



## COURT MARTIAL

**Citation:** *R. v. Malone*, 2019 CM 5004

**Date :** 20190924

**Docket :** 201941

General Court Martial

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

**Between :**

**Her Majesty the Queen**

- and -

**Warrant Officer J.K. Malone, Offender**

**Before :** Commander C.J. Deschênes, M.J.

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### **REASONS FOR SENTENCE**

(Orally)

[1] Warrant Officer Malone pleaded guilty to one charge: conduct to the prejudice of good order and discipline. The particulars of the charge read as follows:

“In that he, between 18 and 21 September 2017, at McBride, British Columbia, did harass Corporal R.M. Poole by sending images of a sexual nature to her cell phone.”

[2] This Court must now determine and impose a sentence on this charge in which a guilty plea was entered.

[3] The circumstances of the case are described in the Statement of Circumstances and admitted to by the offender, which reads as follows:

“Statement of Circumstances”

1. At all relevant times, Warrant Officer J.K. Malone (WO Malone) was a member of the Canadian Armed Forces, Regular Force, as a member of 1 Service Battalion of 1 Canadian Mechanized Brigade Group, 3 Canadian Division Support Base Edmonton.
2. Between the dates of 18-21 September 2017 WO Malone was on a refuelling tasking in McBride, British Columbia with a Cpl Houde, MCpl Moustier, and with the complainant, Cpl R. Poole.
3. During the tasking, WO Malone, MCpl Moustier, and Cpl Poole attended a bar and consumed alcoholic beverages. Upon returning to their quarters, WO Malone sent text messages to Cpl Poole that were inappropriate and sexual in nature.
4. By text message, WO Malone offered to find someone that he knew that Cpl Poole could have sexual relations with, as opposed to a stranger.
5. WO Malone continued the text message conversation stating that he was bored, to which Cpl Poole replied that he should go to bed.
6. WO Malone then sent a series of sexually-themed photos with captions to Cpl Poole. The first such photo appears to depict a puppet of the Sesame Street character Cookie Monster performing cunnilingus on a woman. The caption reads "C is for cookie!" and "Nom nom nom nom nom".
7. After receiving this photo by text message from WO Malone, Cpl Poole texted him back, telling him to go to bed, to which WO Malone replied that he was bored. Cpl Poole again texted to WO Malone, telling him that he should go to bed.
8. WO Malone then sent Cpl Poole a second photo. This one depicted six different women, each of whom appeared to be performing fellatio. The caption reads "Why the long face?" Cpl Poole did not respond to this message.
9. WO Malone then sent a third photo, this one depicting a man whose face is covered in blood. The caption reads "A real man loves his woman every day of the month."
10. Sexually inappropriate messages such as these:
  - a. Corrode the moral and internal cohesion of a unit;
  - b. Effect the foundation of esprit de corps; and,

- c. Are totally incompatible with the military ethos and effective military service.

11. WO Malone acknowledges that the above-noted messages that he sent to Cpl Poole were inappropriate in nature and were prejudicial to good order and discipline.

12. At the first opportunity provided in the courts martial process, WO Malone fully acknowledged and took responsibility for making the above noted comments. In so doing, he has publically denounced the making of such comments and shown leadership in taking responsibility for his actions.”

### **Evidence**

[4] As part of the sentencing process, the prosecution provided the documents required under *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) article 112.51. He also complied with the requirement of QR&O article 112.482, by introducing as exhibit a victim impact statement. The prosecutor informed the Court that portions of the victim impact statement had been redacted because these portions contained personal information that was unrelated to the harm done to the victim as a result of the commission of the offence.

[5] The defence introduced an Agreed Statement of Facts with two personnel evaluation reports (PER) attached. The first PER is dated 1 April 2016 and covers the evaluation period from 1 April 2015 to 31 March 2016. The second PER covers the period from 1 April 16 to 31 July 16. The Court found that the absence of certification on the PERs was not detrimental to the weight given to these documents. However, the second PER provided by the Defence was not signed by any of the signatory authorities, including the member himself and there was information missing clearly indicating that this document is still in its draft form. For this reason only, the Court grants little to no weight to this second PER.

