



COURT MARTIAL

Citation: *R. v. Penner*, 2018 CM 2011

Date: 20180316

Docket: 201801

Standing Court Martial

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

Between:

Her Majesty the Queen

- and -

Master Corporal R. Penner, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Corporal Penner, today you admitted your guilt to one charge contrary to section 97 of the *National Defence Act (NDA)*.

Particulars: In that he, on or about 2 September 2017, at or near Camp Adazi, Republic of Latvia, was drunk.

[2] Considering that the prosecutor offered no evidence on the first charge and the Court accepted and recorded a plea of guilty with respect to the second charge, the Court will now determine and pass sentence on that charge.

[3] The Statement of Circumstances reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. At all relevant times, Master Corporal Penner was a member of the Canadian Armed Forces, Regular Force. He was posted to 1st Battalion, Princess Patricia's Canadian Light Infantry at 3rd Canadian Division Support Base Edmonton, Alberta, as an infantryman.

2. The 1st Battalion was deployed to the Republic of Latvia as the enhanced Forward Presence (eFP) Battle Group (BG) Rotation 8, under Operation REASSURANCE. It was housed at Camp Adazi, Latvia. The tour dates were approximately June 2017 through January 2018.

3. As part of the deployment, Task Force Standing Orders were issued, including number 101 – Operation REASSURANCE Rotation 8 eFP BG Alcohol Policy. This policy was signed by the Commanding Officer on 30 June 2017 and promulgated to the unit. It stated the purpose of the order, the prohibitions on consuming alcohol, the definitions of an alcoholic beverage, and the limited the amounts (2 per day) and circumstances in which such beverages could be consumed. It also prohibited, by reference to the definition of section 97 of the National Defence Act, becoming drunk.

4. The promulgation of the order was done through orders groups at the battalion, company and platoon levels. Reminders of the policy were frequent at all levels. Battle Group parades occurred on Saturdays. For these parades, senior non-commissioned officers were employed in security roles to allow all soldiers to attend. The alcohol policy was reiterated often at these parades. Additionally, a copy of the alcohol policy was placed in the common messing tent. Master Corporal Penner was briefed on, and knew, the policy.

5. On 2 September 2017, a mandatory social function was held, commonly referred to as a 'smoker'. Alcoholic beverages were available. Master Corporal Penner attended and consumed alcohol. He obtained and consumed more than two beers while at the smoker. He became intoxicated.

6. At approximately 2330 hours, Master Corporal Penner was found by Sergeant Pethick, inside the camp lines, lying on top of some large boxes outside. The Sergeant noted that Master Corporal Penner was drunk, smelled of alcohol and was unable to make coherent sentences. He was having difficulty sitting and standing upright. Sergeant Pethick told Master Corporal Penner to go to bed. Master Corporal Penner resisted, and stated that he needed to find his phone. Master Corporal Penner began to push and shove with Sergeant Pethick when the Sergeant tried to guide him towards his bed.

7. Sergeants Scott and Hartwick came to assist. Sergeant Hartwick calmed Master Corporal Penner down. He had difficulty walking, and the three Sergeants escorted Master Corporal Penner to his bed in a sleeping tent.

8. The three sergeants went outside of the tent and met with Sergeant Adams and Warrant Officer Crowston. While they were standing and talking, Master Corporal Penner exited the tent, and moved to a nearby electrical box. He began to urinate on ground beside the side of the tent.

9. Warrant Officer Crowston addressed Master Corporal Penner, telling him to stop urinating and go back to bed. Master Corporal Penner said twice “fuck you, you piece of shit” or words to that effect, to Warrant Officer Crowston. Master Corporal Penner also hugged Warrant Officer Crowston, stating that he loved him, between expletive outbursts. Sergeant Hartwick again took charge of Master Corporal Penner, moving him away and speaking with him. At approximately midnight, Sergeant Hartwick got Master Corporal Penner to return to bed, where he stayed.”

[4] The Agreed Statement of Facts reads as follows:

“AGREED STATEMENT OF FACTS”

1. Master Corporal Penner has been struggling with alcohol related problems since prior to joining the Regular Force in 2012.

