



COURT MARTIAL

Citation: *R. v. Mileusnic*, 2019 CM 3001

Date: 20190121

Docket: 201879

Standing Court Martial

Canadian Forces Base Cold Lake
Cold Lake, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Captain C.J. Mileusnic, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, D.C.M.J.

SENTENCE

(Orally)

[1] Captain Mileusnic pleaded guilty to the charge of low flying which reads as follows:

“FIRST CHARGE FLEW AN AIRCRAFT AT A HEIGHT LESS
NDA Section 109 THAN THE MINIMUM HEIGHT AUTHORIZED
IN THE CIRCUMSTANCES

Particulars: In that he, on 28 November 2016, at or near the Cold Lake Air Weapons Range, while acting as pilot of aircraft CF188731 and operating under Visual Flight Rules, flew at an altitude less than 1,000 feet above ground level, contrary to Table 1-1 of the Royal Canadian Air Force Fighter Force Training Rules dated 14 January 2014.”

[2] The Court, having accepted and recorded a plea of guilty in respect of this charge, now finds you guilty of this offence. The prosecution decided not to present any evidence on the second and third charge on the charge sheet, and, accordingly, I have found you not guilty of these charges.

[3] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of the military activity in the Canadian Armed Forces (CAF). The purpose of this system is to prevent misconduct or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] Concerning the sentence to be imposed by the Court, the prosecutor and the offender's defence counsel presented a joint submission. They recommended that the Court impose a fine in the amount of \$2,000.

[5] The circumstances of the offence were presented through a Statement of Circumstances which goes as follows:

“AGREED STATEMENT OF CIRCUMSTANCES

1. At all times material to this case, Captain Mileusnic was a CF188 pilot posted at the 401 Tactical Fighter Squadron (TFS), a unit located in 4 Wing Cold Lake, Alberta.
2. On 28 November 2016, Swift flight was scheduled on the approved daily flying program and was authorized by the 401 Squadron Operations Officer.
3. Captain Mileusnic, call sign “Swift 31”, was tasked as the two-ship formation lead for the mission. He was assigned aircraft CF188731.
4. Captain McQueen, call sign “Swift 32”, was tasked as his wingman. He was assigned aircraft CF188747.
5. Both pilots were qualified as element (i.e., two-ship) leads. Swift flight was Captain Mileusnic's second mission as a two-ship lead.
6. Swift flight was an unopposed air-to-ground training mission with the objective of practicing weapon deliveries of two Mark 83 inert bombs and two laser-guided training rounds (simulating laser-guided bombs) against pre-planned targets located inside the Cold Lake Air Weapons Range (CLAWR). To avoid simulated bomb fragmentation after dropping

their bombs, each pilot would fly a safe escape manoeuvre comprising of a 5G level turn through 90 degrees of heading change.

7. The overall squadron training plan for that day, with the assigned aircraft was that Swift Flight would fly the first wave, drop their weapons and then the jets would “hot turn/hot crew” swap to the second wave.

8. A hot turn/hot crew swap means that the aircraft is not fully shutdown between sorties. It involves shutting down the left engine to allow the pilot to safely disembark, a new pilot to board, and then the aircraft is refuelled. This practice is conducted regularly to avoid potential maintenance problems that can occur with a cold start and to maximize aircraft availability for the planned flying program.

9. Following the “hot turn/hot crew” swap, the second wave would fly an assessed air interdiction mission. This particular mission was a priority for 401 TFS as it was a final assessment for a pilot working towards his “Combat Ready” qualification. The “hot turn/hot crew” procedure was necessary to ensure the completion of the second wave mission, as planned. “Hot turns” are prohibited when air-to-ground weapons are loaded on an aircraft.

10. For these reasons, before Swift flight launched, senior officers of the 401 TFS pressured the pilots to drop all weapons in the course of their mission.

11. All pilots operating Royal Canadian Air Force (RCAF) aircraft shall comply with the National Defence Flying Orders and other promulgated Orders and Rules, as they apply to their particular aircraft types.

12. The RCAF Fighter Force Training Rules (FFTR) are ratified by the 1 Canadian Air Division Senior Staff Officer Fighters and are issued on the authority of the Commander of the 1 Canadian Air Division. The FFTR apply to the Canadian Fighter Force and provide a common set of training rules for all types of training activities in order to maintain a safe training environment.

13. The FFTR dated 21 January 2014 and its rules applied to Swift flight.

14. As the formation lead, Captain Mileusnic had the responsibility to select from the FFTR dated 21 January 2014 and brief the training rules that were applicable to Swift flight.

