



COURT MARTIAL

Citation: *R. v. Morgado*, 2017 CM 4012

Date: 20170915

Docket: 201728

Standing Court Martial

Royal Military College of Canada
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Officer Cadet O. Morgado, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code of Canada*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant shall not be published in any document or broadcasted or transmitted in any way.

REASONS FOR SENTENCE

Introduction

[1] Officer Cadet Morgado, having accepted and recorded your plea of guilty in respect of the only charge on the charge sheet, the Court now finds you guilty of that charge under section 93 of the *National Defence Act* (NDA) for disgraceful conduct.

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 a reprimand and a fine of \$1,500.

[3] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. I am not obliged to go along with whatever 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. This is the test 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 undeniably high as joint submissions respond to important public interest considerations. 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. The benefits of joint submissions are not limited to the accused but extend to victims, witnesses, the prosecution and the administration of justice generally; by saving time, resources and expenses 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, even if certainty of outcome is important for the parties, it is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As noted by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, 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 usually 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 court martial proceedings, 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, to an extent that may not always be necessary in civilian criminal justice courts. The particular requirements of sentencing at courts martial do not detract from the guidance provided by the Supreme Court of Canada on joint submissions, as laid out at paragraph 54 of *R. v. Anthony-Cook*.

Matters considered

[7] The prosecutor read a Statement of Circumstances which was entered in evidence as Exhibit 6, along with other documents provided by the prosecution as required at QR&O 112.51. The prosecution also entered a Statement obtained from the victim as Exhibit 7 which informs the Court as to the impact the offence had on her. The defence did not call any witnesses nor introduce any evidence in mitigation.

[8] In addition to the 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 similar cases. These submissions and the evidence, including the information received from the victim, allow me to be sufficiently informed to impose punishment adapted to the individual offender and the offence committed.

The offender

[9] Officer Cadet Morgado is 22 years old. He is completing his studies at the Royal Military College (RMC) of Canada here in Kingston. He has joined the Canadian Armed Forces (CAF) in July 2013 and served at RMC St-Jean prior to being posted to Kingston at the completion of the Basic Military Officer Qualification – Land in August 2015. The Court has not been provided with any information about Officer Cadet Morgado's performance and potential as a member of the CAF nor about any impact the completion of these proceedings may have on his future career prospects with the military.

The offence and its impact

[10] 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 93 of the *NDA* for disgraceful conduct are punishable by imprisonment not exceeding five years or to less punishment. On that basis, disgraceful conduct is a disciplinary offence of significant gravity.

[11] The facts surrounding the commission of the offence in this case are disclosed in the Statement of Circumstances read by the prosecutor and formally admitted as accurate by Officer Cadet Morgado. These circumstances can be summarized as follows:

- (a) At the time of the offence, Officer Cadet Morgado was employed as an instructor at the Cold Lake Cadet Survival Camp in Cold Lake, Alberta. In the course of that employment, he had as a colleague Officer Cadet K.-A. T.
- (b) During the week of 27 June to 1 July 2016, the Camp instructors participated in a period of indoctrination prior to the arrival of the cadets for the summer.

- (c) On the evening of 30 June, the Camp instructors, including Officer Cadet Morgado and Officer Cadet K.-A. T., attended a mess dinner where they both consumed alcohol. After the mess dinner, they, along with many Camp instructors, continued to consume alcohol outside, in the vicinity of the Camp parade square.
- (d) Past midnight, Officer Cadet K.-A. T. asked two friends, civilian instructors at the camp, to accompany her to a washroom in proximity. By that time, Officer Cadet Morgado was intoxicated with alcohol, having consumed wine during the mess dinner and a bottle of Captain Morgan rum since.
- (e) Before Officer Cadet K.-A. T. made it to the washroom, Officer Cadet Morgado ran up to her, put his left arm around her shoulder, without her consent, and asked, "Would you give me a blow job?" or words to that effect. Officer Cadet K.-A. T. responded, "No. I have a boyfriend back home." Officer Cadet Morgado replied, "Why not?" Officer Cadet K.-A. T. answered, "Because I have a boyfriend back home" and Officer Cadet Morgado replied, "Well, I am in the mood" or words to that effect.
- (f) During the brief interaction, Officer Cadet Morgado kept his left arm around Officer Cadet K.-A. T.'s shoulder, without her consent, until she managed to remove Officer Cadet Morgado's arm from around her shoulder and pull away from him.
- (g) After the incident, Officer Cadet K.-A. T. was distraught and sought help. The incident was immediately reported up the chain of command and subsequently to military police. Officer Cadet Morgado was arrested on 5 July in the course of the investigation and released under conditions a few hours later. He agreed to write a letter of apology addressed to Officer Cadet K.-A. T. concerning the incident of 1 July 2016.

