sergeant Conway first joined the Regular Force in November 1999 following prior service with the Communications Reserves in Prince Edward Island from April 1997. On completion of occupational training as a linesman, he served on postings mainly in Kingston, but also in Greenwood and Shilo. In the last 20 years he deployed to Bosnia, to the Middle East on two occasions and to Afghanistan.

[12] Sergeant Conway's trouble commenced in July 2016, as a result of sporadic reporting and communications between him and his unit. On 12 July, a formal reporting

schedule was developed in the course of an interview during which supervisors clearly explained to Sergeant Conway the expectations of the unit in light of his MEL. A formal reporting schedule was imposed whereby Sergeant Conway would have to report by phone every Tuesday at 1000 hours. In addition, it was confirmed that all obligations concerning the requirements to obtain a leave pass in order to leave the Kingston area continued to apply. On 19 July 2016, Sergeant Conway failed to report to his unit as required. Despite numerous attempts to contact him, he could not be located. On 26 July Sergeant Conway missed a scheduled meeting with his case worker at the Joint Personnel Support Unit (JPSU).

[13] On 9 September 2016, Sergeant Conway met with two members of his unit and promised to report in person to CFSCE on 13 September 2016, which he did. On 16 September 2016 Sergeant Conway confirmed a Return to Work program with the JPSU in Kingston, signing a statement of understanding which established his normal duty as from 0800 to 1600 daily and whereby he acknowledged that he is accountable for his whereabouts and must be reachable by the chain of command during these times. Pursuant to the agreement, during duty hours, Sergeant Conway was authorized to work from home and attend the gym. He was required to attend all scheduled appointments and had a weekly in-person meeting with Master Warrant Officer Tobin at 1000 hours every Wednesday morning.

[14] From 30 September 2016 to 11 October 2016, Sergeant Conway missed a number of medical appointments and attempts by military authorities to contact him were unsuccessful. His pay was stopped after he had been identified as an absentee on 31 October 2016. In December 2016 he travelled to eastern Canada to visit his girlfriend. In January 2017, while still absent from the CAF, Sergeant Conway was admitted to intensive care at the Kingston General Hospital after having been assaulted by unknown persons. He suffered a critical head injury consisting of a skull fracture with an intracranial bleed. Sergeant Conway agreed to attend the Canadian Forces Base (CFB) Kingston medical clinic for a medical examination and to obtain military medical assistance from the acting base surgeon. The examination took place on 27 January. Sergeant Conway received a permanent medical category with high risk limitations including: unfit to work in a military environment, unfit to deploy or be entrusted with sensitive information. He was also arrested by military police for being AWOL.

[15] After having been charged pursuant to section 90 and section 88 of the *NDA* on 27 January, Sergeant Conway was ordered to be retained in custody. He was released under conditions imposed by a military judge on 30 January 2017, including the obligation to report in person at 1000 hours on workdays unless on authorized leave and the obligation to be available by telephone. On 9 February 2017, Sergeant Conway received a remedial measure in the form of “Counselling and Probation” for having failed to report on 19 July 2016 and on a weekly basis from 6 October 2016 to 26 January 2017 as well as having failed to report to two appointments directed by 33 Health Services Center. Sergeant Conway received another remedial measure in the form of a “Recorded Warning” on 15 February 2017 for a conduct deficiency for misusing the duty vehicle and having lied to his supervisor.

[16] On 17 February 2017, Sergeant Conway failed to report at 1000 hours as required by his undertaking, arriving late at approximately 1020 hours. He was told by Master Warrant Officer Tobin that his absence had been reported to the military police and that he was to remain in place until their arrival. Sergeant Conway became agitated and confrontational. Upon a direct order from Master Warrant Officer Tobin to sit down and wait in her office for the arrival of military police, Sergeant Conway fled the office and took flight. He was arrested soon after by a member of the military police in a marked police vehicle who had observed Sergeant Conway running in the direction of his residence on CFB Kingston. Upon activation of lights and sirens, Sergeant Conway jumped into a dumpster before being placed under arrest.

