COURT MARTIAL

Citation: *R. v. Betts*, 2017 CM 3010

Date: 20170530
Docket: 201709

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Able Seaman B.W. Betts, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Able Seaman Betts has been found guilty by this General Court Martial on 28 May 2017 of two offences for conduct to the prejudice of good order and discipline. The facts of this case relate to two separate incidents that occurred on 3 and 5 November 2015 on Canadian Forces Base Esquimalt.

[2] The trial started on 15 May 2017. During the first week, a number of preliminary matters were dealt with by the Court and on the second week, the trial proceeded. The deliverance of the finding by the Court occurred last Sunday, 28 May 2017. I proceeded with the hearing on sentence yesterday and today.

[3] As a matter of evidence, I heard three witnesses and some documents were provided to the Court, those related to the career of the offender, Operation HONOUR. There was also the Personnel Development Review (PDR) of Able Seaman Betts and the Remedial Measure taken, which is more specifically counselling and probation, in relation to the conduct brought before the Court on both charges.

[4] As the military judge presiding at this General Court Martial, it is now my duty to determine the sentence. In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the Canadian Armed Forces. The purpose of this system is to prevent misconduct or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish in a trusting and reliable manner successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[5] Here, in this case, the prosecutor suggested the Court to sentence the offender to a fine in the amount of $800 combined with confinement to barracks for a period of 21 days. The offender's defence counsel recommended this Court to impose only a fine in the amount of $200.

[6] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline and, from a more general perspective, the maintenance of a just, peaceful and safe society. However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a court, must be adapted to the individual offender and constitute the minimum necessary intervention since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[7] As it has always been the practice of this court and as mentioned by the Court Martial Appeal Court in *R. v. Tupper*, 2009 CMAC 5 at paragraph 30:

> [A] trial judge must consider the fundamental purposes and goals of sentencing as found in sections 718 and following of the *Criminal Code* . . ..

Keeping in mind this legal context then, the fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Armed Forces (CAF);

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society when necessary; and

(e) to rehabilitate and reform offenders.

[8] When imposing a sentence, a military court must also take into consideration the following principles:

(a) the sentence must be proportionate to the gravity of the offence;

(b) the sentence must be proportionate to the responsibility and previous character of the offender;

(c) the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) the offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances. In short, the Court should impose a sentence of imprisonment or detention only as a last resort, as it was established by the Court Martial Appeal Court and the Supreme Court of Canada decisions; and,

(e) lastly, any sentence to be imposed by the Court should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

[9] The Court is of the opinion that sentencing, in this case, should focus on the objectives of denunciation and general deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from reoffending, but also deter others in similar situations from engaging in the same prohibited conduct.

[10] Operation HONOUR aims to eliminate harmful and inappropriate sexual behaviour within the CAF, which was identified by many witnesses in this court martial as an order to implement a culture change. The implementation of this operation has been articulated in an Operational Order dated 14 August 2015 and signed by the Chief of Defence Staff. Commanding officers got the task, during the early fall of 2015, to inform their subordinates about the nature of Operation HONOUR and to take this opportunity to also develop and deliver education to them on harmful and inappropriate sexual behaviour.

[11] The commanding officer of Canadian Forces Fleet School (CFFS) Esquimalt achieved that by ordering the delivering of briefings, first at the lowest level, followed by his own briefing. Petty Officer 1st Class Proulx, an instructor on Qualification Level 3 course for boatswain, delivered such briefing to two classes. Able Seaman Betts, a candidate on the course, attended that briefing. During that briefing, which also involved discussions among the group, Operation HONOUR was presented. Harmful and inappropriate sexual behaviour including unacceptable language or jokes and offensive sexual remarks were covered.

[12] On 3 November 2015, the Commanding Officer of CFFS Esquimalt, Commander Hooper, gave his briefing in a building called Work Point, at the Naval

Officers Training Centre Venture. About a hundred persons were present. He also presented the concept of Operation HONOUR and reviewed concepts about harmful and inappropriate sexual behaviour, which would include unacceptable language or jokes and offensive sexual remarks. While waiting for the beginning of the briefing, Ordinary Seaman Kowalyk, one of the course mates of Able Seaman Betts, picked up some words said by the latter. He heard him say, in a joking tone, that he was looking for Master Seaman Schnob's wife in order to fuck her. Master Seaman Schnob was the instructor responsible for the group of Able Seaman Betts and his coursemates.

[13] Two days later, the class of Able Seaman Betts had a day at the range, firing a weapon. They were divided in groups, allowing one group to be on the fire line for shooting, and the other group waiting in the classroom on the range. While in the classroom with Able Seaman Betts and some other coursemates, Leading Seaman Cramer heard him saying, in a conversational tone, how deeply he had penetrated Master Seaman Schnob's wife. Leading Seaman Cramer decided to report to Master Seaman Schnob that those derogatory comments were made about wives. He clearly implied that they were referring to the instructor's wife. Petty Officer 1st Class Proulx and Master Seaman Schnob gathered the class at the end of the day and told all candidates how unacceptable such comments were. Master Seaman Schnob added that he would put at the hospital the individual who said those words and that he would be in jail for assault.