2. He was repatriated from Latvia on 11 September 2017. This resulted in the cessation of tour pay and benefits.

3. On 30 October 17, he drank significantly. He was transported by ambulance to a hospital. He was hospitalized overnight for abdominal pain. After his hospitalization, Master Corporal Penner sought help to deal with his addiction and voluntarily attended a residential treatment program.

4. Master Corporal Penner attended a treatment program at Cedars at Cobble Hill, Cobble Hill, British Columbia, from 2 November to 22 December 2017. There, he was diagnosed with alcohol dependence. In November 2017, Dr. Lyn MacBeath, a psychiatrist, noted that Master Corporal Penner was committed to fully participating in the program while he was undergoing treatment. Dr. Chris Bosman, a treating physician, noted at the time of discharge that Master Corporal Penner had progressed well in treatment, had been engaged in the program, and gained insight into his addictions. His prognosis was deemed good if he was compliant with discharge planning. Twice a week since being discharged from Cedars, Master Corporal Penner has diligently attended

group therapy sessions, organized by the Base Addictions Office.

5. Master Corporal Penner was placed on Counselling and Probation for misuse of alcohol on 5 February 2018.

6. On 10 February 2018, Master Corporal Penner was involved in an altercation with his spouse's ex-boyfriend. The following Monday morning, a day he was on duty, Master Corporal Penner drank three ounces of rum. He was having difficulty dealing with the stress associated with the altercation and its aftermath. He called his mother for support. His mother advised his unit that he had been drinking and that she was concerned for her son well-being. The Royal Canadian Mounted Police were called and attended his residence. Master Corporal Penner felt unwell and anxious, and asked to go the hospital. The RCMP officer accompanied him to the hospital.

7. Master Corporal Penner was closely supervised in Latvia. His performance while deployed to Lativa was assessed as good. His initiative and interest in developing subordinates was noted by his platoon chain of command. He was also noted to be often absent from platoon orders groups. Following his return from Latvia, Master Corporal Penner was employed in A Company stores, where it was noted that he worked hard to complete his numerous assignments and that he had informed his chain of command of his various medical appointments.

8. Commander, Canadian Joint Operations Command, Lieutenant-General S.J. Bowes, stated that alcohol incidents represent a significant risk to operational effectiveness as a result of their effect on discipline and morale. He believes that prosecuting Master Corporal Penner for his offence was vital to reinforce the importance of military discipline.

9. The Commanding Officer of the 1st Battalion is of the view that Master Corporal Penner's performance and behavior since joining the 1st Battalion in 2012 have been erratic. The Commanding Officer views this incident as not minor in nature, as it occurred during a deployment in Latvia and because of Master Corporal Penner's rank. It is the assessment of the Commanding Officer that Master Corporal Penner has breached his counselling and probation as a result of the 12 February 2018 incident. The Commanding Officer has delayed seeking an administrative review and Master Corporal Penner's release from the Canadian Armed Forces, and has instead, offered Master Corporal Penner one further chance to improve."

Joint submission

[5] In a joint submission, both the prosecution and defence counsel recommend that the court impose a sentence composed of a reprimand and a fine in the amount of \$750.

[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 plea 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. 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, honesty and judgement of both the counsel and their duty to the court.

Evidence

[10] In this case, on consent, the prosecutor read the Statement of Circumstances and the Agreed Statement of Facts and provided the documents required under article 112.51 of the *Queen’s Regulations and Orders for the Canadian Forces* which 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 highlighting the facts and considerations relevant to Master Corporal Penner.

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

The offender

[13] Master Corporal Penner is 31 years old. He transferred from the reserves (where he served since the summer of 2008) to the regular force on 5 December 2012. As indicated on his conduct sheet, he was charged for being absent without leave while on a course ten years ago. There is no indication that alcohol was involved, so the Court is not considering it for the purpose of this sentencing. Similarly, although the prosecution suggests that there may have been a civil offence that predated his enrollment, without specifics, the Court will not rely upon it.

