



COURT MARTIAL

Citation: *R. v. Furtado*, 2018 CM 2010

Date: 20180316

Docket: 201765

Standing Court Martial

3rd Canadian Division Support Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.A. Furtado, Offender

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

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Corporal Furtado, today you have admitted your guilt to one charge contrary to section 86 of the *National Defence Act (NDA)*.

Particulars: In that he, on or between 7 January 2017 and 12 March, 2017, at Canadian Forces Base Wainwright, Wainwright, Alberta, did quarrel with XXXX Corporal O.C. Avelino.

[2] Pursuant to section 194 of the *NDA*, counsel requested the court to consider the full range of incidents outlined in the Statement of Circumstances, as they formed part of the chain of circumstances related to the charged offence.

[3] The Statement of Circumstances reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. At all material times, Corporal Furtado was a member of the Canadian Armed Forces, Regular Force. He was serving as an Infantryman with the 3rd Battalion Princess Patricia’s Canadian Light Infantry, attending the Primary Leadership Qualification (PLQ) course at 3rd Canadian Division Training Centre (3 CDTC), CFB Wainwright, Wainwright, Alberta.

2. At all material times, Corporal Avelino, was a member of the Canadian Armed Forces, Reserve Force. He was an infantryman with the Calgary Highlanders, serving with a Regular Force unit while attending the PLQ course at 3 CDTC, CFB Wainwright, Wainwright, Alberta. Prior to attending the PLQ course, Corporal Avelino had made an application for a component transfer from the Reserve Force to the Regular Force. After the PLQ course, Corporal Avelino was successful in his application and is now serving in the Regular Forces as an Infantryman with the 1st Battalion Princess Patricia’s Canadian Light Infantry.

3. Corporal Furtado and Corporal Avelino were classmates on the PLQ course running from 7 January 2017 until the end of March 2017. Corporal Furtado and Corporal Avelino met for the first time on the PLQ course and had no prior contact before commencing the course. During Corporal Furtado and Avelino’s PLQ course, teasing and pranks amongst course mates was common and considered to be in good humour.

4. At the end of January 2017, Corporal Furtado entered the sleeping area of Corporal Avelino, which was shared with several other course mates. In an attempt to, “jokingly goof around,” with classmates sharing the sleeping area with Corporal Avelino, Corporal Furtado was wearing only a T-Shirt and was otherwise naked from the waist down. When Corporal Avelino entered his sleeping area and encountered Corporal Furtado wearing only his T-Shirt, Corporal Avelino pushed Corporal Furtado out of his way to express his displeasure with Corporal Furtado’s actions. In an attempt to demonstrate that he was just joking around with his friends, Corporal Furtado approached Corporal Avelino and grabbed at Corporal Avelino’s person pretending to grab at Corporal Avelino’s gentile area. As a result, Corporal Avelino grabbed Corporal

Furtado's hand and pushed him onto a nearby bed. No contact was made by Corporal Furtado to the body of Corporal Avelino.

5. While Corporal Avelino believed that Corporal Furtado's intent was to joke around, Corporal Avelino felt his privacy was not respected and he made it clear that he did not consider it a joke and did not want to be touched. Corporal Furtado did not attempt a similar act towards Corporal Avelino again.

6. In February 2017, while Corporal Avelino was urinating in a urinal at the CFB Wainwright mess washroom, Corporal Furtado came up behind him and, through Corporal Avelino's combat pants, poked Corporal Avelino in the buttocks. Corporal Avelino was shocked, angry and immediately turned and yelled words to the effect, "I fucking told you to stop this shit." Corporal Avelino described his response as "losing it" on Corporal Furtado by yelling at him in the washroom. The yelling response was witnessed by another classmate.

7. The poke involved a single finger, was quick, on the buttocks, did not penetrate his anus and did not cause any injury. Corporal Avelino felt humiliated by the incident.

8. After the incident, course staff noticed that Corporal Avelino looked upset and asked him what was wrong. Corporal Avelino reported that Corporal Furtado had touched him and that he did not like getting touched. Course staff spoke to Corporal Furtado who then apologised to Corporal Avelino and indicated that such behaviour would not happen again. Corporal Furtado and Corporal Avelino shook hands.

