COURT MARTIAL

Citation: *R. v. MacDonald*, 2017 CM 2002

Date: 20170614
Docket: 201734

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman C.C. MacDonald, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Leading Seaman MacDonald, today you have admitted your guilt to one offence, one count under section 129 of the *National Defence Act*, for neglect to the prejudice of good order and discipline. The statement of particulars reads as follows:

> *Particulars*: In that he, on or about 28 August 2016, at or near Palma de Mallorca, Spain, failed to contact the Duty Watch on board HMCS CHARLOTTETOWN in accordance with Op REASSURANCE Maritime Task Force Standing Order 003/16, as was his duty to do so.

[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 relevant times, Leading Seaman MacDonald was a member of the Canadian Armed Forces, Regular Force. He was posted to Her Majesty's Canadian Ship (HMCS) CHARLOTTETOWN, as a Sonar Operator.

2. Leading Seaman MacDonald was posted to HMCS CHARLOTTETOWN in 2011. On or about 29 June 2016, HMCS CHARLOTTETOWN was deployed to Operation REASSURANCE, Rotation 5. This mission was expected to be approximately six months in duration, operating in the vicinity of the Mediterranean Sea.

3. As part of Operation REASSURANCE, the Commanding Officer of HMCS CHARLOTTETOWN issued Task Force Standing Orders for all members of the ship's company and associated personnel. These included Task Force Standing Order 003/16 – Operation REASSURANCE Maritime Task Force Standing Orders – Administration (TFSO 003/16).

4. TFSO 003/16 covered the procedure for approving and conducting overnight leave off the ship during port visits. Paragraph 3, sub-paragraph L, stated (emphasis in original):

> Personnel on approved overnight leave are to check in by calling or emailing the ship NLT **1000** local time the day following if they are not required for work or duty. Personnel who have emailed must receive an email acknowledgement from [email address] prior to 1030 to be considered checked in. Personnel who are not checked in (i.e. they have not connected with the ship via phone, nor received an email acknowledgement from the [email address] by 1030), are to return to the ship ASAP. Personnel are to note that an email time stamped after 1000 will be considered late. Checking in is the member's responsibility.

5. The Task Force Standing Orders, including TFSO 003/16, were posted on the ship's public bulletin board, as well as being made accessible on the ship's "splash-page", the default homepage of the ship's internal computer system. Leading Seaman MacDonald had an active computer account from the time of his arrival on HMCS CHARLOTTETOWN until his departure from the ship in November 2016.

6. TFSO 003/16 was referred to in Routine Orders. Routine Order 35/16, covering the period of 26-30 August 2016, reproduced the entirety of paragraph 3, including sub-paragraph L. Routine orders were posted

in the canteen area and distributed to all messes. The routine order was also posted electronically on the ship's "splash-page". Leading Seaman MacDonald was aware of TFSO 003/16 and routine orders, and understood the procedure for overnight leave during port visits.

7. On 24 August 2016, Leading Seaman MacDonald requested 2 days leave on 28-29 August 2016, to be spent ashore in the port of Palma de Mallorca, Spain. The proposed leave was approved on 25 August 2016, including the note that Leading Seaman MacDonald would check-in to his hotel on the evening of 27 August 2016.

8. Leading Seaman MacDonald checked into his hotel on 27 August 2016, advising the ship that he had done so at 1820 hours, as required by TFSO 003/16.

9. On the morning of 28 August 2016, the Duty Staff aboard HMCS CHARLOTTETOWN noted that Leading Seaman MacDonald had not checked in with the ship at 1000 hours in accordance with TFSO 003/16. Calls were made to the contact numbers provided by Leading Seaman MacDonald, but no answer was received. The Duty CPO2, Chief Petty Officer Second Class (CPO2) Skinner collected the senior sonar operator, Petty Officer First (PO1) Class Marlow, and two duty drivers to search for Leading Seaman MacDonald.

10. At approximately 1300 hours, the search party travelled to the hotel. CPO2 Skinner and PO1 Marlow entered and asked the concierge to contact Leading Seaman MacDonald's room. There was no answer. A member of the hotel staff was sent to knock on the door of Leading Seaman MacDonald's room. There was a reply to the effect of "all good – go away". CPO2 Skinner and PO1 Marlow obtained the room number and attended the room themselves. There was some delay before Leading Seaman MacDonald answered. Both CPO2 Skinner and PO1 Marlow had to identify themselves and tell him through the door that they were concerned for his safety and would call the police and advise the ship. Leading Seaman MacDonald opened the door and allowed them to enter his room at approximately 1342 hours.

11. Leading Seaman MacDonald appeared dishevelled, as if he had just woken up from sleeping. He was alone in the room and the room was otherwise in good order, with only a few personal items in view.

12. When asked why he had not contacted the ship, Leading Seaman MacDonald replied that his cell phone was not working. When further asked, he stated that he did not think to call using the hotel's phones.

> 13. CPO2 Skinner confirmed with Leading Seaman MacDonald that he understood that he was to contact the ship that evening, and then again in morning prior to 1000 hours. CPO2 Skinner and PO1 Marlow then departed Leading Seaman MacDonald's room and returned to the ship."

Joint Submission

[3] The joint submission before the Court today is reviewed in the context of the current 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".

[4] In a joint submission today, both prosecution and defence counsel recommend that I impose a sentence composed of a fine in the amount of $750, payable in six instalments of $125.

Public Interest in Sentencing

[5] By setting a high "public interest" threshold, the SCC sent a message reinforcing the importance of plea bargaining within the criminal justice system. The efficient use of plea bargaining and joint submissions benefit many different stakeholders engaged in the criminal justice system, and particularly the military justice system.

