COURT MARTIAL

Citation: *R. v. Duvall*, 2017 CM 2008

Date : 20171024
Docket : 201717

Standing Court Martial

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

Between:

Her Majesty the Queen

- and -

Captain S.P. Duvall, Accused

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

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, directs that any information that could identify the persons described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Captain Duvall, today you admitted your guilt to one charge contrary to section 93 of the *National Defence Act* (*NDA*) for disgraceful conduct. The particulars read as follows:

> In that he, between 01 August 2010 and 31 January 2011 at or near Canadian Forces Base Gagetown, Gagetown, New Brunswick, touched A.D. on the buttocks without her consent.

[2] The Statement of Circumstances filed in court is reproduced to provide a full account of the circumstances of both the offence and the offender.

"STATEMENT OF CIRCUMSTANCES

1. At all material times, Captain Duvall was a member of the Regular Force, Canadian Armed Forces (CAF). At the time of the incident, Captain Duvall was posted to the Royal Canadian Artillery School (RCA School) and had the rank of Lieutenant. Captain Duvall was posted to the 4th Artillery Regiment (General Support (GS)), formerly known as 4th Air Defence Regiment, on 27 May 2011. Captain Duvall was released from the CAF under item 5f on 18 January 2017.

A. THE COMPLAINT

2. In June 2016, A.D. mentioned to a group of friends an incident involving Captain Duvall. One of these friends, Captain Conley was also an Artillery Officer and reported the incident to Captain Carter, the Adjutant of 4th Artillery Regiment (GS). Captain Carter then approached A.D. at a mess function and asked her if he could report the incident to the military police. A.D. agreed and shortly thereafter, she was interviewed by an investigator about her complaint.

B. THE INCIDENT

3. Between August 2010 and January 2011, A.D. was posted on Canadian Forces Base (CFB) Gagetown and was awaiting training between her common army phase and her professional training. At around 1600 hours, on a Friday evening between August 2010 and January 2011, A.D. attended the Carleton Barrack's Officers' Mess with other officers like she would frequently do on Fridays. She had supper there at around 1700 hours and had 1 or 2 drinks. She was wearing civilian attire, a mess appropriate casual business dress, as she had finished work earlier that day.

4. After supper, A.D. was standing at the Armoured Table in the bar area of the Officers' mess with several other CAF members. At some point, Captain Duvall approached her from behind to attempt to join the conversation. A.D. was acquainted with Captain Duvall as they were course mates on their Common Army Phase that took place earlier in 2010.

5. As he arrived at the table, Captain Duvall stood beside A.D., placed his full hand on the right side of her buttocks and held it there for few seconds. A.D. was shocked and uncomfortable and then, she froze. Captain Duvall did not say anything and removed his hand.

> 6. After the incident, A.D. went to the bathroom to process what had just happened. She stayed at the mess for another 5 to 10 minutes but she did not feel comfortable going back to the table. She therefore decided to leave the mess and asked one of her friends to escort her back to her room.
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> 7. A.D. did not consent to the contact and believed it was of a sexual nature. To A.D., it felt like a slow and deliberate touching of her buttocks; something that could not have been accidental or caused by someone just passing by. She described it as similar to the way a husband would touch his wife's waist.
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> 8. It was the first and last time A.D. wore a dress to the mess. She only recently started wearing dresses again to mess functions as she is accompanied by her husband. A.D. recently decided to talk about this incident because of Operation Honour."

Joint submission

[3] In a joint submission, both the prosecution and defence counsel recommend that I impose a sentence of a severe reprimand and a $1000.00 fine.

[4] The joint submission before the Court is reviewed in the context of the current Supreme Court of Canada (SCC) guidance in *R. v. Anthony-Cook*, 2016 SCC 43. In that decision, the SCC clarified that a trial judge must impose the sentence proposed in a joint submission "unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest".

[5] A plea bargain occurs when counsel come together, outside the court, to discuss their respective positions in a quid pro quo 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 an offender, such as Captain Duvall, who is clearly remorseful, to begin making amends. 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 court martial.

[6] Logistically, coming to a meaningful resolution in a discipline matter, victims and witnesses are not required to travel and testify before the court martial. In the case of inappropriate sexual conduct, a plea bargain and a joint submission helps the healing process as it spares the victim from having to testify and be cross-examined on the incident. It also assists the defence in that the accused can assess his or her options for resolution earlier rather than later.

[7] In the case of the military justice system, the systemic benefits of joint submissions also extend to the unit. The accused's unit is responsible for providing the

administrative support to both the member and the court martial. When the matters can be dealt with quickly, the unit benefits directly.

[8] 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. As you heard when I did the verification of the guilty plea, by entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. Thus, in exchange for making a plea, the accused must be assured a high level of certainty that the Court will accept the joint submission.

