



COURT MARTIAL

Citation: *R. v. Mercer*, 2020 CM 5003

Date: 20200129

Docket: 201939

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Chief Warrant Officer S.A. Mercer, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Chief Warrant Officer Mercer pled guilty to a charge of quarrels and disturbances, in that he fought with a person subject to the Code of Service Discipline contrary to section 86 of the *National Defence Act (NDA)*. The Court accepts his guilty plea and must now determine and impose a sentence. In this regard, the prosecution and the defence presented a joint submission recommending that the Court impose a sentence consisting of a fine in the amount of \$500.

[2] The Statement of Circumstances, which the offender formally admitted as true, provides details regarding the circumstances surrounding the commission of the infraction. The Statement of Circumstances reads as follows:

“AGREED STATEMENT OF CIRCUMSTANCES

1. At all times material to this case, Chief Warrant Officer (“CWO”) Mercer was a member of the Regular Force, Canadian Armed Forces.
2. At the time of the incident, CWO Mercer was the Brigade Sergeant Major of 2 Canadian Mechanized Brigade Group, a formation located in CFB Petawawa, ON.
3. On the afternoon of 1 June 2018, 2 CMBG HQ conducted a “mug out” event at the Jubilee Lodge in CFB Petawawa. The event started at 1300hrs and the dress was civilian casual attire. The personnel attending the event included the Commander 2 CMBG, Colonel (“Col”) Mike Wright, CWO Mercer, and other members of the 2 CMBG HQ. During the event, alcohol was served by the Jubilee Lodge bar staff and food was also offered.
4. Meanwhile, officers of 1st Battalion Royal Canadian Regiment (“1 RCR”) and of the Enhanced Forward Presence Battle Group (“eFP BG”) attended a similar event at the Normandy Officer’s Mess (“Mess”) located in CFB Petawawa. The event was led by Lieutenant-Colonel (“LCol”) MacBeth, the Commanding Officer of 1 RCR and of the eFP BG, and who was the President of the Mess Committee (“PMC”). Alcohol was also served by the Mess bar staff and some food was offered as part of the normal TGIF weekly Mess event.
5. Officers from various units of CFB Petawawa were also present at the Mess. The participants were dressed in CADPAT. Other than the two bartenders, there were no civilians at the Mess that evening.
6. On 1 June 2018 at approximately 1730hrs, LCol MacBeth contacted Col Wright to inform him that the former Brigade G3, LCol Irvine, was home from Operation PROTEUS for his House Hunting Trip and was visiting his fellow officers at the Mess.
7. This information was mentioned by Col Wright to CWO Mercer who explained that he would like to have the chance to see LCol Irvine as they had worked together at 2 CMBG in the previous years.
8. At around 1800hrs, the 2 CMBG HQ mug out event was concluding at the Jubilee Lodge. At that point, only eight to ten individuals were remaining and most of them decided to go to the Mess to continue the evening.

9. At 1845hrs, Col Wright contacted LCol MacBeth, to request his permission as PMC to invite CWO Mercer as his guest. LCol MacBeth granted permission.
10. At approximately 1900hrs, the remaining individuals from the 2 CMBG HQ staff arrived at the Mess.
11. At that time, the crowd at the Mess included 20 to 25 officers, CWO Mercer, and the two civilian bartenders. The ambience at the Mess was one of celebration and fun.
12. At around 2100hrs, Capt Lefebvre (2 CMBG HQ G4 Ops) and Maj Demaine (2 CMBG HQ G2) engaged in a consensual and amicable grappling match. They did so, since throughout the year, they had often joked with other members of the 2 CMBG HQ staff as to who would be the strongest based on their respective impressive statures. The grappling match occurred on the grass area next to the patio of the Mess. The majority of the individuals from the Mess watched.
13. At around 2115hrs, LCol MacBeth and Col Wright engaged in a funny parody of a wrestling match in the same location. This event was also consensual and was conducted in order to make the crowd laugh. Neither match created turmoil.
14. At around 2130hrs, there were approximately 10 to 15 people remaining at the Mess and most were engaged in small group conversations around the bar. At this point in time, most attendees had been consuming alcohol for the majority of the evening, including a few rounds of shooters.
15. Based on the assessment from the bar staff, no one was intoxicated to the point where serving alcohol had to be refused. Both CWO Mercer and LCol MacBeth were getting drunk. At that point in time, CWO Mercer had consumed approximately six to eight beers and a few shooters. He had very little to eat throughout the evening.
16. At around 2200hrs, CWO Mercer and LCol MacBeth were engaged in a casual conversation by the bar. At some point, LCol MacBeth and CWO Mercer engaged in what appeared to be a friendly grapple while standing. LCol MacBeth managed to grab CWO Mercer in a headlock.
17. Initially, it appeared to the people present at the Mess that it was just another friendly wrestling occurrence as many knew the two

