



COURT MARTIAL

Citation: *R. v. Ogston*, 2017 CM 2003

Date: 20160620

Docket: 201645

Standing Court Martial

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

Between:

Her Majesty the Queen

- and -

Sergeant R.J.A. Ogston, Offender

Before: Commander S.M. Sukstorf, M.J.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Sergeant Ogston, today you have admitted your guilt to one offence; that is, one count under section 129 of the *National Defence Act*, an act to the prejudice of good order and discipline. The statement of particulars reads as follows:

Particulars: In that he, on or about 29 September 2015, at or near CFB Gagetown, New Brunswick, directed, or allowed, candidates to swim contrary to the 5 Canadian Division Support Base Gagetown, Range Standing Orders.

[2] The Statement of Circumstances and the Agreed Statement of Fact filed in court are reproduced to provide a full account of the circumstances of both the offence and the offender:

“STATEMENT OF CIRCUMSTANCES

1. At all material times, Sgt Ogston was a member of the Regular Force posted to the Royal Canadian Armoured Corps School.

2. On 29 September 2015 Sgt Ogston was the senior non-commission-officer in charge of running background activities as part of Development Phase 1 serial 0006, an armoured driver course.

3. The activity was intended to show the students how to conduct dismounted bridge reconnaissance drills. Sgt Ogston informed his chain of command at that time that he was taking the students to the area of Swan Lake in order to conduct dismounted drills. He did not advise them that he intended to have the student swim. Doctrinally, dismounted bridge reconnaissance normally does not involve swimming.

4. Sgt Ogston proceeded to take the students to Swan Lake. Once there, he instructed the students on the theory regarding bridge reconnaissance. He then asked if there were any strong swimmers who would be willing to go swimming in the lake. Two students, Pte (B) Lemay and Pte (B) Bouchard raised their hands. They were then told to swim across a section of Swan Lake with the destination being the second pillar of the Trans-Canada overpass that spans the lake. For the swim, the students were given the option to strip down to their underwear or remain in their combat attire. The students decided to take off their combat attire in order to avoid getting it wet. Sgt Ogston told the swimmers to find out what the bridge was made of and then to swim back.

5. The distance of the swim is estimated to be between 30 and 40 metres. The students reported that, at times, they were unable to touch the bottom of the lake because it was too deep.

6. Once the students were back, Sgt Ogston told them to dry off, get dressed, they were informed that swimming was not part of a normal bridge reconnaissance and they then headed back to the bivouac. This practice was repeated in the afternoon with those students who had been conducting driver training during the morning.

7. As such, two more students, Sdt Belanger and Pte (B) Sukonthapanic volunteered to swim in a manner consistent with the morning activity.

8. Watermanship exercises are subjected to specific safety rules. For CFB Gagetown, those rules are contained notably within 5 Canadian Division Support Base – Range Standing Orders, which refers, and

requires adherence, to all applicable rules contained within “Training Safety – B-GL-381-001/TS-000. Notably, the rules provide the following:

- a. The Range Control authorizations must be obtained prior to conducting any watermanship exercise;
- b. A Site Commander and a Safety Officer shall be appointed prior to the exercise. Under no circumstances may one person be named to both appointments;
- c. During any activities, on or near water, foam life-jackets of MOT approved pattern shall be worn at all times (this is subject to some specific exceptions, as provided in the standing order, none of which applying to the activity that led to the charge);
- d. Safety boats shall be operated by skilled personnel and equipped with lifebuoys, spare cordage coiled for throwing and a boat hook. At least two persons shall crew the boat to ensure quick reaction in emergencies. Normally, boat propulsion will be by paddles or oars. Qualified lifeguards shall be on duty;
- e. Enough boats shall be used so that all swimmers may quickly reach a boat and support themselves in an emergency.

9. Sgt Ogston knew of 5 Canadian Division Support Base – Range Standing Orders.

10. The activities Sgt Ogston carried out on 29 September 2015 was in violation of all the applicable rules summarized above.”

“AGREED STATEMENT OF FACTS

VIEWS OF THE COMMANDANT OF THE ROYAL CANADIAN ARMoured CORPS SCHOOL

1. LCol Hutt was the commanding officer of the Royal Canadian Armoured Corps School when the charges were laid by the unit. He expressed the following views in relation to this matter:

“This offence is considered to be serious in nature because it puts the name and quality of instruction of the RCACS into question. This offence provided very little training

value to the candidates on the conduct of a bridge reconnaissance. The lack of forethought, adequate planning, and failure to take the necessary safety precautions could have resulted in serious injury of the candidates. The RCACS is a strong proponent of ensuring that candidates receive quality instruction. Sgt Ogston should have been capable of analyzing the situation and possible safety issues that could have occurred.”

