**COURT MARTIAL**

**Citation:** *R. v. Harding*, 2018 CM 4017

**Date:** 20181105
**Docket**: 201834

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Leading Seaman J.V. Harding, Offender**

**Before:** Commander J.B.M. Pelletier, M.J.

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**REASONS FOR SENTENCE**

(Orally)

***Introduction***

[1] Leading Seaman Harding, 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 129 of the *National Defence Act* (*NDA*) for conduct to the prejudice of good order and discipline, specifically for having used cocaine, contrary to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 20.04.

***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 as a sentence a fine of $2,000.

[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 than the sentencing usually performed in civilian criminal justice courts. Even when a joint submission is made, the military judge imposing punishment should 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 as exhibit, along with other documents provided by the prosecution as required at QR&O 112.51. Defence counsel also entered as exhibit Agreed Statement of Facts highlighting mitigating evidence on behalf of Leading Seaman Harding.

[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 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] First, the offender. Leading Seaman Harding is a 31-year-old Weapons Engineering Technician with the Royal Canadian Navy, regular force. He is currently serving with the submarine Her Majesty's Canadian Ship *Windsor* as a junior sonar maintainer here in Halifax. He joined the CAF from London, Ontario in August 2010. Following basic and initial naval training joined his first ship in 2012 and, just over a year later joined the submarine service. He was placed on counselling and probation and removed from his operational post in August 2017 until successful completion of the period of counselling and probation a year later.

[11] Leading Seaman Harding is married and has an eight-year-old son. The Court is informed that following Leading Seaman Harding's admission of drug use to military police in June 2017, his performance and attitude have been assessed as excellent and he has been actively supporting his peers. He has successfully completed addiction awareness training in March 2018 and has rebounded well. He has instructed his counsel to resolve the matter with a guilty plea early after the charge has been preferred in April 2018. His chain of command supports the continuation of his career with the CAF.

***The offence***

[12] 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 129 of the *NDA* are punishable by dismissal with disgrace from Her Majesty's service or less punishment.

[13] The facts surrounding the commission of the offence in this case are disclosed in the brief Statement of Circumstances read by the prosecutor and formally admitted as

accurate by Leading Seaman Harding. These circumstances can be summarized as follows:

(a) Between 19 January 2016 and 1 April 2016, on four occasions, Leading Seaman Harding purchased cocaine from Leading Seaman Stow, another member of the CAF.

(b) Leading Seaman Harding consumed this cocaine on each occasion, at or near Halifax, Nova Scotia.

(c) On 16 December 2009, he signed a document in which he confirmed that he understood, and would comply with, the Canadian Forces Drug Control Program which mentions that the use, the possession, the production and the trafficking of illegal drugs by CAF members is not tolerated and is prohibited under article 20.04 of the QR&O.

***Aggravating factors***

[14] The Canadian Forces Drug Control Program has been for decades a key instrument for ensuring operational effectiveness, discipline, the security of property and the safety of persons in the CAF. Considerations listed in article 20.03 of the QR&O cover both the professional competencies and the standards of conduct expected of members. Therefore, the use of cocaine is a breach of an important tenet of service in the CAF and a serious disciplinary offence. The court martial in *R v Racine*, 2014 CM 1011 at paragraphs 18, 19 and 22 mentioned that the subjective seriousness of any offence under section 129 of the *NDA* will vary depending on the intrinsic significance of the act, conduct or neglect within the spectrum of norms established to ensure operational effectiveness and the maintenance of discipline within the CAF.

[15] Drug offences may attract more severe punishment in the military context as would be the case for civilians, as stated in the case of *R v Benedetti*, 2013 CM 2009. Indeed, as stated in *Racine*, paragraph 22, an outrageously lenient sentence could fail to deter such practices, which is not in the interests of individuals or of the CAF. That being said, punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[16] Specifically aggravating in this case is the nature of the drug used, the repetition of the offence and the fact that the drug was purchased from another member of the CAF, encouraging a traffic which could have negative impact on the operational effectiveness, discipline and safety of persons in the CAF. I agree with the prosecutor that as a 29-year-old with six years of service including time on submarines, an environment particularly safety sensitive, Leading Seaman Harding should have known better.

***Mitigating factors***

[17] 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, including the following:

(a) First and foremost, Leading Seaman Harding's guilty plea, which avoided the expense of energy and costs of running a trial, which I consider as 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 Leading Seaman Harding collaborated with authorities early on.

(c) Third, the fact that Leading Seaman Harding has no criminal or disciplinary record and has performed well since admitting to the commission of the offence. I have to conclude that his behaviour was out of character for him.

(d) Finally, Leading Seaman Harding's service with the CAF in the last eight years and his efforts to rehabilitate himself which in my view, are indicative of his potential to make a positive contribution to the Navy and indeed society in the future.

***Objectives of sentencing to be emphasized in this case***

[18] 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. I do believe, however, that specific deterrence is also a relevant factor in the absence of explanation as to what caused Leading Seaman Harding's offence, although the importance of this factor is reduced in the circumstances of this case. I do agree with the defence to the effect that any sentence imposed should not compromise the rehabilitation of Leading Seaman Harding.

***Assessing the joint submission***

[19] The submissions from the prosecution contained brief references to previous cases. Those assist me in assessing the joint submission and determine if it is acceptable. I may depart from the joint submission of counsel for a fine of $2,000 only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[20] The issue for me to assess as military 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 the 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.

[21] 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 offence, 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.

[22] 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.

[23] I do believe that a reasonable person aware of the circumstances of this case would expect that the offender, guilty of conduct to the prejudice of good order and discipline, would receive a sentence composed of punishments that both express disapprobation for the failure in discipline involved and have a personal impact on the him. A fine of the amount proposed is aligned with these expectations.

[24] Considering 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.

[25] Under subsection 145(2) of the *NDA*, the terms of payment of a fine are in the discretion of the service tribunal that imposes it. At the sentencing hearing, the prosecution did not object to the demand made by defence that the fine be payable by instalments of $500 per month unless the offender is released from the CAF.

[26] Leading Seaman Harding, the circumstances of the charge you pleaded guilty to reveal a behaviour that is highly unacceptable, especially in the CAF. I am told that you have bounced back from this mishap but you should never forget what you have done and what it could have cost you. I understand from the information before me that you are married and have a son. You are serving on submarines, an elite position in the CAF

and the Navy. I hope that you have taken the time to think about whatever led you to jeopardize your position and the well-being of your family by choosing to purchase and use cocaine. I hope you are determined not to let that happen again. You are a privileged member of the CAF and our society. With that comes responsibility which you have failed to consider in offending. That said, from the mitigating evidence I heard and the assessment from your chain of command, I trust you will remain a productive member of the Navy and the submarine service and, most importantly you will respect the law in the future.

**FOR THESE REASONS, THE COURT:**

[27] **SENTENCES** you to a fine of $2,000 payable in four monthly instalments of $500, commencing no later than 1 December 2018. In the event you are released from the CAF for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to your release.

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**Counsel:**

The Director of Military Prosecutions as represented by Major M.L.P.P Germain
Counsel for Her Majesty the Queen

Major B.L.J. Tremblay and Lieutenant(N) M.C. Fortin, Defence Counsel Services,
Counsel for Leading Seaman J.V. Harding