COURT MARTIAL

Citation: *R. v. Mitchell*, 2018 CM 4020

Date: 20181206
Docket: 201865

Standing Court Martial

Her Majesty's Canadian Ship *Brunswicker*
Saint John, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman N.C. Mitchell, Accused

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Leading Seaman Mitchell, having accepted and recorded your plea of guilty in respect of the two charges on the charge sheet, the Court now finds you guilty of these charges; the first under section 129 of the *National Defence Act* (*NDA*) for conduct to the prejudice of good order and discipline, specifically for having harassed Leading Seaman S.F., the second for drunkenness.

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 a severe reprimand and a fine of $2,500.

[3] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. 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] Indeed, the threshold to depart from the joint submission being made is 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.

[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. 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, those particular requirements of sentencing at courts martial do not detract from the guidance provided by the Supreme Court 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 *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 112.51. The prosecutor advised the court that the person identified in the particulars of

charge 1 as the victim of the harassment has been advised of the possibility to prepare a victim impact statement, but that no such document would be presented to the Court.

[9] Defence counsel read on the record and entered as exhibit an Agreed Statement of Facts highlighting mitigating evidence on behalf of Leading Seaman Mitchell, as well as a letter of character reference highlighting his positive contribution, potential and attitude during his time in high school and since.

[10] 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 and the offences

[11] Leading Seaman Mitchell is a 25-year-old member of the Naval Reserve who has been serving as a supply technician with Her Majesty's Canadian Ship (HMCS) *Brunswicker* since joining the Canadian Armed Forces (CAF) in March 2011. He has served full time on a number of occasions, mainly during the summers, with the exception of a significant period of full-time service from April to December 2013, including a 78-day deployment on Class C reserve service in the Caribbean Basin. Leading Seaman Mitchell is currently serving part-time in the Naval Reserve while completing an undergraduate degree in English Literature. Throughout the years, he has received an impressive number of awards for his academic achievements and is still held in high regard by the Department Head of English from his former high school. He is expected to graduate from the University of New Brunswick in May 2019.

[12] 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 Leading Seaman Mitchell. These circumstances can be summarized as follows:

(a) On 9 December 2017, Leading Seaman Mitchell was taking part in his unit's Christmas party which took place in HMCS *Brunswicker*'s facilities, in Saint John, New Brunswick.

(b) Throughout this event, Leading Seaman Mitchell consumed multiple alcoholic beverages and became intoxicated.

(c) At one point during the evening, while conversing with a colleague, Leading Seaman S.F., and waiting in line at the bar for drinks with her, he touched her buttocks without her consent. A few moments later, while she was still waiting in line at the bar, he touched her breast without her consent.

[13] Leading Seaman Mitchell has expressed apologies to the victim in this case by sending her text messages on 19 December 2017 in which he states on numerous occasions that he was sorry for his inappropriate behaviour. He has sent these messages even if he was so intoxicated on the evening of 9 December 2017 that he has poor recollection of his inappropriate behaviours toward the victim in this case. Since that time, Leading Seaman Mitchell has significantly decreased his alcohol consumption and voluntarily restrains from frequenting establishments serving alcohol. Shortly after charges were preferred, Leading Seaman Mitchell instructed his defence counsel to resolve this matter efficiently and to proceed with a guilty plea.

[14] As a result of the incident, Leading Seaman Mitchell was the object of two formal administrative measures. He was first placed on initial counselling for alcohol misconduct at his unit. He met with a supervisor on a monthly basis in order to assess his conduct and performance during the six months monitoring period which ended on 24 July 2018. Secondly, and most importantly, he was placed on administrative review for sexual misconduct and recently received a notice of intent to proceed with an administrative release from military careers authorities at National Defence Headquarters. Leading Seaman Mitchell is currently drafting representations in an attempt to demonstrate to the administrative decision maker that he still has a place in the CAF.

[15] The Court has not been informed of the position of Leading Seaman Mitchell's immediate chain of command as it pertains to his wish to remain an active member of the Royal Canadian Navy. However, I have been informed that Leading Seaman Mitchell has received support from a member of the Canadian Senate in this endeavour.

Objectives of sentencing to be emphasized in this case

[16] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation and deterrence in sentencing the offender. Indeed, the sentence imposed must deter the offender and others who may be tempted to act in the same unacceptable manner.

[17] That being said, I do agree with the defence to the effect that any sentence imposed should not compromise the rehabilitation of Leading Seaman Mitchell, which on the facts presented to me, appears to be well underway. Indeed, Leading Seaman Mitchell seems to have made efforts to address one of the root causes of his behaviour of 9 December 2017, namely abuse of alcohol, and does benefit from support in his recovery from the consequences of the events.

Aggravating factors

[18] The considerations underpinning the non-harassment policy that applies to the CAF are centred on values such as trust and respect for the dignity of every person to ensure that the work environment fosters teamwork and encourages individuals to

contribute their best effort in order to achieve the defence objectives of Canada. Harassment erodes mutual confidence and respect for individuals and can lead to a poisonous work environment where team cohesion and morale are placed at risk, along with operational effectiveness.