15. Given the mission profile that the pilots planned on that day, the FFTR dated 21 January 2014 required Swift Flight to brief the Low Level Awareness Training (LLAT) rules.

16. The term “low level” means at an altitude below 1000 feet above ground level (AGL).

17. Amongst other things, the LLAT rules required that aircraft flying below 1000 feet AGL have an operational Heads-Up-Display (HUD) and Radar Altimeter (RadAlt).

18. The HUD is the primary flight instrument in the aircraft, providing flight, navigational and weapon delivery information. It projects collimated symbology into the pilot’s forward field of view.

19. The RadAlt is a system used to indicate the altitude an aircraft is flying at, AGL. Its information is normally displayed on the HUD.

20. Prior to taking off, Captain Mileusnic briefed the appropriate LLAT rules as required.

21. On 28 November 2016, the Swift Flight departed the Cold Lake Aerodrome at 1034 hours, transiting 45 nautical miles to the CLAWR at an altitude ranging between approximately 500 to 900 feet AGL.

22. At some point in the flight, Captain Mileusnic noticed that the altitude indication displayed on his HUD was flickering between the RadAlt mode, which indicates the altitude AGL, and the mode showing his altitude above sea level.

23. Despite this, Captain Mileusnic chose to continue the mission.

24. While in the CLAWR, the Swift Flight completed a total of five target runs, releasing all of their air-to-ground weapons. The mission was flown in accordance with the way the mission was planned and briefed.

25. Throughout the five target runs, Captain Mileusnic flew aircraft CF188731 at an altitude ranging between 400 to 700 feet AGL, knowing the aircraft RadAlt was not consistently showing his altitude in AGL, as required by the FFTR.

26. During the last target run, Captain McQueen flew the target run-in at 450 feet AGL with Captain Mileusnic in a three mile trail position. While conducting the safe escape manoeuvre, Captain McQueen inadvertently flew into terrain and died instantly.

27. Captain Mileusnic provided over watch over the crash site until lack of fuel forced his return to the Cold Lake Aerodrome, without further incident.

28. The actions of Captain Mileusnic during the Swift flight are in no way alleged to have contributed to the crash and death of Captain McQueen.”

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

“AGREED STATEMENT OF FACTS

1. Captain Chris Mileusnic joined the Canadian Armed Forces on 28 August, 2012. He is currently a CF188 pilot with 401 Tactical Fighter Squadron (TFS), and previously flew the CF188 aircraft with 409 TFS. He flew the CF-18 during Operation IMPACT in 2015, and has also deployed to the Arctic on multiple occasions in support of the North American Aerospace Defence agreement, twice intercepting Russian strategic bombers.

2. Captain Mileusnic is married and has one daughter, age 3.

3. Both a Board of inquiry and a Flight Safety Investigation determined that Captain McQueen’s crash was the result of individual pilot error.

4. Further, Captain Mileusnic has suffered significant career consequences as a result of this case, including:

- a. On 12 December 2016, Captain Mileusnic lost his flight lead status as a result of the incident on 28 November 2016;
- b. On 15 January 2017, Captain Mileusnic was grounded, meaning he was not permitted to fly at all;
- c. In December of 2017, almost a year after the incident, Captain Mileusnic was un-grounded, however, Captain Mileusnic was then permitted only wingman status, not flight lead status;
- d. In March of 2018, Captain Mileusnic had to begin the entire flight lead upgrade syllabus again, which took until July 2018 before he was back to possessing the same qualification that he had in November 2016;

- e. During the period of 19 months that Captain Mileusnic was reduced to wingman status, grounded, or re-training, he missed the following exercises: a live missile test firing at Ex COMBAT ARCHER 17, MAPLE FLAG 2017, RED FLAG ALASKA 2017 and Ex PUMA SOUTH 2017; and
- f. Captain Mileusnic received a Recorded Warning related to this matter.

5. Finally, Captain Mileusnic has relived the traumatic events of 28 November, 2016 multiple times while supporting the related Board of Inquiry and Flight Safety investigation, in addition to the process leading up to this court martial. The loss of his friend and colleague has had a significant impact on Captain Mileusnic, and that impact will be felt for the rest of his life.”

[7] Two witnesses were also heard by the court in order to provide a full context of the status of Captain Mileusnic at this time and also to complete the circumstances related to Captain Mileusnic arising from the incident.