members had unarmed combat experience and were qualified as unarmed combat instructors.

18. A few seconds after LCol MacBeth had grabbed CWO Mercer into a headlock, both men fell on the floor, with CWO getting the worst of the fall, and it's at this point that the quarrel became more intense.
19. Once on the ground, CWO Mercer was heard cursing and growling. He got on top of LCol MacBeth who was still holding on to him. CWO Mercer managed to free one hand while keeping LCol MacBeth down. He then threw two to three punches at LCol MacBeth's head.
20. While on the ground, LCol MacBeth adopted a defensive posture and did not throw punches back in response to the actions of CWO Mercer.
21. Lieutenant ("Lt") Dunlop, a bystander, managed to grab CWO Mercer's punching arm and while doing so dropped his glass of beer, which broke on the floor. It's at that moment that Col Wright, who was outside on the patio when the fight started, came inside the Mess and said "What's going on here?", or words to that effect, and ordered the fight to stop.
22. LCol Williams and Lt Dunlop pulled CWO Mercer off LCol MacBeth and brought him a few feet away from the scene. Lt Dunlop was holding CWO Mercer's arms up and told him to calm down. He had a blank look in his eyes and was continuing to growl. CWO Mercer seemed disoriented and confused. He said to Lt Dunlop: "Where am I, what's going on, what happened, I was about to leave", or words to that effect.
23. Col Wright approached and asked if CWO Mercer was all right and asked Lt Dunlop to let go of CWO Mercer's arms. Lt Dunlop let go of CWO Mercer and backed away.
24. Meanwhile, LCol MacBeth was also helped up and tried to laugh off the incident by saying out loud: "I did not see that coming", or words to that effect.
25. Overall, the altercation lasted about 15 seconds.
26. Both members sustained injuries. LCol MacBeth had a little bit of blood on his face, a small cut under his eye and suffered some bruising to his shoulder and neck.

27. With respect to CWO Mercer, his knuckles were cut and slightly bleeding. Also, the side of his face had the skin rubbed raw to the point of bleeding. His left shoulder was extremely sore. The inside of his mouth was cut. His front lip was split on the inside. His ankle was hurt such that he could not run for two months.
28. After checking quickly on the condition of both members, Col Wright asked if LCol MacBeth would accept to talk to CWO Mercer. LCol MacBeth responded that he was willing to talk to CWO Mercer. Col Wright brought both of them into another room of the Mess so they could discuss the incident.
29. After the incident, CWO Mercer repeatedly told Col Wright and LCol Williams how apologetic and embarrassed he was for what had happened.
30. Shortly after, LCol Williams arranged for a cab and accompanied CWO Mercer to his home. LCol MacBeth stayed at the Mess until everyone vacated the premises.
31. No one called the Military Police to investigate. On Monday, 4 June 2018, Col Wright informed the Commander 4 Division, Brigadier-General Cadden of the incident.”

