



COURT MARTIAL

Citation: *R. v. Pett*, 2020 CM 4003

Date: 20200113

Docket: 201925

Standing Court Martial

Moss Park Armoury
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal K.G. Pett, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] On 5 December 2019, this Standing Court Martial found Master Corporal Pett guilty of two charges under the Code of Service Discipline related to an incident on the evening of 16 November 2018 at Moss Park Armoury in Toronto. Under the first charge, laid under section 85 of the *National Defence Act (NDA)*, Master Corporal Pett was found to have behaved with contempt towards a superior officer by walking away from Master Warrant Officer Lang as he was being spoken to saying, “fuck this” or words to that effect. As for the second charge, laid under section 95 of the *NDA* for ill-treatment of a subordinate, Master Corporal Pett was found to have said to Corporal Turner in the course of an argument, “I will fucking beat you up” or words to that effect.

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 recommend that I impose a reprimand and a fine in the amount of \$1,500.

[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 (SCC) 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, bringing certainty to parties and to the administration of justice.

[5] Yet, even if certainty of outcome is useful, 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 recognized by the SCC, 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. It is a key opportunity for the Court to deal with the disciplinary requirements brought about by the conduct of the offender, on a military establishment, in public and in the presence of members of the offender's unit.

[6] The imposition of a sentence at court martial proceedings, therefore, performs an important disciplinary function, making this process different from 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.

[7] 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 trial, seven witnesses were heard in addition to the accused. Several documents were entered as exhibits.

[9] At the sentencing hearing, the Court accepted, as exhibits, documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* article 112.51.

[10] In addition to this evidence, the Court also benefitted from the submissions of counsel in support of their joint submission 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. As a result, I can adequately apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence.

The offender

[11] Master Corporal Pett is 48 years old and comes from the Toronto area. He started playing the bagpipes at a young age, joined the cadets and subsequently the 48th Highlanders band as a volunteer 30 years ago, prior to joining the primary reserve in 1993 as a musician in the band. He has essentially served on Class A reserve service for the past 26 years completing various engagements and courses as a musician, including the Qualification Level 6A qualification in 2012 as well as the Primary Leadership Qualification in 2009, as a prerequisite to his appointment as master corporal.

[12] Master Corporal Pett is employed in his civilian life as a driver with the Toronto Transit Commission. He has unfortunately been involved in a number of significant accidents in that capacity and has been suffering from post-traumatic stress disorder (PTSD) as a result first of an incident in 2010 when a person jumped on the rails just in front of the subway train he was driving. His treating psychologist testified that following that accident the prognostic for recovery was good and after six or seven months away from work Master Corporal Pett did return to full duty. However in 2014, as a streetcar driver, he had another accident which involved a pedestrian crossing in front of his streetcar between two parked cars. Once again Master Corporal Pett could do nothing to avoid the accident. This led to a resurgence of his symptoms of PTSD including anxiety and depression. He was treated with prolonged exposure and a number of coping strategies were recommended, including the need to disengage himself from a situation if he feels overwhelmed. Master Corporal Pett had once again to be treated in May 2019 after a third PTSD-related incident he suffered.

[13] Master Corporal Pett is currently on long-term disability from his civilian employment and parades about four half-day sessions per month with the 48th Highlanders.

The offences

[14] The altercation involving Master Corporal Pett on 16 November 2018 here at Moss Park Armoury occurred in the course of a training evening. Pipers and drummers from the 48th Highlanders Band were rehearsing with civilian dancers in preparation for the St. Andrew's Charity Ball.

[15] During a break after the band had just played a set of jigs, Master Corporal Pett took exception to a remark made to him by Corporal Turner to the effect that the band had not been playing roundly enough and should play the piece differently. From his testimony, I gather that Master Corporal Pett was not impressed with the tone employed

by Corporal Turner during his intervention. He perceived that Corporal Turner had no right to give him lessons on a set of jigs he had played for decades, especially since Corporal Turner had just played them very badly. An altercation ensued during which Master Corporal Pett uttered various threats of bodily harm to Corporal Turner including saying, “I will fucking beat you up” or words to that effect.

[16] The intervention of Master Warrant Officer Lang, the band’s Pipe Major, had the effect of calming things down between Master Corporal Pett and Corporal Turner. Master Corporal Pett stepped away from the formation to drink some water and chat with another colleague.