[19] Specifically aggravating in this case is the nature of the gestures committed. The touching of a colleague's buttocks and breasts without her consent demonstrates a lack of respect that is totally unacceptable. Another aggravating factor relates to the circumstances of the misconduct in this case. What has been described as the unit Christmas party is a traditional official function that has been held for such a long time because it constitutes a prime occasion to have fun in a relaxed setting with colleagues of all ranks. Harassing and drunken behaviour may ruin that occasion for everyone, especially for the person or persons directly affected by the misconduct. No one should attend their unit holiday party in fear of being molested. The facts of this case reveal a significant incident of sexual harassment.

Mitigating factors

[20] 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 Mitchell's guilty plea, which avoided the expense of energy and costs of running a trial, demonstrating an offender who is taking full responsibility for his actions, in this public trial in the presence of his family and members of his unit and community;

(b) Second, the fact that Leading Seaman Mitchell expressed apologies to the victim early on and instructed his counsel to arrive at a resolution of this matter shortly after charges were preferred;

(c) Third, the fact that Leading Seaman Mitchell has no criminal or disciplinary record;

(d) Fourth, Leading Seaman Mitchell's completion of initial counselling for alcohol misconduct and his efforts to address alcohol abuse concerns as part of his rehabilitation; and

(e) Fifth, Leading Seaman Mitchell's service with the CAF in the last seven years, the support he can benefit from as evidenced by testimonials as to his good character, demonstrating in my view, his high potential to make a positive contribution to society in the future, within and outside of the Naval Reserve.

[21] I wish to discuss for a moment the issues of the negative publicity brought by these offences as raised by defence counsel in his submissions. I agree that pretrial publicity may prejudice an accused, especially in a community where his military service is performed part-time as it is the case here. In my view, this consequence does speak to the need for specific deterrence in imposing an appropriate sentence as it may show that the offender has had an opportunity to learn from his or her mistake and therefore the objective of specific deterrence has been met to an extent. That is the case here.

[22] However, as stated in the case of *R. v. Brunelle*, 2017 CM 4001, paragraph 20, I do not accept that the publicity arising from the conduct of the trial itself constitutes a mitigating factor. The offence was committed by a member of the CAF, on another member of the CAF, right here in this Naval Reserve unit, in the context of a military function. In these circumstances, what other outcome than this trial is to be expected? Military authorities brought this matter to military prosecutors who requested that a court martial be convened, as provided by law. This is a court and, as any other court in a democratic society which promotes the rule of law, it sits in public. Spectators, military or civilians, are welcome to attend; so are journalists whose job it is to report within the limits of publication bans and other court orders as applicable. I cannot see how that entirely logical outcome would somehow constitute a factor mitigating punishment.

Assessing the joint submission

[23] To assess the acceptability of the joint submission, the Court has considered the objective seriousness of the offences 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, while offences under section 97 of the *NDA* are punishable by imprisonment for less than two years or less punishments, with a caveat that limits recourse to punishments of imprisonment or detention in certain circumstances, applicable here.

[24] The submissions from counsel contained brief references to previous cases, especially *R. v. Bernier*, 2015 CM 3015. 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 severe reprimand and a fine of $2,500 only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[25] 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, any opinion I might have on an appropriate sentence is not sufficient to reverse the joint submission that was made to me.

[26] 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.

[27] 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 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. 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.

[28] 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 as well as drunkenness arising out of the same incident, would receive a sentence composed of punishments that both express disapprobation for the failure in discipline involved and have a personal impact on him. A sentence composed of a severe reprimand and fine of the amount proposed is aligned with these expectations.

[29] 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. I must, therefore, accept it.

[30] Under ss. 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 the defence as to payment of the fine by an initial payment of $500, followed by eighth monthly payments, unless the offender is released from the CAF.

[31] Leading Seaman Mitchell, the circumstances of the charges you pleaded guilty to reveal a behaviour that is highly unacceptable. I hope you understand you could have faced more severe charges and consequences if it was not of restrictions affecting military prosecutions these days. I do give you credit for addressing a potential root cause of your behaviour, being the abuse of alcohol. Keep that weakness in mind in the future. However, I also invite you, if you have not already done so, to think about other potential causes for your total lack of respect for the sexual integrity of a colleague on

9 December 2017. You appear to have enormous potential. I cannot be the judge of your future with the Naval Reserve, but some important persons tell me you have a future in making people's lives fuller in other fields of activity, including literature and drama. You will never reach that potential without respect for others, especially women, with whom you will interact. I am confident you have learned a lesson and that you are determined to prove that this incident was entirely out of character for you.

FOR THESE REASONS, THE COURT:

[32] **SENTENCES** you to a severe reprimand and a fine in the amount of $2,500 payable as follows: a first payment of $500 no later than 15 December 2018, followed by eight monthly instalments of $250, commencing no later than 1 January 2019. 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.

Counsel:

The Director of Military Prosecutions as represented by Major M.L.P.P Germain

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Leading Seaman N.C. Mitchell