[6] The defence called one witness: Master Warrant Officer Jensen, senior mobile support equipment operator for 5th Canadian Division G4 transportation in Halifax. Master Warrant Officer Jensen testified that he was posted to his current position two months ago. Before this posting, he was the company sergeant major of transportation company 1st Service Battalion for three years. During this period, Warrant Officer Malone worked under his supervision. The witness testified that once the allegations were brought to his attention, the offender was removed from his position; he was also removed from the company and placed under the direct supervision of the battalion headquarters. The witness stated that, during this time, Warrant Officer Malone was put under remedial measures where he was assigned various tasks and was required to report for monthly remedial measures interviews. Master Warrant Officer Jensen also stated that Warrant Officer Malone embraced performing these various tasks and

carried himself professionally. He testified that he would work again with Warrant Officer Malone; that the offender is an asset to the Canadian Armed Forces (CAF) and could continue to be gainfully employed within the CAF. The witness also provided a printed email he prepared, which was sent on 10 September 2019 to defence counsel. The email provides additional details regarding the performance of the offender and the tasks he was assigned during the remedial measures period.

### **Positions of the parties**

#### ***Prosecution***

[7] The prosecution recommended that this Court impose a punishment of a severe reprimand. In his submissions, the prosecutor explained that, based on the gravity of the offence and the degree of responsibility of the offender, it was a fit and appropriate sentence. He argued that the prejudice to the victim was important and needed to be taken into consideration. He also listed as aggravating factors the position of authority the offender occupied at the time and the fact that he was drinking with subordinates the day the offence took place. The prosecutor also stated that the offender demonstrated poor judgement that was shocking to the conscience when he sent the texts and images of a sexual nature to a subordinate. In doing so, the offender's actions affected ethos and dramatically impacted the victim. However, the prosecution recognised that the guilty plea and the absence of a conduct sheet should mitigate the sentence. Highlighting the sentencing principles at articles 203.1 to 203.3 of the *National Defence Act (NDA)*, he asked the Court to focus on the principles of general and specific deterrence as well as denunciation. As part of his submissions, he provided three court martial decisions where physical contacts took place between the offender and the victim. He recommended a sentence of a severe reprimand, in order to send a message that such behaviour will not be tolerated.

#### ***Defence***

[8] The defence agreed with the submissions of the prosecution regarding the relevant aggravating and mitigating factors to consider; however, he stressed that the offender demonstrated an early willingness to accept responsibility for his action. He submitted that the victim impact statement had limited probative value. He mentioned understanding the focus on the objective of general deterrence, in light of the context of Operation HONOUR, but explained that there was no indication of a problem within the offender's unit. From his viewpoint, rehabilitation is key in this case because the offender can still serve within the CAF. The defence also mentioned that the offender had no intent to cause harm when he committed the offence, therefore this should mitigate the sentence. For these reasons, he recommended a reprimand, submitting that there is no difference between a severe reprimand and a reprimand, save for the presence of the word "severe".

### **Analysis**

***Purposes, objectives and principles of sentencing to be emphasized in this case***

[9] The fundamental purposes of sentencing in the military justice system are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale and to contribute to respect for the law and the maintenance of a just, peaceful and safe society. The fundamental purposes of sentencing are achieved by imposing sanctions that have one or more of the objectives set out within the *NDA* at subsection 203.1(2). On the facts of this case, the prosecution submitted that the objectives they considered most important are general and specific deterrence as well as denunciation. The Court accepts that general deterrence is the most important objective in imposing a just sanction in this case.