[3] The Court must now decide whether the jointly proposed sentence, a punishment of a fine in the amount of \$500, would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

Positions of the parties

Prosecution

[4] After briefly mentioning that the sentencing principles contained at section 203.1 of the *NDA* were applied for this joint submission, the prosecution contends that the most important objective for this case is general deterrence, however rehabilitation of the offender should also be considered. He mentioned that the proposed sentence was agreed to by the defence after “rigorous negotiation.” He confirmed that the chain of command was consulted and agreed to the joint recommendation, reassuring the Court that there was no concern from a public perception viewpoint. Speaking of the range of punishment for this offence, the prosecutor states that the sentencing range goes from a small fine at the lowest end of the spectrum, to a hefty fine with a severe reprimand. He refers to *R. v. Corporal T.J. Desjarlais*, 2006 CM 48, where after a guilty plea, the offender was imposed a sentence of a \$600 fine. He submits that the proposed sentence is well within the range of punishment.

[5] The prosecutor identified as aggravating factors, the rank and seniority of the offender, the fact that the offence was committed at the officer's mess and also that the offence was witnessed by officers present at the mess, some of which had to intervene to separate the offender from the senior officer with whom he was quarrelling. He also enumerates several mitigating circumstances to support the recommendation: the conduct forming the basis of the offence, which lasted only about 15 seconds, was out of character for the offender, qualifying it as a lapse in judgment; the guilty plea and the absence of a conduct sheet were taken into consideration in mitigating the sentence; the presence of adverse consequences following the commission of the offence that the offender had to deal with, referring to the administrative measures imposed on him. He submits that the offender is a fine Canadian Armed Forces (CAF) member, who had an outstanding military career and who has the potential to continue contributing to the CAF. From his perspective and based on the evidence, the joint recommendation would not bring the administration of justice into disrepute.

Defence

[6] Defence counsel submits a long list of circumstances mitigating the sentence, such as the guilty plea, the absence of a conduct sheet and the distinguished career of the offender, as demonstrated by the Performance Evaluation Reports (PERs) introduced as exhibits, and the many awards and medals he received. He also emphasizes the adverse career and financial impact suffered by the offender through the numerous administrative measures imposed on him, some of which defence counsel contends are unlawful. He finds particularly disconcerting the disparity of consequential treatment received as compared to that which Lieutenant-Colonel MacBeth received, the senior officer with whom he fought. The latter received a \$500 fine after a contested summary trial and was allowed to continue his service in the CAF without other measures taken against him. Additionally, defence suggests that Lieutenant-Colonel MacBeth was instead rewarded, as he was allowed to deploy to Latvia. Counsel contends that the delays in bringing this matter to court martial, combined with the humiliation suffered by the offender during the commission of the offence, would call for a more lenient punishment. He mentioned that it is the offender's sense of duty that drove him to cooperate fully from the beginning. In fact, Chief Warrant Officer Mercer made it clear with him that he wanted to plead guilty. From the defence counsel's perspective, although a lower punishment would be called for in the circumstances, the joint submission would not bring the administration of justice into disrepute.

Evidence

[7] As part of the evidence produced in accordance with article 112.51 *Queen's Regulations and Orders for the Canadian Forces* (QR&O), the prosecutor provided the Court with the Agreed Statement of Circumstances as well as the documentary evidence listed at QR&O article 111.17.

[8] The defence introduced an Agreed Statement of Facts which provides details of the aftermath of the offence, including a chronology of events that lists the

administrative measures taken against the offender as well as information regarding LCol MacBeth's summary trial process. He also introduced a letter from now-Brigadier-General Wright which states that he is taking responsibility for his own involvement in this matter. Finally, defence counsel filed nine PERs dated from April 2009 to March 2019, with a PER exemption for the period from 1 April 2012 to 31 March 2013.

Analysis

[9] The military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the CAF. The purpose of this system is to prevent misconduct, or in a more positive way, to promote good conduct. It is through discipline that an armed force ensures that its members would 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 tried by an independent tribunal and, if convicted, punished in the same way as any other person living in Canada. Sentencing in a court martial thus includes a significant disciplinary aspect. To determine a sentence, the Court must be guided by the sentencing principles contained in the *NDA* at sections 203.1 to 203.95.