[17] On 17 February 2017, following his arrest, Sergeant Conway was charged with a number of new offences. He also received a remedial measure in the form of "Counselling and Probation" for, once again, lying to his supervisor, failing to submit a leave pass and failing to be reachable by phone. On the same day, his commanding officer signed a Notice of Intent to recommend his release from the CAF under item 2(a), unsatisfactory service for his continued and prolonged failures to comply with orders and directions provided by the chain of command.

[18] Sergeant Conway was detained in pre-trial custody from 17 February until now, having been ordered by a military judge to be retained in custody on 22 February, following a second custody review hearing. While in pre-trial custody, Sergeant Conway has been seen daily by a team of five health care professionals. While he is currently stable, doctors stated that further incarceration would create a risk for a deterioration of his mental health. During his period of pre-trial custody, Sergeant Conway has been described as a model prisoner by military police and has attended and participated fully in all programming and treatment recommended by his health care team.

Objective gravity of the offences

[19] 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 83 of the *NDA* are punishable by imprisonment for life. The other offences are punishable by the less severe maximum punishments of dismissal with disgrace for the charge under section 129 of the *NDA* and imprisonment for less than two years for the other two charges under sections 90 and 101.1 of the *NDA*.

Aggravating Factors

[20] The circumstances of the offences in this case reveal a gradual yet significant loss of awareness on the part of Sergeant Conway of his most basic duty of service to the CAF as a member of the Regular Force. Chronologically, the incidents relating to charge three in July 2016 reveal two failures to report as directed once a week, a

minimal requirement imposed on Sergeant Conway in consideration of his medical condition. Then there is the significant period of absence without leave between 6 October 2016 and 27 January 2017. Finally, the events of 17 February, following his release under conditions imposed by a military judge, when once again Sergeant Conway failed to report on time and, making matters much worse, failed to obey a direct order from his superior to remain in her office choosing instead to leave the building on foot until apprehended by the military police shortly afterwards.

[21] I believe the conduct of Sergeant Conway reveals the following aggravating factors:

(a) The duration of the absence in relation to the AWOL offence, which in this case amounts to 114 days, a significant period of time;

(b) The repetitive nature of breaches committed by Sergeant Conway as evidenced by his failures to report, not only in relation to the AWOL charge but also in relation to the third charge under section 129 and the fifth charge for breach of condition.

(c) The rank of the offender, who as a sergeant is not only experienced enough to understand the importance of reporting to his unit as directed but also, as a leader, should have been able to understand the consequences of his failure, not only to report but also and especially to grasp the gravity of not obeying the lawful command of his superior in relation to the first charge under section 83;

(d) The fact that the offences constituted an abuse of the consideration given by his unit to his medical condition, leading to the significant accommodation given to him to report only weekly, starting in the summer of 2016. These concessions came with a corresponding obligation on an injured member to try to get better and to respect the minimum conditions imposed. Instead, Sergeant Conway abused the flexibility given to him by becoming AWOL. In doing so, he breached the trust placed in him by his supervisor and the chain of command.

[22] 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.

[23] It is especially important to be cautious about factors that are included either in the nature or in the elements of the offences to which an offender has been found guilty, after a trial or a guilty plea. For instance in this case, evidence was offered to demonstrate the significant burden that the offences brought to his unit, especially Sergeant Conway's long period of absence, including the extra work required from a

number of people to locate him, have him apprehended and then monitor his compliance with release conditions. Yet, efforts such as those are part of the military personnel management function performed routinely across the CAF, as a result of any unforeseen situation involving its members. The obligation of service until lawfully released imposed on members of the Regular Force imposes, as a corollary, an obligation of supervision on superiors. A member who does not show up for work clearly generates an additional burden on his or her chain of command. But so is the case for a member who gets injured, who is selected for employment outside the unit on short notice or who takes parental leave. The CAF is set up to deal with such issues.