***Accounting for relevant aggravating or mitigating circumstances***

[10] The fundamental principle of sentencing is also found in the *NDA*. Section 203.2 provides that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In accordance with section 203.3 of the *NDA*, when determining a sentence, the Court shall take into consideration other sentencing principles, including that the sentence be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

**Aggravating factors**

[11] After hearing the submissions of counsel, the Court accepted the following aggravating factors:

- (a) Victim/Unit impact: A review of the victim impact statement confirmed that Warrant Officer Malone's conduct had an enduring personal and professional impact on the victim;
- (b) Leadership: Warrant Officer Malone was in a position of authority during the refuelling tasking while on temporary duty; and
- (c) Nature of the text messages: The text messages contained sexual connotations and the images were of a sexual nature and were inappropriate.

**Mitigating factors**

[12] After hearing the submissions of counsel, the Court accepted the following mitigating factors:

- (a) Warrant Officer Malone, at an early stage, showed a willingness to take responsibility for his actions. His guilty plea has an important impact in mitigating his sentence;

- (b) Warrant Officer Malone has no conduct sheet nor criminal record for the Court to consider;
- (c) Warrant Officer Malone was removed from his position and from the company and was imposed remedial measures where he had to report for monthly interviews. He displayed a positive attitude while performing the tasks assigned to him during the remedial measures. Master Warrant Officer Jensen's testimony confirmed Warrant Officer Malone's progression and positive attitude during this period; and
- (d) The evidence before the Court was consistent in confirming that Warrant Officer Malone is a competent and skilled CAF member, committed to military service and capable of making a continued positive contribution. The testimony also confirmed that notwithstanding this lack of judgement with respect to the conduct that brought the charge before the Court, Warrant Officer Malone is well regarded by his former supervisor. His PER confirmed he performed very well within his unit.

### **Parity**

[13] When determining a fit and fair sentence, the law requires that the sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In making its recommendation on sentence, the prosecution relied upon precedents, with the distinction that actual physical contact occurred. In these cases, a severe reprimand was imposed as a sentence, coupled with a fine in two of these cases.

[14] Based on the case law and submissions made by counsel, it is clear that the misconduct in the case at bar is less serious than that set out in the precedents. The Court specifically notes that there was no physical contact between Warrant Officer Malone and the victim and, although he ought to have known that his conduct would be offensive, he did not intend to cause harm. These are some of the factors differentiating Warrant Officer Malone's case from the offenders in the precedents provided and must be weighed carefully in the determination of any sentence this Court may impose.

### **Overall assessment of sentence**

#### ***The offender***

[15] Warrant Officer Malone is 39 years old. He joined the CAF in January 1998 as a reserve force member and transferred to the regular force in July 2001. He is the recipient of military decorations. He has no conduct sheet.

[16] The Court noted from the records introduced as exhibits that Warrant Officer Malone deployed to Afghanistan in 2007 and to Ukraine in 2016-2017. Warrant Officer Malone has demonstrated progress in his rehabilitation and with his training,

background, skills and commitment to the CAF; his continued service is of significant benefit to the CAF. The Court is of the view that given his rehabilitation of the shortcomings that led to the charge before the Court, the need for specific deterrence is not pressing.

[17] I have considered the prosecution's recommendation of a severe reprimand. Based on all the factors, I am not convinced that a severe reprimand is the appropriate sentence for the individual circumstances of Warrant Officer Malone. A severe reprimand is higher on the scale of punishments than a reprimand and is intended to stand out as a blemish on the career record of an offender more so than a reprimand. In this particular case, I do not believe that a severe reprimand would constitute a fit and fair sentence. But for the guilty plea and his early willingness to make amends, in light of the prejudice suffered by the victim, a severe reprimand would have been an appropriate sentence. Yet, considering all the facts of this case, a reprimand, coupled with a fine in the amount of \$1,500, would constitute a fit and fair sentence for this offence and this offender.

**FOR THESE REASONS, THE COURT:**

[18] **SENTENCES** Warrant Officer Malone to a reprimand and a fine in the amount of \$1,500, payable in monthly instalments of \$50 commencing on 31 October 2019.

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**Counsel:**

The Director of Military Prosecutions as represented by Captain C.R. Gallant

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, counsel for Warrant Officer J.K. Malone