



COURT MARTIAL

Citation: *R. v. Reyes*, 2018 CM 4015

Date : 20181003

Docket : 201805

Standing Court Martial

LCol George Taylor Denison III Armoury
Toronto, Ontario, Canada

Between :

Her Majesty the Queen

- and -

Master Warrant Officer M.P. Reyes, Offender

Before : Commander J.B.M. Pelletier, 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 anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as “Sgt B.” shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Warrant Officer Reyes, 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, specifically for having surreptitiously made visual recordings of J.B. in a female washroom at the LCol George Taylor Denison III Armoury (Denison Armoury).

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 imprisonment for a period of five months and a reduction in rank to the rank of sergeant.

[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. Joint submissions bring certainty to all participants, especially to the accused, but also to the prosecution who obtains 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, as evidenced in this case.

[6] The imposition of a sentence at court martial proceedings therefore performs an important disciplinary function, making this process different from the sentencing usually performed in civilian criminal justice courts. Even when a joint submission is made, the military judge imposing the sentence must 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 other courts. Yet, 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 *Anthony-Cook*.

[7] New legislative provisions setting out the purposes and principles of sentencing by service tribunals have come into force on 1 September 2018. Without repeating the content of these dispositions, I wish to mention that the fundamental principle of sentencing found at section 203.2 of the *NDA* provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the degree of responsibility of the offender.

Matters considered

[8] In this case, the prosecutor read a Statement of Circumstances which was entered in evidence, along with other documents provided by the prosecution as required at the Queen's Regulations and Orders for the Canadian Forces (QR&O) 112.51. The prosecution also entered as exhibits two victim impact statements as well as two letters from military commanders. The defence did not present any evidence in mitigation.

[9] In addition to this 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 victims and members of the chain of command allow me to consider and apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed.

The offender

[10] Master Warrant Officer Reyes is a forty-four-year-old member of the reserve force who used to serve as the 4th Canadian Division Headquarters (HQ) sergeant major on class B reserve service until this employment was ceased in February 2017, following a military police investigation which led to the charge laid against him for which he is being sentenced today. In his capacity as sergeant major of the HQ, Master Warrant Officer Reyes acted as an advisor to the HQ senior leadership, chief disciplinarian, and counsellor to his subordinates in matters of leadership and soldiering. He also occupied the position of battery sergeant major in his home unit, the 7 Toronto Regiment, Royal Canadian Artillery.

[11] Master Warrant Officer Reyes emigrated from the Philippines in 1988 and joined the CAF at the age of seventeen on the 3rd of October 1991, twenty-seven years ago. He has had what appears to be a stellar career, as evidenced by his rise in the ranks and responsibilities entrusted to him throughout the years. For the first ten years or so of his career, he mainly served on part-time class A reserve service, with the exception of full-time service on class B in summer months. He started serving regular full-time assignments in 2002, mainly in what was then known as Land Forces Central Area

(LFCA) Headquarters here in Toronto. He deployed twice for six-month tours in Afghanistan, first to Kabul in 2005-2006 and then to Kandahar, in 2008-2009. Master Warrant Officer Reyes has a common-law spouse and together they have a five-year-old daughter. I am told he is a stepfather to two grown-up children from a previous union.

[12] The Court is informed that Master Warrant Officer Reyes has not engaged in any class of service since his arrest and that his career is subject to an administrative review, his unit having recommended that he be released from the CAF.

The offence and its impact

[13] To assess the acceptability of the joint submission, the Court has considered the objective seriousness of the offence 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 less punishment. On that basis, disgraceful conduct is a disciplinary offence of significant gravity.

[14] 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 Master Warrant Officer Reyes. These circumstances can be summarized as follows:

- (a) On the morning of 9 June 2016, E.B. is in the process of getting changed into her combat uniform after having used the toilet in a female handicap bathroom at Denison Armoury. She noticed the lens of an iPhone located under a sink, on the drainage pipe facing the toilet. The phone is in a white case that concealed its appearance against the white insulation under the sink. E.B. removed the iPhone from its position, and noticed that it was on. She depressed a button on the phone to stop the recording and subsequently turned over the phone to the military police.
- (b) The bathroom is a single person type washroom. Set up for handicap use, it is frequently used by women to change into and out of uniform. It is located adjacent to an office which at the time was occupied by Master Warrant Officer Reyes.
- (c) The military police investigated. Having sought and obtained a search warrant, they searched the internal memory of the iPhone and after obtaining a production order from Apple and Rogers they were able to confirm that the phone in question belonged to Master Warrant Officer Reyes.
- (d) On 26 October 2016, military police executed search warrants at Master Warrant Officer Reyes's residence and his offices at Denison Armoury and at 7 Toronto Regiment in Moss Park Armoury. They concurrently arrested and questioned Master Warrant Officer Reyes.