9. On 10 March 2017, while in the PLQ classroom, Corporal Avelino drew a caricature of Corporal Furtado on his personal notepad and titled it "evolution of a pear". It was depicting Corporal Furtado as a pear. A course mate asked Corporal Avelino to stop drawing the picture, as both he and Corporal Avelino knew it would upset Corporal Furtado.

10. Corporal Avelino ignored the course mate's concern and continued to draw. A few other people noticed the caricature and were amused. Wondering why his colleagues were grinning, Corporal Furtado approached Corporal Avelino from behind and saw the caricature. He asked Corporal Avelino why he would make the drawing after he had asked his colleagues not to refer to him that way. Corporal Avelino quickly put away the caricature. Corporal Furtado demanded to be handed the drawing. When Corporal Avelino refused to do so and denied its existence, Corporal Furtado began to flick Corporal Avelino's ear in an attempt to get him to hand over the caricature. Corporal Avelino reported the ear flicking to the course staff.

11. After class, Corporal Furtado asked again to be handed the caricature. He told Corporal Avelino that if he did not give him the caricature, he would mess with his gear.

12. When they returned to their sleeping quarters area, since Corporal Avelino had not handed Corporal Furtado the caricature, Corporal Furtado flipped Corporal Avelino's mattress. He then told Corporal Avelino that they were "squared".

13. Corporal Avelino began to walk away to report the mattress flipping incident. Corporal Furtado then voiced his displeasure with Corporal Avelino involving the staff when he had drawn an offensive picture of him and despite Corporal Furtado assisting Corporal Avelino throughout the PLQ course. A quarrel resulted, which had the two standing face-to-face and during which Corporal Furtado poked Corporal Avelino in the chest. Various course mates had to come and separate the two.

14. On 12 March 2017, Corporal Avelino made a full report of the various incidents described above to his chain of command and then, at their direction, to the Wainwright Military Police.

15. On 13 March 2017, the PLQ course proceeded to the field training portion of the course which had both Corporal Avelino and Corporal Furtado working in close proximity to each other. There were no further issues arising between the two."

[4] The Statement of Facts reads as follows:

"STATEMENT OF FACTS

1. Cpl Furtado, upon becoming aware of the allegations made against him, promptly accepted responsibility for his actions and provided a written account of some of the key circumstances at issue in this matter. In addition, he maintained an open willingness to provide additional details regarding the allegations, again, demonstrating his willingness to accept full responsibility for his actions and demonstrating to his chain of command his desire to continually improve and develop his career.

2. Capt J.P. Wright, the second in command of Cpl Furtado's company, describes Cpl Furtado as an excellent soldier, an avid family man and a valued friend to countless members of 3 Battalion Princess Patricia Canadian Light Infantry (3 PPCLI). He states that he is a natural leader, a source of morale and that he knows how to motivate his fellow

soldiers and make them feel part of the team. He maintains that Cpl Furtado has never been a source of administrative or disciplinary problems, that he is a very hard worker, an excellent team player and an asset to the unit.

3. Capt Wright further identified that Cpl Furtado's morale and self-worth has been significantly affected by the disciplinary process. Nonetheless, he notes that Cpl Furtado has strived to improve himself and educate others about the errors of his ways.

4. The disciplinary process has in fact caused Cpl Furtado significant stress and anxiety.

5. WO J. Bradshaw, a superior of Cpl Furtado on many occasions, describes him as a fine upstanding member of 3 PPCLI and a good performer. He further states that Cpl Furtado is not a malicious person and that he usually diffuses tense situations.

6. Cpl Furtado financially supports his two sons, both under the age of 4 years old.

7. Cpl Furtado apologized promptly to Cpl Avelino after both the February and March 2017 incidents. His offence was not premeditated."

Joint submission

[5] In a joint submission, both the prosecution and defence counsel recommend that the court impose a sentence comprised of a reprimand and a fine in the amount of \$700.

[6] In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada 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."

[7] As you heard when I verified the guilty pleas earlier, by entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this right is one we all stand to protect. Thus, in exchange for making a plea, the accused must be assured of a high level of certainty that the Court will accept the joint submission.