[9] In rendering its decision, the SCC highlighted the professional responsibility of both the prosecutor and defence counsel. They are key players in the administration of our military justice system and 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. The prosecutor is aware of the needs of the military and its surrounding community and is responsible for representing those interests. As evidenced in the prosecution's submissions and the Statement of Impact on Regimental Discipline, the prosecution has consulted directly and appropriately with both the victim and the chain of command.

[10] In order for the military justice system to be able to rely heavily on joint submissions emanating from plea bargains, the court must have confidence that the negotiations are conducted in a manner that promotes and respects the rights of the accused. Defence counsel acts exclusively in the accused's best interest, including ensuring that the accused's plea is a voluntary and informed choice and unequivocally acknowledges his guilt.

[11] As members of the legal profession and accountable to their respective law societies, both the prosecution and defence counsel have a duty not to mislead the court in their submissions. As such, as the military judge presiding, and being asked to consider a joint submission, I expect that both counsel will have fulfilled their professional responsibilities in their independent roles. In effect, they are in a better position than the court to weigh and assess relevant factors, the evidence available as well as the public interest.

Assessing the joint submission

[12] In this case, the prosecutor read the Statement of Circumstances and provided the documents required at the *Queen's Regulations and Orders for the Canadian For*ces article 112.51 supplied by the chain of command. The Statement of Circumstances was introduced on consent to inform the Court of the context of the incident that led to the charges before the court as well as facts pertaining to Captain Duval.

[13] Furthermore, the Court benefitted from submissions from counsel to support their joint position on sentence highlighting the facts and considerations relevant to

Captain Duvall. The prosecution and defence provided the Court with a number of judicial precedents for comparison.

[14] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of any indirect consequence of the sentence so I may impose a punishment adapted specifically to Captain Duvall's circumstances and the offence committed.

The offender

[15] Captain Duvall is 37 years old. He enrolled in August 2006 and appears to have served his country well. He has a spouse and two children to support. He was released under a section 5(f) item of release, considered unsuitable for further service in January 2017.

[16] He has a conduct sheet and I note that in July 2016, he was convicted by Summary Trial for inappropriate touching of another service member and sentenced to a $1,500 fine.

[17] As noted in the Statement of Circumstances, Captain Duvall was a colleague of the victim, A.D., and the alleged inappropriate touching was over A.D.'s clothes and took place on a Friday evening, in the Officers' mess.

Objectives of sentencing to be emphasized in this case

[18] The prosecution has emphasized that all the objectives of sentencing were considered, but both she and defence counsel felt that those of greatest importance in addressing this incident are general deterrence and denunciation which, on the facts before the Court, I agree with. The prosecution highlighted that denunciation is pivotal in this case as it sends a message that inappropriate, lower sphere conduct is equally unacceptable as the more serious misconduct. This principle was well articulated in part of the Statement of Impact from the Commanding Officer, Lieutenant-Colonel Bouckaert which reads as follows:

> "As the Commanding Officer of 4th Artillery Regiment (General Support), RCA, a combat arms unit, this could not be more relevant – trust, respect and esprit de corps are essential to mission success, yet Captain (Ret'd) Duvall – one of my former Officers and guardian of my post precious resource, my soldiers– stands to threaten and erode the morale, cohesion and operational effectiveness of my Regiment. This is simply unacceptable; even one single act of wrongdoing, whether conducted with intent, inadvertently, or without malice, is one too many. Captain (Ret'd) Duvall's incident, despite articulated regret and acknowledgement of CAF policies, reinforcing my firm belief that his behaviour is deeply rooted and will continue if not addressed appropriately."

[19] In making the joint submission, counsel advised the Court that they have taken into account all relevant aggravating and mitigating factors. However, prosecution did include some aggravating and mitigating factors for the record. The court considered the following:

(a) Aggravating factors

i. At the time of the incident, the accused was a lieutenant and a commissioned officer. He had served for several years by then and as a future leader, he would have been aware of the values of the CAF and should have known that inappropriate touching was wrong and would threaten the morale, cohesion and operational effectiveness of the CAF;

ii. Conduct sheet – although this incident unfolded almost seven years ago, you have a summary trial conviction for an incident that unfolded on 25 April 2016 which was well after Operation HONOUR began, sending a clear message that this type of behaviour is unacceptable;

iii. Officers' mess – the incident unfolded at the mess on a Friday evening when colleagues get together in what is supposed to be a safe environment to interact and relax together. Under tradition, it is a place where officers can gather with friends or colleagues, build cohesion and morale. Regrettably, the actions of the accused disrupted that evening for the victim as she felt uncomfortable staying there. She left shortly thereafter and didn't feel comfortable wearing a dress to the mess for many years; and

iv. Lack of respect – the incident itself reflected a lack of respect for your colleague. Not only did you exercise poor judgement and invaded her personal space, with inappropriate touching, your actions made her feel uncomfortable and alienated her from her own mess, which is supposed to be an area of refuge for all officers. You violated a fundamental tenet of officership. As an officer, you were required to ensure that the workplace is free of harassment and that every member's integrity and dignity were respected at all times and that they feel comfortable being there and contributing. The CAF as a whole loses when we are not able to draw on everyone's contribution.