[14] Master Seaman Schnob discussed about the situation with his superiors. The day after, he was removed and replaced as an instructor on the course because there was fear that he could not properly assess the candidates in light of the situation. He stayed on the course to perform administrative duties for the remaining time, which was about two weeks.

[15] On that same day, an investigation was initiated; on 10 June 2016, charges were laid against Able Seaman Betts. In July 2016, those charges were referred to a referral authority and subsequently sent to the Director of Military Prosecutions. They were initially preferred in December 2016; in April 2017, charges were withdrawn and preferred again.

[16] Now, in order to appreciate the circumstances for sentencing purpose, the Court considered the aggravating and mitigating factors. As a matter of aggravating factors, the Court considered:

(a) the objective seriousness of the offence. The offences that he was found guilty of are related to section 129 of the *National Defence Act*, for which the maximum punishment that can be imposed by this Court is dismissal with disgrace from Her Majesty's service or to less punishment;

(b) the subjective seriousness of the offence. The Court identified four factors:

i. clearly, those comments showed disrespect. They were inappropriate towards: first, the person they were aimed at, which is Leading Seaman Schnob, and his supervisor, Master Seaman Schnob at the time; also they were done in the presence of other members; and another member heard them. I would like to remind you that, as a matter of ethic, respecting the dignity of all persons is more than fundamental for members of the CAF. You must treat every person with respect and fairness, and clearly, by your comments, you failed;

ii. there is also the environment. You were on training; you were at the basic level for your trade. It was something required for you to show that, at least from basic training, you got some sense of this principle as a matter of respect, and this is not what you have done in that kind of environment, in your relation with other members. You should have known better; you were not on basic training, you were at a higher step. You had sufficient knowledge to know that such conduct was inappropriate;

iii. there is also the context of the commission of the offences. You were recently briefed, twice, once each time before each incident, and you knew that Operation HONOUR was aimed at educating people on such conduct in order to stop it, which you did not do;

iv. there is also what I consider as being a clear lack of judgement by making those comments.

[17] As a matter of mitigating factors, I identified the following ones:

(a) what I consider first is your age and your potential in the CAF. Basically, you are at the beginning of your career in the CAF and your young age calls, essentially, for getting more experience. With the time and the potential disclosed so far, including the time you have spent recently on a ship where you were assessed and where you were considered as one of the top performers among boatswains, you clearly disclosed that you have potential to progress and become a really good sailor;

(b) there is also the fact that it is a first offence; you are a first offender. This is the very first time that you are caught; that you are involved in such a situation. There is a potential for you to learn from that experience;

(c) there is also the Remedial Measure. Remedial measure is not a sentence, for sure, and I do not consider this as being a sentence, but it is part of the circumstances. And what I do understand is further to the matter being addressed through military discipline measures, such as the Record

of Disciplinary Proceedings provided to you where charges were laid, you were put on counselling and probation for a period of six months. And this measure, at least, indicates that authorities took it seriously and the result of it is that you demonstrated that you also took it seriously, because it was clearly related to the conduct described in both charges. So, I consider this as being a mitigating factor;

(d) there is also the time elapsed since the incidents. I do not see any delay so I cannot identify or blame anybody for the way things were handled, and that is not the aim of my comment. I am not saying that it took too much time for the unit to deal with the matter or the investigation to be conducted; I do not have any factual basis for making such a comment or also to make any remark about the preferral and what happened with the prosecution. I am not at that point. But for sure, considering the suggestion made by parties, the time that elapsed since the incidents must be considered as a mitigating factor and I will explain myself later, but I have to consider this.

[18] Now, having a look at the case law provided by counsel, at the end of the day, all those cases suggest to the Court something similar; and similar, I would say, to a lack of judgement, such as the one you disclosed: severe reprimand, reprimand, fine or a combination of those, such as a severe reprimand and a fine or reprimand and a fine; or them alone, have been considered by courts in various circumstances. But, when I look at them, the message I got is this is the usual range, especially when I am dealing with a first offender.

[19] What I got as a matter of suggestions from counsel is, at least, a fine would be appropriate in the circumstances; there's an agreement by both counsel. I would agree that the fine seems appropriate. I was also told by the prosecution that a reprimand or a severe reprimand would not fit in the circumstances and I would agree with the prosecution. I think it does not call for such type of punishment in the circumstances, being at the beginning of your career and what a reprimand would aim to pass on as a message, I do not think it would be appropriate.