Assessing the joint submission

[8] The prosecutor who proposes the sentence will have been in contact with the chain of command and, in this case, the victim. He is aware of the needs of the military and its surrounding community and is responsible for representing those interests.

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.

[9] As members of the legal profession and accountable to their respective law societies, the court relies heavily on the professionalism and judgement of both counsel and their duty to the court.

Evidence

[10] In this case, on consent, the prosecutor read the Statement of Facts and then provided the documents required at article 112.51 of the *Queen's Regulations and Orders for the Canadian Forces* that were supplied by the chain of command.

[11] In addition, the court benefitted from submissions from counsel, including an outline of relevant case law to support their joint position on sentence, while highlighting the facts and considerations relevant to Corporal Furtado.

[12] Counsel's submissions and the evidence before the court have enabled me to be sufficiently informed of Corporal Furtado's personal circumstances, allowing me to consider any indirect consequence of the sentence, so I may impose a punishment adapted specifically to Corporal Furtado and the offence committed.

The offender

[13] Corporal Furtado is 30 years old. He enrolled in the Canadian Armed Forces (CAF) on 23 September 2009 and has served for roughly nine years. He has no previous conduct or criminal record for the Court to consider. He has deployed on one operational tour to Afghanistan under Operation ATTENTION. He is married and supports two young sons under the age of four.

Objectives of sentencing to be emphasized in this case

[14] The prosecution has emphasized that in their negotiations, both he and defence counsel closely considered the objectives of sentencing. Based on the submissions of counsel, sentencing should focus on the objectives of denunciation and general deterrence. The Court highlights that the principle of general deterrence means that the sentence should deter not only Corporal Furtado from reoffending, but also deter any other CAF members who might be tempted to commit similar or comparable offences.

[15] I agree with prosecution that we need to send a strong message denouncing this type of conduct. Horseplay, teasing and bantering, particularly when members are away on course, is not uncommon. However, as I stated in the case of *R. v. Gobin*, 2018 CM 2007:

[H]orseplay may be fun until someone is not enjoying it anymore. At this point, a line is crossed and what had been considered fun becomes harassment, which eventually leads

to a breakdown of trust, loyalty and discipline, all which are fundamental to the functioning of an effective armed force.

[16] I reiterate again that low-level behaviour of hazing, roughhousing and incessant teasing is not acceptable and will not be tolerated in the CAF. In the *Gobin* decision, I quoted the prosecution who summed the concerns very eloquently:

[A]ny perception that it is acceptable sets up a gateway for harassment that will eventually break things down.

[17] Further, I agree with both counsel that in this case, the objectives of denunciation and general deterrence should not trump the objective of rehabilitating Corporal Furtado.

[18] In making the joint submission, counsel relied upon *R. v. Ordinary Seaman J.D. Durante*, 2009 CM 1014, *R. v. Bernales-Solari*, 2012 CM 2004, *R. v. Pichette*, 2016 CM 4004, and *R. v. Gobin*, 2018 CM 2008. Further they advised the court that they had taken into account all relevant aggravating and mitigating factors.

Aggravating factors

[19] After hearing the submissions of both counsel, the Court highlights the following aggravating factors for the record:

- (a) Lack of respect and self-discipline. This inappropriate behaviour constituted unwanted touching, albeit on the low end, ironically unfolding during a course on leadership; and
- (b) Nature of the conflict. Although there is one charge before the court, the court was requested to consider three separate incidents in the consideration of its sentence.

Mitigating factors

[20] The Court also highlights the following mitigating factors for the record:

- (a) No conduct sheet;
- (b) Age of the accused and ongoing rehabilitation. The evidence before the court is that Corporal Furtado has a promising career ahead of him within the CAF. In the Statement of Facts, he is described as “a fine upstanding member of 3rd Battalion, Princess Patricia’s Canadian Light Infantry and a good performer”;
- (c) Statements from Captain Wright and Warrant Officer Bradshaw. The court was provided with evidence from the member’s chain of command reinforcing his strong performance;

- (d) Court martial and disciplinary proceedings. The fact that Corporal Furtado experienced stress through the investigation and post charge period, was withdrawn from his career course and had to publicly face this court martial has had a deterrent effect not only on him, but also for witnesses and other members of the military community who are aware of his case; and
- (e) Remorse and taking responsibility for his conduct. As counsel acknowledged, Corporal Furtado took immediate responsibility for his conduct. He apologized to Corporal Avelino on two different occasions. After the incidents, the pair worked closely together in completing assignments and during the field portion of their course.