[12] The Court was informed of the impact of the offence on the victim. Being treated as she was by Officer Cadet Morgado made her consider releasing from the CAF. She has lost confidence and self-esteem and suffers from social isolation since the incident. The views from the victim demonstrate how one's disgraceful actions may have such a significant and sometimes unforeseen impact on persons affected.

Aggravating factors

[13] The circumstances of the offence in this case are serious as they have to be to sustain a charge of disgraceful conduct, punishable by imprisonment by up to five years. Generally speaking, the circumstances of the offence of disgraceful conduct in this case reveal a highly inappropriate request of a perverted nature made to a colleague, accompanied by unsolicited touching. The acts of Officer Cadet Morgado invaded

Officer Cadet K.-A. T.'s privacy in the most intrusive way, without any form of consent. They cannot in any fashion be justified by the consumption of alcohol by those present or the fact that the occasion was festive.

[14] Officer Cadet Morgado ran up to Officer Cadet K.-A. T. as she was heading to the washrooms where she could expect to be left alone. The behaviour of the offender is a violation of the trust that colleagues in arm of the CAF should have for one another. Officer Cadet Morgado violated the physical integrity of a fellow member of the military family, on base, in the context of a gathering of colleagues. As I found in the case of *R. v. Chapman*, 2016 CM 4019, conduct that places the safety, security and health of fellow members at risk threatens the operational effectiveness of the CAF. Sure enough, there were impacts and very real consequences for a member of the CAF in this case as the victim has lost confidence and self-esteem. She is also reconsidering her future with the military.

Mitigating factors

[15] The Court also considered the arguments of counsel as to mitigating factors arising either from the circumstances of the offence or the offender in this case. What I do accept as mitigating circumstances are the following:

- (a) First and foremost, Officer Cadet Morgado's guilty plea, which I consider as a clear indication that the offender is taking responsibility for his actions, in this public trial in the presence of members of the military community. He has also formally apologized to the victim and allowed her to have a voice at the sentencing hearing, demonstrating consideration to what she has had to go through as a result of his actions.
- (b) Second, the fact that Officer Cadet Morgado has no criminal or disciplinary record.
- (c) Third, I considered the impact on Officer Cadet Morgado of being arrested and detained, even for a short period of time in relation to the offence, and the impact of the release conditions imposed on him.
- (d) Finally, I have considered Officer Cadet Morgado's young age, his short but apparently satisfactory service with the CAF, indicative in my view of his potential to make a positive contribution to Canadian society in the future, in any capacity.

Objectives of sentencing to be emphasized in this case

[16] The circumstances of this case require that the focus be placed on the objectives of denunciation and general deterrence in sentencing the offender. At the same time, any sentence imposed should not compromise the rehabilitation of Officer Cadet Morgado.

Assessing the joint submission

[17] The first thing I need to do in determining the appropriate sentence is to assess the joint submission and determine if it is acceptable. The prosecutor and defence counsel both recommended that this Court impose the punishments of a reprimand and a fine of \$1,500 to meet justice requirements. 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.

[18] 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, any opinion I might have on an appropriate sentence is not sufficient to reverse the joint submission that was made to me.

[19] The high threshold imposed on trial judges to reverse joint submissions is necessary to allow all of their benefits 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 the community's interest 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 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.

[20] 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, 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.

[21] I do believe that a reasonable person aware of the circumstances of this case would expect that the offender, guilty of disgraceful conduct, 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 a reprimand and a fine is aligned with these expectations, as stated in recent precedents such as *Chapman* and *Brunelle* (2017 CM 4001), even if circumstances in those cases were more severe than the circumstances involving Officer Cadet Morgado in this case.

[22] Considering all of these factors, as well as the circumstances of the offence and of the offender, the applicable sentencing principles and the aggravating and 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 must, therefore, accept it.

[23] Officer Cadet Morgado, the circumstances of the charge you pleaded guilty to reveal a very troubling conduct and I hope that by now you realize the gravity of what you have done. I am prepared to accept that this episode reflects a huge mistake on your part. I trust you're determined by this point not to make a mistake like that again. You have now paid your debt to the military justice system with respect to these events although you will have to live with the consequences of your actions.

FOR THESE REASONS, THE COURT:

[24] **SENTENCES** you to a reprimand and a fine of \$1,500 payable forthwith.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Colonel A. M. Tamburro, Captain M. Gough and Captain M.-A. Sigouin

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