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 both counsel, the 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 Master Corporal Penner from reoffending, but it should also deter other Canadian Armed Forces (CAF) members who might be tempted to commit offences. Similarly, both counsel emphasized the importance of Master Corporal Penner's ongoing rehabilitation, and any sentence that the Court chooses to impose should not detract from the progress that he has made.

[15] In making the joint submission, counsel advised the Court that they have taken into account all relevant aggravating and mitigating factors.

Aggravating factors

[16] The Court highlights the following aggravating factors for the record:

- (a) Deployed operations. The charge before the Court involved behaviour that occurred out of the country, on a deployment, in violation of an order that specifically limited the consumption of alcohol;
- (b) Rank. The incident occurred while Master Corporal Penner was serving abroad as a master corporal, in an acting leadership role, where he was responsible for enforcing the rules;
- (c) Deviance of authority. The disorderly conduct that followed reflected a lack of respect for the senior non-commissioned officers who tried to assist him; and
- (d) Degree of drunkenness. Although he was not technically on duty, he was deployed in a theatre of operations and he was clearly unfit if asked upon to perform any duty.

Mitigating factors

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

- (a) Guilty plea. Master Corporal Penner's guilty plea reflects both his genuine remorse for his conduct and his acceptance of responsibility for his misconduct and must be given significant weight in the consideration of sentence;
- (b) Incident was contained. The incident took place over approximately twenty minutes and was only observed by senior non-commissioned officers who tried their best to ensure that Master Corporal Penner was put to bed;
- (c) Repatriation and court martial. The fact that he was immediately repatriated from his tour abroad, suffering both a financial and professional setback flowing from his conduct must be considered. The Court acknowledges his courage and willingness to disclose his addiction publicly as an important step to his recovery and a mitigating factor;
- (d) Efforts to rehabilitate:
 - i. The fact that Master Corporal Penner voluntarily attended Cedars at Cobble Hill, British Columbia, for a residential substance abuse treatment programme was an important step. However, more importantly, by all accounts, he has shown a commitment to continue to attend his group sessions and is taking steps to keep himself on track. Living with an addiction is a lifelong sentence in itself and Master Corporal Penner must strive to live one day at a time, and
 - ii. Based on the evidence before the Court, Master Corporal has turned a corner. He has recognized that he is dealing with a serious addiction and he is voluntarily addressing its underlying causes. As counsel indicated, the charges before the Court flowed from his addiction and if he is provided the support to address the underlying cause of this offence, he deserves the opportunity to continue along this healthy path to complete rehabilitation.
- (e) Remorse. The sincere apology that Master Corporal Penner made to the Court reflects a level of humility and reinforces the fact that he has accepted responsibility for his conduct.

Conclusion

[18] Before I pronounce sentence, I wish to commend you on the concrete steps that you have made to turn your life around. Overcoming an addiction is not an easy

challenge. In fact, it may present you with the biggest challenge of your career. However, the courage you have displayed in making these first few steps is inspirational. Coupled with that is the support that you are being provided by both your company staff as well as your family. You have to be grateful to your commanding officer for extending your counselling and probation, and to your mother who made it very well known that you had relapsed and needed to be brought back in line again. You are a strong man and if you can keep your addiction in check, you will enjoy a rewarding career and personal life.

[19] Upon hearing your final comments before sentencing, it is apparent that you have a great deal to offer and you seem to be keen to extend that offer. I'm hopeful that you can personally convert some of your lessons learned and your struggle in overcoming addiction into positive messaging to help and lead others who may be experiencing similar challenges and who could benefit from your understanding, compassion and support.

[20] 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?

[21] The fine recommended by counsel is significant and the reprimand will stand out as a blemish on the career record of Master Corporal Penner, serving as a powerful reminder of how addiction can impact not only personal lives, but also professional lives.

[22] Considering all of the factors, the circumstances of the offence and of the offender, the indirect consequences 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:

[23] **FINDS** you not guilty of the first charge, contrary to section 129 of the *NDA* and guilty of the charge of drunkenness contrary to section 97 of the *NDA*.

[24] **SENTENCES** you to a reprimand and a fine in the amount of \$750, payable forthwith.

Counsel:

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

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Master Corporal R. Penner