[10] This is true also when counsel propose a joint submission. Joint submissions are essential in a justice system as they allow the system to function efficiently. When presented with a joint submission, like any civilian court of criminal jurisdiction, courts martial should not depart from it unless it would be contrary to the public interest, as stated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43 at paragraph 32:

Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[11] In other words, trial judges are not to depart from a joint submission unless the mutually-agreed recommended sentence would cause an informed and reasonable public to lose confidence in the institution of the courts or unless it would be contrary to public interest. Consequently, trial judges have limited sentencing discretion when presented with a joint submission. It is not about a trial judge's viewpoint that a more severe or more lenient punishment should be imposed, and in rejecting the joint submission, tinker with the sentence. The threshold to depart from the joint recommendation is very high.

[12] The public interest test ensures that these resolution agreements are afforded a high degree of certainty. Accused persons who plead guilty are able to minimize the stress associated with trials. In addition, costs to run courts martial are significantly reduced. Not only are the witnesses not required to take valuable time away from their duties, the unit of the accused is required to allocate resources for a much shorter period of time. Furthermore, a guilty plea offers accused persons an opportunity to take responsibility for their actions and tend to show that they are indeed remorseful.

[13] This court must therefore examine the joint submission and determine if it is contrary to the public interest or whether it would cause an informed and reasonable person or public to lose confidence in the institution of the courts. If it is not contrary to the public interest or if it would not bring the military justice system into disrepute, this court is required to accept it even though it may have come to a different conclusion in the absence of a joint recommendation.

[14] When considering a joint submission, trial judges rely heavily on the work of the prosecution as representing the community's interests, and the defence counsel acting in the accused's best interest. Trial judges can rightfully assume that counsel took all relevant facts into consideration when mutually agreeing upon an appropriate sentence. The Agreed Statement of Circumstances that was read in court and filed as an exhibit, provides the Court with the facts that guided counsel in coming to a joint submission, as it generally provides a fulsome description of the circumstances surrounding the commission of the offence, including the existence of aggravating factors.

Aggravating factors

[15] When determining whether the proposed punishment of a fine of \$500 meets the test, I have considered the following aggravating factors:

- (a) rank and seniority. By virtue of rank, non-commissioned officers have achieved a number of years in the service and they generally occupy supervisory roles; as a result, the CAF places great trust in them and expects them to lead by example. Junior ranks look up to members of these ranks for guidance and mentorship. The conduct forming the basis of the offence is not one expected of someone of this rank and seniority;
- (b) the rank of the person subject to the Code of Service Discipline with whom the offender fought with;
- (c) the quarrel happened in the presence of officers, some of which had to be involved in breaking up the quarrel;
- (d) it happened at the mess, a CAF affiliated establishment;
- (e) the level of violence. Although the offender was put into a headlock, once he was able to break free, he punched the other member two to three times in the head; and
- (f) both the offender and the other member sustained minor injuries as a result.

Mitigating factors

[16] The court also accepted and took into consideration in its decision the following significant, compelling mitigating circumstances. This is a case of bad things happening to good people:

- (a) both the offender and the senior officer agreed to a friendly grapple;
- (b) provocation; when the quarrel started, the offender was put into a headlock and fell, taking the brunt of the fall and hurting himself, which caused him to react;
- (c) the conduct was out of character;
- (d) the offender immediately accepted responsibility, has apologized at the first opportunity, and continued to do so when opportunities presented themselves. He even offered to his chain of command to resign his appointment as 2 Canadian Mechanized Brigade Group (2 CMBG) Sergeant Major;
- (e) the senior officer implicated in the quarrel, Lieutenant-Colonel MacBeth, was found guilty after a summary trial for the same offence and was sentenced to a \$500 fine;
- (f) the offender had to prepare submissions to the presiding officer of his upcoming summary trial requesting that his matter be referred to court martial, because of legitimate concerns related to witnesses being tainted following Lieutenant-Colonel MacBeth's summary trial;
- (g) the numerous consequences that impacted both the offender's career and financial means. Although it is not the role, nor would it be appropriate for this Court to criticize the decisions and actions of the chain of command regarding a member's career, it is appropriate to identify career consequences that constitute mitigating circumstances:
 - i. the offender was told that he would achieve no further career advancement;
 - ii. he was placed on Recorded Warning on 18 June 2018;
 - iii. he was issued a Notice of Intent to Temporarily be Removed from Senior Appointment on 10 July 2018;
 - iv. he was also issued a Notice of Intent to Permanently Remove from Senior Appointment on 29 August 2018;