[8] Although the court is not bound by the joint recommendation made by counsel, it is generally accepted that the sentencing judge should depart from the joint submission only when it is contrary to the public interest, as stated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, at paragraph 32.

[9] The only situation where the court would depart from the recommendation is where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system, and this includes the courts martial.

[10] It is the responsibility, in these circumstances, for lawyers to provide to the Court a full account of the offender’s situation and of the circumstances of the offence in a joint submission. Here, the Court is satisfied with the information provided by counsel. They provided sufficient and detailed information for the Court to appreciate the joint submission arising from their discussions in the specific context they were dealing with.

[11] In this case, the principles and objectives of denunciation, general deterrence and rehabilitation were an integral part of counsel’s discussions and the basis for their joint submission.

[12] Captain Mileusnic is 35 years old. He enrolled in 2012 as a pilot. At the time of the incident, in 2016, he was having a normal career progression. It was his second experience as a lead pilot on a two-ship formation.

[13] Here, the charge of low flying involves only his personal responsibility. Counsel were clear that the incident that caused the death of Captain McQueen is unrelated to the charge for which Captain Mileusnic pleaded guilty today and was convicted of. He went through three types of investigation; two of them were about his responsibility, and clearly stated that he had nothing to do with what was related to Captain McQueen's death. The third one was related to the commission of a service offence, to which he pleaded guilty today.

[14] Captain Mileusnic pleaded guilty at the first opportunity. He is a first-time offender and made the decision to accept full responsibility for what he did. Although this type of offence is considered serious, as is any offence within the Code of Service Discipline, it is clear that the low flying charge in this case is, objectively speaking, low in the scale of seriousness since the maximum punishment imposed by Parliament is imprisonment of less than 2 years.

[15] Accordingly, the sentence proposed and suggested by counsel does reflect that, in the sense that for cases such as this one, the range of sentence to be considered for the Court in these circumstances goes from a fine up to a severe reprimand and a fine. So I just want to confirm that counsel were more than right when they came with that suggestion.

[16] But it is not only the objective seriousness of the offence that is considered by counsel when they have this discussion. They have to also consider all other subjective facts, all other facts that they must consider to determine the subjective seriousness of the offence. And I think through the Statement of Circumstances, the Agreed Statement of Facts, and in the light of both testimonies, I think the Court got a full account of what were the circumstances at the time of the incident related to the charge, but also a full account of what is the character of Captain Mileusnic. And it is based on this information that counsel came with this suggestion that would respect the principle of proportionality to the seriousness of the offence and the character of the offender. So all put together, made them suggest to the Court that a proper sentence to be imposed by the Court would be a fine in the amount of \$2,000.

[17] Looking at this case as a whole, I will accept the joint submission made by counsel to sentence Captain Mileusnic to a fine in the amount of \$2,000 as it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[18] What happened to Captain McQueen, the incident, was clearly unrelated to the charge and the facts on which the charge is based that is before this Court.

[19] What I got from counsel and what added Major Ferguson is it is unfortunate that during the commission of an offence that is not related, Captain Mileusnic attended the loss of a friend while performing his duty as a pilot. Now he had, and still has, to learn to live with that and use it as a lesson, as suggested by his commanding officer. You can learn from an experience, even if it is a bad experience, unfortunately.

[20] From what I see this morning, Captain Mileusnic, with the support of your chain of command, your family, close friends and the community you will be able to overcome this experience and continue to perform your duty as a pilot in the Canadian Forces if it is your wish to do so.

[21] This court martial will put an end to this procedure related to your conduct, but as expressed by the witnesses, it does not mean that it puts an end to everything else. Learning to live with this type of thing and to continue to progress in your career is still there. So I wish you good luck in performing your duty, and for me, I just wish to thank counsel for their hard work. People maybe are attending for the first time these proceedings, but I have been involved in preliminary proceedings with counsel and with the attendance of Captain Mileusnic through videoconference means, so I understand that counsel have worked on this case for a long time and they found a way to achieve justice, keeping on their mind public interest, but also interest for Captain Mileusnic. So thank you very much. Thank you to those who attended these proceedings.

FOR ALL THESE REASONS, THE COURT:

[22] **FINDS** Captain Mileusnic guilty of the first charge of flying an aircraft at a height less than the minimum authorized in the circumstances, and

[23] **SENTENCES** Captain Mileusnic to a fine in the amount of \$2,000, payable immediately.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois and Captain B.M. MacMillan

Major F. Ferguson and Lieutenant(N) B.K. Lemon, Defence Counsel Services, Counsel for Captain C.J. Mileusnic