[24] The failure to show up for work, on the part of a member of the CAF, constitutes a penal offence of AWOL while the same failure from other employees in the public or private sectors does not. The very existence of such an offence in the Code of Service Discipline, a unique feature of service in the CAF, attests to the inconvenience and loss of military capability that such an absence generates. Once an offender is guilty of that offence, he or she faces the sanction provided in the law, the severity of which having to be assessed based on the circumstances of the offence and degree of responsibility of the offender. Factors such as the duration of absence, its repetition, the direct loss of capability by virtue of the tasks assigned to the offender that could not be performed are amongst the relevant factors going to severity. Yet, factors outside of the immediate control of the offender such as the extra work of supervisors in reassigning personnel and the personnel management tasks to be performed in relation to the offender should not increase the sentence. More precisely, decisions to lay charges, arrest the offender, keep him in custody until taken before a military judge, detain him pre-trial, hold a trial and administer the consequences of any sentence all require significant resources but are not within the control of the offender and should not be considered as aggravating on sentencing.

[25] Another pitfall to avoid in determining aggravating factors is the risk of allowing possibilities or perceptions to become uncontested facts aggravating the sentence. Any perception to the effect that those granted accommodation as a result of a mental health condition may present too strong a challenge for the chain of command to handle has been compensated for by the conduct of this trial in open court, in the presence of interested members of the military community and the public. The fact is that Sergeant Conway is sentenced today for behaving in a manner that is considered incompatible with the standard set by the CAF in the course of his accommodation. It attests that abuse of accommodation for medical reasons will not be tolerated. 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

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

(a) First and foremost, Sergeant Conway'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.

(b) Second, the heartfelt apologies issued by Sergeant Conway when he took the stand in court;

(c) Third, the fact that Sergeant Conway has no criminal or disciplinary record.

(d) Fourth, Sergeant Conway's lengthy period of service with the CAF, including deployments overseas indicating what can be presumed as a valuable contribution to the operations and training of the CAF on the basis of the information available to me.

(e) Fifth, the medical condition suffered by Sergeant Conway. It is a fact that Sergeant Conway's regrettable behaviour of the last several months occurred concurrently with mental health challenges and a marital breakdown. He has been diagnosed with PTSD not unlike many veterans of missions. This is not an excuse but it provides context in understanding his struggle to make appropriate choices in attempting to get better. Compounding those challenges are the consequences of the significant injuries suffered in an assault last January.

(f) Finally, the exemplary conduct of Sergeant Conway while in custody for the last month. Hopefully, this shows a potential for Sergeant Conway to change his ways and make a positive contribution to Canadian society in the future.

Objectives of sentencing to be emphasized in this case

[27] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation, as well as specific and general deterrence in sentencing the offender. At the same time, any sentence imposed should not compromise the rehabilitation of Sergeant Conway, especially given his current medical challenges.

Assessing the joint submission

[28] 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 I impose a sentence composed of the punishments of detention for a period of one day, a reduction in rank to corporal and a fine of $1000. The joint submission also includes a recommendation that the proposed sentence of detention be suspended. 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.

[29] 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 reject the joint submission that was made.

[30] 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.

[31] 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.

[32] I do believe that an informed and 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 involved and have a personal impact on the offender. A sentence composed of punishments of detention, a reduction in rank and a fine is aligned with these expectations.

[33] That informed person would know that offences of AWOL for long durations such as this one and offences of failure to comply with a condition imposed by a military judge have been punished by custodial sentences on numerous occasions in the past, as evidenced by the cases mentioned by the prosecutor, namely *R. v. Grenier*, 2013 CM 4014, *R. v. Caza*, 2014 CM 3002 and *R. v. Caicedo,* 2015 CM 4020. These precedents reveal that the duration of a period of detention in circumstances such as in this case could fall in a range of 30 to 60 days, considering the accompanying punishments proposed by counsel. That informed person would also be in a position to appreciate the significant personal impact that pre-trial detention may have.