[6] A plea bargain occurs when counsel on both sides come together, outside the Court, to discuss their respective positions in a quid pro quo or, in other words, a 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, Leading Seaman MacDonald has done in this case. By encouraging plea deals, the burden on the Court is reduced and the prosecution benefits directly by not needing to take every matter to a full trial. This is pivotally important as the SCC has also now imposed very strict timelines on the Court system to ensure the timely trial of all cases in the criminal justice system. You just have to listen to the news today to hear that there is a backlog in the system to understand that these types of plea bargains for lesser offences are critical to dispensing with the backlog.

[7] Logistically, coming to a meaningful resolution in a discipline matter, victims and witnesses are not required to travel to the court and, more importantly, they will be spared the ordeal of testifying, which 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 options for resolution earlier rather than later.

[8] In the case of the military justice system, the systemic benefits of joint submissions also extend to the unit, which in this case, involved both HMCS Charlottetown and Trinity. The accused's unit is responsible for providing the necessary administrative support to a court martial. When matters can be dealt with quickly, all stakeholders benefit directly.

[9] 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 giving up his constitutional right to be presumed innocent and it's not something that should be taken lightly. Thus, in exchange for a plea deal, the accused must be assured with a high level of certainty that the Court will accept the joint submission.

Assessing the joint submission

[10] When the SCC set the high threshold to leverage the benefits of joint submissions, it placed significant responsibility on both the prosecutor and defence counsel. They are both key players in the administration of justice. 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.

[11] 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 and its surrounding community and is charged specifically with representing those interests.

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

[13] As members of the legal profession and accountable to their respective Law Societies, the prosecution 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 both fair and consistent with the public interest.

Sentencing matters considered

[14] In this case, the prosecutor read a Statement of Circumstances and provided the documents as required by *Queen's Regulations and Orders for the Canadian Forces* article 112.51. An agreed Statement of Circumstances was also introduced on consent to inform the Court as to facts pertaining to the incident that led to the offence you pled guilty to today.

[15] 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 your particular case. I am also aware of the sentences imposed by similar precedents.

[16] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed so I may consider any indirect consequence of the sentence and to impose a punishment, adapted to yourself as the offender, with respect to this specific offence committed.

The offender

[17] Leading Seaman MacDonald is 31 years old. He enrolled in the CAF in December 2009 and has served his country very well, where I note he has been engaged in three operations: Operation METRIC; Operation ARTEMIS; and Operation REASSURANCE. He has no prior service conduct record, but does have a civil conviction for an offence that predates his service in the CAF.

Objectives of sentencing to be emphasized in this case

[18] In making this joint submission, counsel have emphasized deterrence and denunciation as the objectives of sentencing. I agree with those objectives.

[19] They have assured the Court that they have taken into account all the relevant aggravating and mitigating factors, although the Court will highlight the following:

(a) The ship was deployed on an operation in a foreign country and, as such, the safety and security of its people, particularly while alongside, was its highest level of responsibility.

(b) The ship had set out specific instructions which were reasonable in the circumstances and designed to ensure that it could provide its members with leisure time alongside and a period of relaxation while at the same time ensuring that its members were safe and accounted for. As the prosecution pointed out, shore leave was a privilege, but it still needs to be administered with due diligence and with clear rules that everyone must follow.

(c) The fact that Leading Seaman MacDonald had not contacted his duty watch caused a search party to be deployed to ensure that they could verify Leading Seaman MacDonald's safety. In other words, his failure to report in to the duty watch had an operational impact on the ship that day.

[20] With regard to the mitigating factors:

(a) Your plea of guilty and the rationale behind it as described in the agreed Statement of Circumstances, must be given their full weight.

(b) You genuinely show remorse and you still have a very bright career ahead of you.

[21] At the end of these proceedings, you must put this matter behind you, learn from it and show your chain of command that you can be the best sonar operator that you can be.

[22] In the circumstances, the Court considers that Leading Seaman MacDonald fully recognizes his responsibility and that his admission of guilt is a sincere expression of remorse for his past conduct. I would note that the fact that you were held to account for your misstep sends an important message that all deployed members must be held to comply with the rules set out. In this case, the rules were designed to ensure that the shore period would be advantageous for all involved. As service members, we must be reliable and held responsible for our conduct at all times. Failure to obey certain rules will impact others we serve with, as was the circumstance in this particular case.

[23] I am sure that the Chief Petty Officers (CPO) and other CAF members sitting in the audience will attest, you are not the first sailor to be charged with similar facts as set out in this offence. I can assure you that should you continue with your career within the CAF, you too will see a déjà vu in a few years of similar facts with sailors and you will know that you must hold them to account, as your chiefs have held you accountable. Discipline is critical to the work we do. The rules put in place by units particularly while on operations are done so for a reason and compliance is not optional. I am confident that as reassured as Chief Petty Officer Skinner and Petty Officer Marlow were to find you safe in your hotel room, they would have had better things to do that day than to go off on a recovery mission. A simple call or email would have averted this problem.

[24] Now, after considering counsel's submissions in their entirety and considering all the evidence before the Court, I must ask myself whether the proposed sentence would 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, would the acceptance of the proposed sentence cause the CAF community and its members to lose confidence in the military justice system?

[25] Considering all of the factors, the circumstances of the offence and yourself, the indirect consequence of the finding or the sentence, the gravity of the offence and your previous character, I am satisfied that the 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:

[26] **FINDS** you guilty of the second charge.

[27] **SENTENCES** you to a fine of $750, payable in six instalments of $125 commencing with deductions in your August 2017 pay.

Counsel:

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

Captain P. Cloutier, Defence Counsel Services, Counsel for Leading Seaman C.C. MacDonald