- (e) Military police seized thirty-two digital storage devices during these searches and found incriminating evidence on three devices, including the seized iPhone, an external hard drive and a MacBook Pro. The iPhone contained one video, recorded on 9 June 2016, in time-lapse mode. This video of the female handicap bathroom at Denison Armoury shows E.B. using the washroom. It ends when E.B.'s finger touches the camera to stop the recording. Another female civilian employee was also filmed using the bathroom. The external hard drive contained eighteen videos. Three of these were taken over the course of a one-week period in May 2012 in a storage room located at Moss Park Armoury and captured four members of the 7 Toronto Regiment in the process of changing. The fifteen others were of a female clerk working at 4 Canadian Division Headquarters named J.B. The MacBook Pro hard drive contained copies of those videos found on the external hard drive.
- (f) The exploitation of the electronic devices revealed evidence which established that the primary target of the recordings was J.B. Fourteen of the recordings capture J.B. either using the washroom or changing from her civilian clothes into her combat uniform. Within ten to twenty minutes after the video begins recording, J.B. can be seen entering the bathroom, dressed in civilian clothing, and carrying her combat uniform. Many of the videos record J.B. undressing, using the toilet, and exposing her breasts, genitals, and buttocks region to the camera. In each of the videos, Master Warrant Officer Reyes is seen installing and removing the recording device. The file metadata established that the "recorded date" of these videos ranged from 9 Aug 2012 to 31 Jan 2013, the dates set out in the particulars of the charge.
- (g) J.B. maintained a predictable daily routine whereby she would arrive at work between 0700 and 0715 everyday dressed in civilian clothing, changing into her combats at work using the handicap bathroom near Master Warrant Officer Reyes's office. At no time was she aware that she was being recorded.
- (h) After changing, J.B. would frequently attend the office of Master Warrant Officer Reyes to converse about various subjects as she considered him a friend. She frequently worked out and went on runs with Master Warrant Officer Reyes. She had a friendly relationship with Master Warrant Officer Reyes outside of work and babysat his dogs on one occasion. Master Warrant Officer Reyes occupied a position of trust in relation to J.B.

[15] The Court was informed of the impact of the offence on the victims through victim impact statements obtained under subsection 203.6(2) of the *NDA* and read by the prosecutor.

[16] From the statement of E.B., who discovered the concealed iPhone in June 2016, the Court notes that she states having been terrified when she noticed the phone in the bathroom, afraid that someone would be watching her real time and/or that the footage would be posted on the Internet to be seen by millions. When she uses public washrooms, she always looks for recording devices, analyzing where one could be hidden. She has lost faith and respect for the military as she can no longer feel protected while at work, given the rank and position of the offender in this case.

[17] For her part, J.B. is very upset at the betrayal of a person she considered a friend. Master Warrant Officer Reyes was her HQ Sergeant Major, from whom she sought guidance and training, with whom she shared lunches. She too is leery of change rooms and washrooms in public places. Importantly, she is uncomfortable being alone with male co-workers, questioning every male's motive. This has impacted her ability to be fully functional in her workplace, where many males are present. Even if she knows that not all of the males have ill intentions, she no longer has confidence in her own judgement of people's character.

Aggravating factors

[18] The circumstances of the offence in this case are extremely 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 to which Master Warrant Officer Reyes has pleaded guilty, in relation to J.B., reveal repeated violations of the privacy and dignity of a subordinate, in a military workplace, brazenly targeting her at moments of vulnerability. Given the position occupied by Master Warrant Officer Reyes at the time he committed the actions he is being sanctioned for today, the acts he carried out constitute a significant breach of the trust given to him by his superiors and the trust he enjoyed from subordinates. His actions were personal, disrespectful in the most intrusive way and highly offensive. They cannot, in any fashion, be justified and, to his credit, Master Warrant Officer Reyes did not try to justify himself when he issued an apology in court at the sentencing hearing. It may be that actions such as these, involving voyeurism, are not meant to be discovered. When they are, however, they can cause significant trauma, as was the case here. Master Warrant Officer Reyes admitted that, saying he did not mean to hurt anyone is meaningless. I find his quest for sexual gratification at the expense of subordinates to be nothing short of disgusting.

[19] Specifically aggravating is, first, the fact that the actions of Master Warrant Officer Reyes were planned, deliberate and conducted over a significant period of time. He has been persistent in specifically targeting J.B. in a location where she had a high expectation of privacy, and where Master Warrant Officer Reyes knew she would be to change into her military uniform at a predictable time during the workday.