(b) Mitigating factors

i. The strongest mitigating factor in your favour is your guilty plea and the rationale behind it. You genuinely showed remorse for

your conduct. Your guilty plea has helped the victim in that she does not have to testify and it also avoids a lengthy trial; and

ii. You have already been released 5(f) from the CAF and have been forced to move on with your life in a career outside of the CAF. The court recognized that you have already paid a very steep price for your conduct.

[20] Captain Duvall, you violated one of the most important obligations of members of the CAF. The military ethos is clear and transparent. It demands the ultimate of respect and integrity in everything we do. However, the Court also notes that you fully accepted responsibility for your conduct and that your admission of guilt is a sincere expression of remorse.

Conclusion

[21] After considering counsel's submissions in their entirety and all the evidence before the Court, I must then 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 general public, the CAF community and its members to lose confidence in the military justice system?

[22] In considering the joint submission before the Court, the prosecution referred me to five cases (*R. v. Wheaton*, 2015 CM 4017, *R. v. Tremblay*, 2013 CM 4031 (*Tremblay), R. v. Bernier*, 2015 CM 3015, *R. v. Christensen*, 2016 CM 1026 and *R. v. Morgan*, 2015 CM 4005), and defence referred the court to three cases (*Tremblay*, *R. v. Prosser*, 2010 CM 3023 and *R. v. Corporal N. Griffith*, 2005 CM 3007) where the Court considered varied facts of inappropriate touching.

[23] As a serving CAF member, I am conscious of the background and the purpose of Operation HONOUR. Its launch, started a long overdue, but necessary conversation towards a journey of addressing and healing – all intended to ensure that the CAF offers a safe and respectful work environment for all CAF members. It aims to hold everyone accountable but it also places special responsibility on the chain of command to ensure that harmful and inappropriate behaviour is stopped in its infancy. I was most impressed with the Statement of Impact from the Commanding Officer, Lieutenant-Colonel Bouckaert who has clearly embraced her responsibility.

[24] However, as with any operation and concentrated effort, the devil is always in the details. Stopping inappropriate sexual behaviour in its infancy is not an easy task. As damaging as each act may be, the smallest indiscretions often fall short of meeting the elements of sexual assault or other similar criminal conduct and let us be clear, civilian prosecutors would not even pursue them.

[25] But at the same time, these less serious acts are completely unacceptable in the military context and must be stopped. A failure to address even the smallest instance of inappropriate conduct is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every CAF member.

[26] The increased commitment to addressing inappropriate conduct brings increased pressure to ensure that people are held to account. However, the increased focus in eradicating inappropriate conduct must be done fairly pursuant to the same Canadian law that we serve to protect.

[27] Without question, the military justice system must also ensure that the accused receives a fair trial where he enjoys the same protections as he would in a civilian court, which includes the presumption of innocence. Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt; the other is that guilt must be proved beyond a reasonable doubt. These two rules are linked to the presumption of innocence to ensure that no innocent person is convicted.

[28] The joint submission before the court recognizes that even the most minor level of misconduct must be addressed and resolved at the appropriate level. It takes significant courage for a victim or complainant to come forward to his or her chain of command to report conduct that has made him or her feel uncomfortable. However, it also takes true commitment from the chain of command and the prosecution to take action to eradicate this unacceptable conduct. In my view, this case is a perfect example of addressing minor inappropriate conduct at the proper level.

[29] As a result of careful negotiations between the prosecution and defence counsel, Captain Duvall pleaded guilty to the section 93 offence of disgraceful conduct and accepted responsibility for his actions. Section 93 of the *NDA* criminalizes conduct that is “shockingly unacceptable” and is punishable up to imprisonment for a term not exceeding five years or to less punishment. The maximum sentence is significant and is a reflection of the seriousness of the offence.

[30] Although Captain Duvall shows remorse and started to make efforts to ameliorate his conduct deficiencies, as Lieutenant-Colonel Bouckaert indicated in her statement, in his case, it is too little, too late.

[31] As such, counsel have recommended a severe reprimand which is intended to send a message to the larger community that any inappropriate conduct, involving even minor touching, is unacceptable and will be severely punished.

[32] Captain Duvall, you clearly betrayed the trust of your family, your colleague, your fellow officers, your commanding officer and your unit. You have demonstrated complete disrespect for, and failed to abide by one of the most fundamental tenets of military discipline which is the respect for others. You must ensure that you seek the appropriate help so that incidents like this do not cripple your future.

[33] Considering all of the factors, the circumstances of the offence and of the offender, the indirect consequence of the finding and the sentence, the gravity of the offence and the previous character of the offender, I am satisfied that counsel have discharged their obligations in making their joint submission. The recommended sentence is in the public interest and does not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[34] **FINDS** Captain Duvall guilty of the one charge before the court; and

[35] **SENTENCES** you to a severe reprimand and a fine in the amount of $1,000.00.

Counsel:

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

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Captain S.P. Duvall