- v. he was once again placed on Recorded Warning for the same incident on 9 September 2018 due to procedural errors with the Recorded Warning previously issued;
 - vi. he was removed from his appointment as a Sergeant Major on 14 September 2018, and was, following that meeting, humiliated by one of his peers who ripped the offender's 4 Division patch off his sleeve while stating that he would not be wearing it anymore; and
 - vii. finally, the offender was posted to National Defence Headquarters on 1 November 2018 and as a result, was separated from his family and suffered adverse financial consequences.
- (h) there were significant delays in bringing this simple matter before the Court;
 - (i) the guilty plea;
 - (j) the offender had a long, successful and outstanding career in the CAF, as demonstrated by the PERs provided by the defence, which contains impressive statements with respect to his character and professionalism. It is clear that he has consistently impressed his superiors before the event that led us here today; and
 - (k) he has deployed to Latvia, Kandahar, and Bosnia, and is the recipient of the following medals: Canadian Forces Peacekeeping Service Medal; Canadian Decoration; General Campaign Star – Southwest Asia; Meritorious Service Medal; Member Military Merit; Queen's Diamond Jubilee Medal and the Commander's Commendation from Afghanistan.

[17] There is overwhelming evidence demonstrating that the offender not only accepted responsibility for his actions, but has shown remorse throughout and has faced significant consequences on his career as a result of his conduct. This weighs heavily in favour of a more lenient sentence.

Parity

[18] I do not accept counsel's view that the proposed sentence is well within the range of punishment. Looking at precedents for this offence, a small fine was imposed only in two cases, in the *Desjarlais* case referred to by the prosecution and in *R. v. Dahr*, 2014 CM 1013. Absent these two cases, the range of punishment for an offence contrary to section 86 of the NDA for an offender below the rank of Chief Warrant Officer who has pled guilty goes from a reprimand, which is higher on the scale of punishment than the proposed sentence, up to a severe reprimand with a fine over \$500 (see *R. v. Charette*, 2016 CM 4020; *R. v. Furtado*, 2018 CM 2010; *R. v. Grant*, 2017

CM 1016; *R. v. Ordinary Seaman J.D. Durante*, 2009 CM 1014; *R. v. Frizell*, 2011 CM 2019; *R. c. Ghaffari*, 2017 CM 4011; *R. v. Boyer*, 2016 CM 1017). Therefore, a fine in the amount of \$500 would place this joint recommendation at the lower end of the spectrum, especially for an offender who holds the highest rank within the non-commissioned officer corps.

[19] Nevertheless, although the proposed sentence is at the lowest end of the spectrum, the presence of significant and compelling mitigating factors militates toward a lenient sentence in the circumstances.

Conclusion

[20] After reviewing the documentary evidence, and after a careful review of counsel's submissions, it is apparent that they considered the offender's situation when they arrived at their joint submission. They also identified and considered the relevant aggravating and mitigating factors surrounding the commission of the offence. Counsel properly addressed the applicable principles and objectives of sentencing in this case.

[21] I am, therefore, satisfied that all documents introduced as exhibits provide this Court with a clear and complete picture of both the offence and the offender and I accept counsel's position that the need for general deterrence and rehabilitation are well met with the joint recommendation today. Therefore, I accept that although it is at the lower end of the spectrum, in light of the significant mitigating circumstances present in this case, this joint submission is in the public interest and it does not bring the administration of justice into disrepute.

[22] Chief Warrant Officer Mercer has suffered severe career consequences as a result of this offence, and his attitude in accepting responsibility and in pleading guilty are to be commended. There is no doubt that he has a lot to offer to the CAF, and the Court trusts that he will not only continue serving, but that he will be offered opportunities to progress in his career either in his current rank or as an officer.

FOR THESE REASONS, THE COURT:

[23] **FINDS** Chief Warrant Officer Mercer guilty of a charge under article 86 of the *NDA*;

[24] **SENTENCES** the offender to a fine in the amount of \$500.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Chief Warrant Officer S.A. Mercer