2. On 29 September 2015, Sgt Ogston’s intentions were to motivate students with an activity that he thought would be appreciated by them, especially considering the warm weather on that day. He sought to increase the morale of his students. He now realizes that the watermanship exercises he conducted were not appropriate.

3. Capt Panza, Tank Troop Leader from C Sqn of The Royal Canadian Dragoons and Sgt Ogston’s immediate supervisor provided a written statement describing Sgt Ogston as a devoted instructor to young leaders, a valuable asset for his Troop, soon to be ready to take on more important tasks and who already successfully performed all tasks as a Troop Warrant during part of Ex Maple Resolve 17. Synthesizing his statement, Capt Panza paints the portrait of a dedicated and experienced CF member.

4. With regards to his family and financial situation, Sgt Ogston is responsible for the majority of the family expenses. His household is composed of his wife and child. In particular, he personally assumes the payment of the family’s home mortgage in addition to repaying a loan incurred after suffering a significant loss following the sale of his house upon his posting to Gagetown.”

Joint Submission

[3] In a joint submission, both prosecution and defence counsel recommend that I impose a sentence of a \$200 fine and 30 days’ stoppage of leave.

[4] This joint submission must be assessed in the context of the recent Supreme Court of Canada (SCC) decision in *R. v. Anthony-Cook*, 2016 SCC 43, where the SCC clarified that a trial judge must impose the joint submission proposed by the prosecution and defence counsel “unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest” (see paragraph 29).

[5] The SCC provided specific guidance on plea bargains and joint submissions shortly after it issued its landmark ruling of *R. v. Jordan* where it imposed very strict timelines on all cases in the criminal justice system. The cases of *Jordan* and *Anthony-*

Cook work together to ensure the efficient and expedient functioning of all criminal justice matters.

[6] A plea bargain occurs when counsel come together, outside the court, to discuss their respective positions in a quid pro quo or solution-oriented manner. There is give and take required to come to a joint recommendation. 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, which I note Sergeant Ogston has clearly done in this case.

[7] Joint submissions reduce the burden on the court as the prosecution does not need to take every matter to a full court martial. It permits both the prosecution and the defence to allocate their time wisely to ensure that the most serious offences can be tried quickly.

[8] Logistically, coming to a meaningful resolution in a discipline matter, victims and witnesses are not required to travel to the court, or, more importantly, will be spared the ordeal of testifying. This may be particularly important where the charges flow from a significant emotional event. It also assists the defence in that the accused can assess his or her options for resolution earlier rather than later.

[9] In the military justice system, the systemic benefits of joint submissions also extend to the unit. The accused's unit is responsible for providing the necessary administrative support to the court martial. When matters can be dealt with quickly, the unit benefits.

[10] The most important gain to all participants is the certainty that a joint submission brings to the process. The accused person has a lot to lose by entering into a plea bargain and the constitutional right to be presumed innocent should not be given up lightly. Thus, in exchange for making a plea deal, the accused must be assured of a high level of certainty that the court will accept the joint submission.

Assessing the joint submission

[11] In rendering its decision, the SCC also highlighted the professional responsibility of both the prosecutor and defence counsel. They are key players in the administration of our military justice system. Prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of the public, the Canadian Armed Forces (CAF) and the accused. Counsel are highly knowledgeable about the circumstances of the offender and the offences, as well as with the strengths and weaknesses of their respective positions.

[12] The prosecutor who proposes the sentence would have been in contact with the chain of command. He or she is aware of the needs of the military at large, the unit and its surrounding community and is responsible for representing those interests.

[13] Defence counsel must act in the accused's best interest, including ensuring that the accused's plea is a voluntary and informed choice to unequivocally acknowledge guilt.

[14] As members of the legal profession and accountable to their respective law societies, the prosecutor and defence counsel have a duty not to mislead the court in their submissions. In short, it is my expectation that they are committed to recommending a sentence that is fair and consistent with the public interest.

The Public Interest Test in Sentencing

[15] In this case, the prosecutor read a Statement of Circumstances and provided the documents required at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51. An Agreed Statement of Facts was also introduced on consent to inform the Court as to the facts pertaining to the incident that led to the offence you pled guilty to today. The Agreed Statement of Facts referred to the written statement of Captain Panza who described Sergeant Ogston as a devoted instructor to young leaders, a valuable asset for his troop and as having successfully performed all tasks required of a troop warrant during part of Exercise MAPLE RESOLVE 17.

[16] In addition to this evidence, the Court 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. I am also aware of the sentences imposed by similar precedents. The prosecution also drew the Court's attention to the case of *R. v. Durante*, 2009 CM 1014, where she highlighted that Dutil CMJ noted that pursuant to QR&O article 108.24, a military judge can also sentence an offender to minor punishments (given that such a punishment would have been available to the commanding officer presiding at a summary trial). Both the stoppage of leave and the fine fall within this category.