[20] A second aggravating factor is that the offence constitutes a betrayal of the trust that both his superiors and subordinates, especially J.B., had in Master Warrant Officer Reyes as a senior leader occupying the position of HQ sergeant major. Even if this is

not a situation where the offender abuses a position of trust in committing the offence, it remains that military leaders in positions such as occupied by Master Warrant Officer Reyes are expected to show what right looks like, as stated in a letter of the chain of command.

[21] Finally, the behaviour of Master Warrant Officer Reyes had a significant impact on J.B. and another victim, E.B., albeit it, in the latter case, the impact was caused outside of the period of time covered by the charge. Master Warrant Officer Reyes violated the privacy and dignity of fellow members of the military family, in the workplace. This had significant consequences on J.B., as she is now wary in the presence of males. In a military workplace, this mental injury impacts her ability to be fully functional as a team member having to work with both males and females. Therefore, the conduct of Master Warrant Officer Reyes did place the health of fellow members at risk and, in doing so, threatened the operational effectiveness of the CAF. I certainly hope J.B., E.B. and any other affected person will be able to overcome their difficulties and be able to turn the page on this disturbing episode in their life.

Mitigating factors

[22] 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 are the following:

- (a) First and foremost, Master Warrant Officer Reyes's guilty plea, which avoided the conduct of a trial, which I consider a clear indication that the offender is taking full responsibility for his actions, in this public trial in the presence of members of the military community.
- (b) Second, the fact that Master Warrant Officer Reyes has no criminal or disciplinary record and a stellar career. I have to conclude that this behaviour was out of character for him.
- (c) Third, Master Warrant Officer Reyes's apologies in court, which I find to have been sincere.
- (d) Finally, Master Warrant Officer Reyes's outstanding service with the CAF in the last twenty-seven years which, in my view, is indicative of potential to make a positive contribution to Canadian society in the future, as long as he can successfully control the impulses which led him to offend in this case.

[23] I must state that I am receptive to the words of defence counsel regarding the plight of Master Warrant Officer Reyes who found himself in a sentencing hearing in a courtroom filled with a high number of military personnel; many former colleagues of his, journalists and other members of the public. This is an entirely usual situation for a military offender of higher rank who has occupied important functions at the unit where

the trial takes place. That situation and the publicity that results from the conduct of this sentencing hearing may be embarrassing, but does not constitute a mitigating factor in the circumstances of this case. The offence was committed by a member of the CAF, on another member of the CAF right here in this armoury. In these circumstances, this trial and sentencing hearing is to be expected and cannot constitute a factor mitigating punishment.

Objectives of sentencing to be emphasized in this case

[24] I agree with counsel that 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 Master Warrant Officer Reyes and his return to society, likely in a civilian capacity.

Assessing the joint submission

[25] The submissions from the prosecution contained a number of remarks on precedents pointing to what would be an appropriate sentence to be imposed in this case on the basis of sentences imposed previously. Yet, the first thing I need to do in determining the appropriate sentence is to assess the joint submission and determine if it is acceptable. I may depart from the joint submission of counsel for five months' imprisonment and a reduction in rank to the rank of sergeant only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[26] Therefore, the issue for me to assess as sentencing judge is not whether I like the sentence being jointly proposed or whether I would have come up with something better. Indeed, the threshold for departing from joint submissions is very high and any opinion I might have on an appropriate sentence is not sufficient to reverse the joint submission that was made to me.

[27] The Supreme Court of Canada has required such a high threshold as it is necessary to allow all of the benefits of joint submissions 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.

[28] 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, including courts martial.

[29] 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 and leadership involved and have a personal impact on the offender. A sentence composed of imprisonment and a reduction in rank is aligned with these expectations, even if, as pointed out by the prosecutor, the reduction in rank is largely symbolic as it is unlikely that the offender will serve in the reduced rank upon being released from prison.

[30] Considering all of these factors, including the precedents discussed by the prosecutor, 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.

[31] Master Warrant Officer Reyes, the circumstances of the charge you pleaded guilty to reveal a very troubling conduct and, having heard your apology yesterday, I believe that by now you realize the gravity of what you have done. Today, you start to pay your debt to society with respect to these events and must learn to live with the consequences of what you have done including in relation to your family, friends and those you have let down in the CAF. I do not see the need to add to what has been said about your conduct at this sentencing hearing as I believe the embarrassment you expressed is real and that you have already started to face punishment for your actions. I do wish to encourage you in addressing the causes of your improper behaviour and hope that you will not reoffend, especially given your potential to once again make a positive contribution to Canadian society in the future.

FOR THESE REASONS, THE COURT:

[32] **SENTENCES** you to imprisonment for a period of five months and a reduction in rank to the rank of sergeant.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh

Mr L. Ben-Eliezer, 1100-121 Richmond Street West, Toronto, Ontario, Counsel for
Master Warrant Officer M.P. Reyes