[34] A reduction in rank is proposed to accompany the main punishment of detention in this case. In the case of an offender of the rank of sergeant, that punishment would reduce the offender to the rank of corporal, as in law, master corporal is not a rank but an appointment. In the circumstances, the imposition of this punishment generates a significant drop in status and pay which has a significant deterrent effect. It also acts as a denunciation tool, especially appropriate when the offence to be sanctioned reveals a justifiable loss in the trust required for one to perform duties attributed to a supervisory rank. This is the conclusion reached by Bennett J.A. writing for the Court Martial Appeal Court of Canada (CMAC) in dismissing the sentence appeals of Leading Seamen Reid and Sinclair, 2010 CMAC 4, as it pertains to their reduction in rank from Petty Officer 2nd Class. Justice Bennett commented on the punishment of reduction in rank as follows:

> A reduction in rank is an important tool in the sentencing kit of the military judge. It signifies more effectively than any fine or reprimand that can be imposed the military's loss of trust in the offending member. That loss of trust is expressed in this case through demotion to a position in which the offenders have lost their supervisory capacity. A demotion was a necessary component of a fit sentence in this case.

[35] Finally, the imposition of a fine is a punishment that is useful to ensure an additional personal impact of the sentence, especially in cases such as this one, when an informed person would know that the offender won't be entrusted with military duties in uniform in the foreseeable future and is facing real prospects of a release from the CAF. An amount of $1000 is sufficient, in conjunction with the other punishments proposed here, to meet the objectives of sentencing in this case.

[36] The duration of the punishment of detention that counsel propose is one day, as a result of the application of what has been described as credit for time served in pre-trial custody. This corresponds to a punishment of 40 days detention, within the range I consider reasonable, as discussed above. As it pertains to the suspension of the punishment of detention under the authority of section 215 of the *NDA*, I agree with counsel that Sergeant Conway meets the two-step test for suspension of a custodial sentence first enunciated by d'Auteuil M.J. in *R. v. Paradis*, 2010 CM 3025, at paragraphs 74 to 89. It has been demonstrated, on the balance of probabilities, that his particular circumstances justify such a suspension, specifically given his medical condition, the 39 days spent in pre-trial custody and the opinion of a medical professional to the effect that further custody would risk deterioration of his mental health. I also agree that a suspension of the punishment of detention would not undermine the public trust in the military justice system, in the circumstances of the offences and the offender including, but not limited to, the particular circumstances justifying a suspension. Indeed, an informed person knowing the significant personal impact of being deprived of liberty for 39 days awaiting trial would understand the need to suspend an additional period of detention for one day to avoid the offender having to serve the sentence.

[37] 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 will, therefore, accept it.

[38] 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 $200 per month unless the offender is released from the CAF.

[39] Sergeant Conway, the circumstances of the charges you pleaded guilty to are serious. They reveal a significant disconnect between your actions and the basic requirements of military service which you had previously adhered to. I am endorsing the joint submission made to me, which means that you will soon be free to go. Remember, however, that you are still in the military. You are still bound to follow the obligations of service that your supervisors will decide to impose on you. More than that, as every citizen, you are bound to respect the law. As I release you, I hope you have learned something in custody over the last month and that you have turned the corner, being determined not to repeat your mistakes. I also hope that you will use what you have learned to restore your health and balance. Take advantage of the help that is offered to you. Lots of people have helped you so far. Don’t let them down.

FOR THESE REASONS, THE COURT:

[40] **SENTENCES** you to detention for a period of one day, a reduction in rank to the rank of corporal and to a fine of $1000 payable in five monthly instalments of $200, commencing no later than 15 April 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.

[41] **SUSPENDS** the carrying into effect of the punishment of detention, pursuant to section 215 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh

Major A.H. Bolik, Defence Counsel Services, Counsel for Sergeant M.M. Conway