[17] Their submissions and the evidence before the Court have enabled me to be sufficiently informed to consider any indirect consequence of the sentence, and to impose a punishment adapted to yourself, as the offender with respect to the specific offence committed.

The offender

[18] Sergeant Ogston is 38 years old. He enrolled in the CAF in August 2002 and has served his country very well, where I note that he has operational tours of duty in both Bosnia (former Yugoslavia) as a reservist as well as in Afghanistan. Sergeant Ogston is married and has a school-aged child; he is the primary income earner. He has no prior service conduct sheet. In fact, Sergeant Ogston has an unblemished record and counsel have both agreed that his chain of command has described him in glowing terms. I note from your Regular Force service record that you very quickly rose in rank from private to sergeant in ten years, and that is not easily accomplished unless you are an outstanding performer. This seems to be reinforced by the very positive and

supportive comments from your chain of command. While holding you responsible for your lack of judgement exercised that day, the comments reflect a high level of confidence in you as well as for your future as a senior non-commissioned officer within the CAF. In other words, they are invested in you. You recently successfully performed the duties of troop warrant during Exercise MAPLE RESOLVE 17 which is an important operational validation exercise run by the Army. It is clear that your chain of command had the confidence to appoint you into that position and it is noteworthy that you did not let them down.

Objectives of sentencing to be emphasized in this case

[19] In making the joint submission, counsel have emphasized deterrence and denunciation as the objectives of sentencing. I agree with their approach.

Aggravating factors

[20] Counsel have assured the Court that they have taken into account all the relevant aggravating factors, although the Court will highlight only a few for the record:

(a) The incident occurred in a training situation where Sergeant Ogston was the NCO responsible for Development Period 1 occupational training for new trainees in the CAF. He conducted the training without his chain of command being aware that he intended to let the candidates swim. They were unable to ensure that safety precautions were in place to minimize risks.

(b) Although his intentions were to motivate his students, his behaviour reflects a disregard for the rules put in place by the chain of command to ensure that all training activities unfold in a safe manner. The incident could have resulted in injury.

(c) Further, the prosecution suggests that some students believed the swim was part of the normal bridge reconnaissance procedures; however, defence quickly clarified that at no time did Sergeant Ogston advise the candidates that swimming was part of normal bridging procedures.

Mitigating factors

[21] Your plea of guilty and the rationale behind it, as described in the agreed Statement of Circumstances and Agreed Statement of Facts, must be given their full weight. You genuinely show remorse and you have a bright career ahead of you. Your positive attitude and high performance as an instructor since this incident are excellent examples of your resilience, learning from your mistake while still moving forward.

[22] At the end of these proceedings, you must put this matter behind you and learn from it. Although your intentions were noble, you clearly exercised a lapse of judgement when you permitted your students to swim contrary to the watermanship

exercises regulations set out within 5th Canadian Division Support Base Range Standing Orders.

[23] As a sergeant in the combat arms, you know that you must be reliable and responsible for your conduct at all times. The work you perform is inherently dangerous and it is for this reason safety protocols must be strictly adhered to. Discipline and safety are critical to the work we do. Safety rules are put in place for a reason and compliance is not optional. Failure to obey certain rules, particularly as it relates to safety, will impact others we serve with. Your trustworthiness as an instructor is essential and I have no doubt that this is the reason your chain of command is holding you responsible. Your leadership on safety issues is pivotal and will resonate with these students long after the training has been completed.

[24] In the circumstances, the Court considers that Sergeant Ogston fully recognizes his responsibility and that his admission of guilt is a sincere expression of remorse for his past conduct.

[25] After considering counsel's submissions in their entirety and considering all the evidence before the Court, I believe the proposed sentence would not be viewed by the reasonable and informed CAF member, as well as the public at large, as a breakdown in the proper functioning of the military justice system. In other words, my acceptance of the proposed sentence would not cause the Canadian Armed Forces community and its members or the greater population at large to lose confidence in the military justice system.

[26] Considering all of the factors, the circumstances of the offence and of the offender, the indirect consequences of the finding or the sentence, the gravity of the offence and the previous character the offender, I am satisfied that this joint submission is in the public interest and does not bring the administration of justice into disrepute. The Court is amply satisfied that counsel have discharged their obligation in making their joint submission today on sentence.

FOR THESE REASONS, THE COURT:

[27] **FINDS** you not guilty of charges one and three and guilty of the second charge.

[28] **SENTENCES** you to a \$200 fine and 30 days' stoppage of leave to begin today, 20 June 2016.

Counsel:

The Director of Military Prosecutions as represented by Major M.E. Leblond

Major A. Gelinas-Proulx and Captain L. Carignan, Defence Counsel Services, Counsel for Sergeant R.J.A. Ogston