[17] Master Warrant Officer Lang then went over to Master Corporal Pett and tried to engage him in a conversation as to what had just occurred in relation to Corporal Turner. Fearing that the conversation would lead to significant levels of stress for him, Master Corporal Pett decided to disengage from the situation as suggested to cope with his PTSD. He refused to engage in the conversation requested by Master Warrant Officer Lang, walked away and was heard saying, “fuck this” or words to that effect. He went upstairs to the band room and was seen exiting the building a short time after, without having been dismissed.

Seriousness of the offences

[18] The Court has considered the objective gravity of the offences in this case. The maximum punishment for the offence of insubordinate behaviour is dismissal with disgrace from Her Majesty’s service. The offence of ill-treatment of a subordinate is punishable by imprisonment for less than two years.

Aggravating factors

[19] The circumstances of the offences in this case reveal the following aggravating factors:

- (a) The aggressive nature of the offence of ill-treatment of a subordinate, specifically the significant threats of bodily harm made to Corporal Turner by the offender;
- (b) The fact that the offence occurred in the presence of members of the public gathered for the dancing instruction in anticipation of a public ball; and
- (c) The fact that the offence constitutes a failure in leadership and judgement from a mature and experienced musician from which the Canadian Armed Forces (CAF) expects much better.

Mitigating factors

[20] That said, the Court acknowledges the following mitigating factors:

- (a) The fact that Master Corporal Pett testified at trial to the effect that he could have handled the situation better in relation to his interactions with both Corporal Turner and Master Warrant Officer Lang on 16 November 2018, showing a recognition of the unacceptable nature of his conduct;
- (b) The personal situation of Master Corporal Pett at the time of the offences, especially his struggles with PTSD which may have played a role in his decision to disengage from an encounter with Master Warrant Officer Lang which he anticipated would be stressful;
- (c) The fact that Master Corporal Pett has no conduct sheet and is therefore considered a first-time offender; and
- (d) the personal situation of Master Corporal Pett now, as he is still recovering on long-term disability, and his excellent prospects for rehabilitation. He has contributed significantly to the CAF in the past, including to the work atmosphere in the band since the offence, and will continue to contribute positively to the CAF and society in the future.

Objectives of sentencing to be emphasized in this case

[21] The circumstances of this case require that the focus be placed on the objectives of denunciation, deterrence and rehabilitation in sentencing the offender. Confidence in the honesty, integrity, discipline, maturity and good judgment of members of the CAF, both by other members and the general public, is critical to the effectiveness of the military in fulfilling its important functions. Members of the CAF are rightly held to a very high standard. The actions of Master Corporal Pett derogated from those standards. The sentence proposed must be sufficient to denounce and act as a deterrent on Master Corporal Pett and others, yet, allow its consequences to be manageable for the offender given the mitigating factors mentioned previously.

Assessing the joint submission

[22] The submissions from counsel contained brief references to previous cases, which assists me in determining that the reprimand and fine being proposed are within the range of sentences imposed in similar cases in the past. 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. As stated earlier, I may depart from the joint submission of counsel only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[23] In determining if that is the case, 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. I do believe that a reasonable person aware of the circumstances of this case would expect that the offender receive a punishment which expresses disapprobation for the failure in discipline involved and has a real impact on the offender. The sentence being proposed is, in my view, aligned with these expectations.

[24] As recognized by the SCC, trial judges must refrain from meddling with joint submissions of counsel if their benefit can be maximized. Indeed, prosecution and defence counsel are well placed to arrive at joint submissions that reflect 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. 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.

[25] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, as well as the aggravating and mitigating factors mentioned previously, I believe the sentence jointly proposed by counsel is adequate and certainly not a sentence that could bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I will, therefore, accept it.

[26] Master Corporal Pett, the offences you have been found guilty of constitute serious breaches of discipline. I understand the stress you were under at the time of the offences and your medical condition but these cannot excuse your behaviour. You seem to have reflected about what happened and have accepted some responsibility before me. I trust you have decided for yourself that you must refrain from engaging in any such behaviour if you are to continue to contribute fully to the CAF.

FOR THESE REASONS, THE COURT:

[27] **SENTENCES** you to a reprimand and a fine in the amount of \$1,500, payable as follows: \$200 no later than 31 January 2020; \$125 before the end of each of the months of February, March, April and May of 2020; and \$200 dollars before the end of each of the months of June, July, August and September of 2020. 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 P. Germain

Major A. Bolik and Captain D. Sommers, Defence Counsel Services, Counsel for
Master Corporal K.G. Pett