Conclusion

[21] Before I pronounce the sentence, I am going to reiterate the same comments I made in the case of *R. v. Gobin*, 2018 CM 2008 because I believe that they merit repeating:

[36] CAF recruitment brochures announce that “[i]nfantry” soldiers are the Army’s primary combat fighters and are responsible for closing with and engaging the enemy [and must be] capable of operating anywhere in the world in any environment.” That is no small task. A lot is demanded of our infantry soldiers or riflemen. This Court has stated that young soldiers, sailors, airmen and airwomen are expected to test their limits and boundaries.

[37] As a rifleman, you may be asked to deploy where you might be needed to fight to the death against an enemy, or alternatively, you could be tasked to serve as a consummate diplomat, interacting and providing assistance to the world’s most vulnerable. For this reason, self-discipline is essential.

[38] From ancient Roman times to today, the best armies have always been the most disciplined. As such, it follows that in international law . . . requires that armed forces be subject to an internal disciplinary system and leaders, at all levels, are required to enforce compliance with the rules of international law applicable in armed conflict. (Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 43). Ultimately, that is why we have a military justice system.

[39] In an effort to maintain a robust armed force capable of meeting any challenge, the CAF recruits young men and women who possess unbridled enthusiasm and energy together with great resourcefulness and trains them in duty and discipline.

[40] However, when our military members operate outside of CAF expectations, appropriate course corrections must be made and this is done with the various tools at the disposal of the military justice system. Discipline in the CAF becomes a trained reflex upon which our superiors, peers and subordinates can rely, at all times.

[41] As such, discipline is an inculcated pattern of obedience. It starts in training, in your unit, with your leaders instilling in you the values Canadians expect of us to be

instinctive, when nobody is looking. . . . It is the way we act, when nobody is looking that is a testament to our character and reflects the discipline needed for Canadians to trust us in our roles.

[42] I refer to a quote from M de Saxe, *Reveries on the art of war*, translated by Brig. General Thomas R. Phillips (Mineola, NY: Dover Publications, 2007), one of the earliest books on the art of war, which was heavily relied upon by Frederick the Great. It still holds true today:

[Translation]

[M]ilitary discipline [. . .] is the soul of armies. If it is not established with wisdom and maintained with unshakable resolution you will have no soldiers. Regiments and armies will be only contemptible, armed mobs, more dangerous to their own country than to the enemy.

[22] Discipline requires a willingness to put others' interests before our own, and to have respect for and compliance with the law. Your immediate acceptance of responsibility for your actions is important here. It gives the Court great confidence as I am sure it has given your chain of command. It is why they still believe in you. You clearly recognize that you crossed the line and you must be disciplined, and you are willing to accept the consequences of that. That is leadership.

[23] The Court has considered the extensive list of mitigating factors and, more importantly, the extensive positive feedback that Corporal Furtado received from his immediate chain of command which is evidence of his rehabilitation.

[24] 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 society 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] The fine recommended by counsel is significant enough and the reprimand will stand out as a blemish on the career record of Corporal Furtado, thereby serving as a personal reminder of his failing.

[26] As counsel have both argued, the Court can impose a fine that is reflective of the seriousness of the offence, but that does not impair the rehabilitation process by providing flexible terms of payment.

[27] Considering all of the factors, the circumstances of the offence and of the offender, the indirect consequence of the finding or 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.

FOR THESE REASONS, THE COURT:

[28] **FINDS** you guilty of the charge of quarrelling contrary to section 86 of the *NDA*.

[29] **SENTENCES** you to a reprimand and a fine of \$700 payable in seven installments of \$100 per month beginning 1 May 2018. In the event you are released from the CAF for any reason before the fine is paid in full, any outstanding unpaid balance will be due the day prior to your release.

Counsel:

The Director of Military Prosecutions as represented by Major R.J. Gauvin

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Corporal J.A. Furtado