[20] Now, what I have to decide, before I go to the amount, is the possibility of a combination of confinement to barracks with the fine. I read the decision of Dutil CMJ in *R. v. Balint*, 2011 CM 1012. First, he discussed the adequacy of such punishment, talking about confinement to barracks and that a court will apply this in rare cases because usually it is more something used by commanding officers and it is designed for this in the context of a summary trial. It does not mean that the court is precluded from considering this; one of the issues Judge Dutil raised is the adequacy of the punishment related to the commander knowing his men and women under his authority, so he has a closer connection than the one that can exist at a tribunal. I do agree that this is the type of punishment that may achieve the objective of general deterrence; I think it is designed exactly for that. I do not see any problem with that.

[21] However, I would agree with your counsel that the time elapsed since the incidents renders it unnecessary in the circumstances of this case, with what I have been told and informed as a matter of evidence, to consider such punishment. Closer to the incidents, probably it would have been appropriate. I do not know if it would have been a court martial which would have sentenced you, but, clearly, if it would have been the case, but closer to the incidents, this type of punishment would have been more relevant to achieve this objective of general deterrence. For me, it is not close enough to the incidents to achieve that objective.

[22] There is also the remedial measures that were taken, during which I clearly understood that you got the message about what kind of behaviour you must adopt regarding unacceptable jokes or sexual remarks involving other members, which include supervisors and their relatives,. I clearly understood from Petty Officer 1st Class Atkins that during that period of time, you were monitored for your conduct, you were not just one among the top performers as a boatswain, but you personally matured during that period of six months and, inferring from that, you now have a different understanding about what is acceptable as a matter of jokes and how it could offend other people and how more prudent you have to be, while in presence of your colleagues. You also disclosed an outstanding performance and I do accept the comment of your counsel saying that, in some ways, you have changed, especially about this attitude. So, there is evidence for the Court to infer that you have changed, that you have matured and it is not based only on the paperwork provided, but also on testimonies provided to the Court. From that point, I do not see how applicable it would be in the circumstances of this case, to consider confinement to barracks, as suggested by the prosecution, so I won't combine this with the sentence of a fine.

[23] Now, what is the appropriate amount for the fine? I was asked by the prosecution to consider $800 and in the absence of a combination with confinement to barracks. On the other hand, your counsel suggested initially, $400 as being proper. When I indicated to him that the way the inscription on the conduct sheet is handled if it is a fine of $200 or less, meaning that it was possible to remove it from your conduct sheet, so meaning by this, that it could be there temporarily, instead of being there forever as a matter of fact, he asked me to give consideration to that.

[24] I understand that one of the points made by the prosecution is the fact that you did not present any evidence of remorse towards your actions in November 2015. I would agree with Perron MJ in *R. v. Hunter*, 2012 CM 4003, that nothing can be taken from pleading not guilty and being found guilty at the end of the process, about the issue of remorse. And I would say that it is different, as he said, from a situation where a guilty plea is entered and a court may infer from that that because an accused pleads guilty to an offence at the first opportunity, then it means that, at least, he takes responsibility for what he did. I cannot say that, but, at least, there is nothing from my perspective that I can assume as the fact that you have no remorse. For sure, you have not presented any such evidence, but I do not see here the obligation for doing so.

[25] So I do not consider necessary, at this stage, in the circumstances of this case, in light of the measures taken, and the fact that you are a first offender to have this punishment stay with you for the remainder of your career. Being a first offender, at the beginning of your career, I think it would be proper to go with an amount of $200. Removal of an entry on the conduct sheet for such a punishment will be made upon completion of a period of 12 months during which no additional conviction has been entered, meaning that if you are not convicted of anything for the next 12 months, basically, it will disappear. But it means that you have to comply with the Code of Service Discipline for a full year. In a way, it is a way for the Court to make sure, for the next year or so, that you have at least a reason to behave. You have many reasons, and you have shown that you have an understanding, but I add another reason to that: if you want to have this disappear from your conduct sheet, you will have to behave properly. And that is the message I would like to pass on to you.

[26] I will not discuss the facts, but for me, doing this in the context of Operation HONOUR makes it serious. As I expressed it, there is no need to come here and say Operation HONOUR is at issue. What is at issue is respect for the people working with you and your supervisors. It is a key element and I hope you will keep that in mind during your entire career. Your start is good, keep it in mind and you will see that if you gain the respect of others, it is because you respect them first. And if you show that, you may become a leader, but it is in your hands. So that is how I approached this and my decision regarding sentence to be imposed.

FOR THESE REASONS, THE COURT:

[27] **SENTENCES** you to a fine in the amount of $200, payable immediately.

Counsel:

The Director of Military Prosecutions as represented by Major D.G.J. Martin

Lieutenant-Colonel D. Berntsen and Major A.H. Bolik, Defence Counsel Services, Counsel for Able Seaman B.W. Betts