**COURT MARTIAL**

**Citation:** *R. v. Kirwin*, 2020 CM 5007

**Date:** 20200312
**Docket**: 201966

Standing Court Martial

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

**Between:**

**Her Majesty the Queen**

- and -

**Sergeant (Retired) D.C. Kirwin, Offender**

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

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**Restriction on publication: Pursuant to section 179 of the *National Defence Act*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "XX", shall not be published in any document or broadcast or transmitted in any way.**

**This order does not apply in respect of the disclosure of information in the course of the administration of justice, when it is not the purpose of the disclosure to make the information known in the community.**

## REASONS FOR SENTENCE

(Orally)

### *Introduction*

[1] Sergeant (Retired) Kirwin pled guilty to an offence of conduct to the prejudice of good order and discipline, in that he sent inappropriate text messages to a minor child of a member of the Canadian Armed Forces (CAF). The Court accepted and recorded a

guilty plea to that charge under section 129 of the *National Defence Act* (*NDA*). This Court must now determine and impose a sentence that is proportional to the circumstances surrounding the commission of the offence and to the situation of the offender. In their submissions, the prosecution and defence are recommending jointly that this Court impose a punishment of a severe reprimand with a fine of $1,000, payable in monthly instalments. The content of the contentious text messages was not provided to the Court.

[2] The offender formally admitted to the circumstances surrounding the commission of the offence as described by the prosecution in the Statement of Circumstances. These circumstances can be summarized as follows. At the time of the commission of the offence, Sergeant (Retired) Kirwin was a serving member of 1 Combat Engineer Regiment (1 CER) in Edmonton. On 17 March 2018, he was contacted by friends of his, a CAF member and his partner, to attend a gathering held at the victim's residence and hosted by the victim's father for St. Patrick's Day. The victim's father was a serving member in Edmonton. The offender and the friends who had invited him arrived at the gathering sometime after 1600 hours. The victim, a 14-year-old, was present at the gathering where a total of nine adults, including the offender, and four children were in attendance. Throughout the evening, the adults, and sometimes the four children present at the residence, openly mingled at different locations throughout the residence. At one point in the course of the evening, the victim joined their father and other attendees including the offender who were having a conversation in the kitchen. Meeting the offender for the first time, the victim had a brief conversation with him at that time. During this brief encounter where they generally discussed their respective level of happiness, the victim sensed that the offender was feeling emotionally down. Without saying a word, he opened the contacts' application of his cellular phone and handed over the device to the victim, who in turn entered their cell phone number in the contacts list as a friendly gesture. Later that night, after the victim and a friend had retired in the victim's bedroom for the night, the victim received inappropriate text messages from the offender between 0213 and 0242 hours on 18 March 2018. Shortly thereafter, the victim brought the text messages to the attention of their mother. The text messages were then brought to the attention of other attendees, some of which confronted the offender who was still present at the residence. The Royal Canadian Mounted Police (RCMP) was contacted. It conducted an investigation and concluded that no criminal offence had been committed.

[3] The incident was reported by the victim's father to the military police (MP) which also investigated the incident. The MP came to the same conclusion and forwarded the matter to the offender's unit, with a recommendation that the laying of a charge pursuant to section 129 of the *NDA* be considered. A unit investigation was conducted, that led to a charge being laid by a member of the offender's unit on 13 February 2019.

[4] The Court must now decide whether a punishment of a severe reprimand with a fine of $1,000 recommended by both counsel as part of a joint submission, would bring the administration of justice into disrepute, or would otherwise be contrary to the public

interest. In order to do so, the Court must first decide if the absence of details pertaining to the nature of the text messages in the particulars of the charge and in the summary of circumstances, precludes this Court from making this determination.

***Positions of the parties***

***Prosecution***

[5] The prosecution contends that the joint submission meets the public interest test as established by the Supreme Court of Canada (SCC) in *R. v. Anthony-Cook*, 2016 SCC 43. He explained that arriving at this joint recommendation required months of negotiation with the defence and entailed detailed reviews and consideration of all the circumstances, including the presence of evidentiary issues. The aggravating circumstances that he considered included the age of the victim, the impact that the commission of the offence had on the victim and their family as well as the location of the offence, which was committed in the victim's home after the offender had been invited. The rank and seniority of the offender were also considered as aggravating. The prosecutor alleges that the conduct affected morale and trust within the unit. He concedes, however, in mitigation, that Sergeant (Retired) Kirwin is a first offender and he took responsibility for his conduct by pleading guilty. In light of all these factors, a more lenient prosecutorial approach has been deemed appropriate, in regard to the mitigating circumstances present in this case.

[6] Putting great emphasis on the applicable test established by the SCC in *Anthony-Cook*, the prosecutor refers to Moldaver's J. ruling to support the joint recommendation, echoing his remarks in general terms with regard to the benefits of joint submissions in the context of the military justice system. He contends that the fundamental purposes of sentencing provided for at article 203.1 of the *NDA* shall be achieved by imposing a just sanction that has for objective to maintain public trust in the CAF as a disciplined armed force. As the offender is no longer a serving member, rehabilitation is not an important consideration in arriving at the appropriate sentence; rather, general deterrence is the most pressing objective to consider.

[7] Counsel for the prosecution presented four court martial decisions in support of the joint submission, in order to demonstrate that it falls within the range of punishment for this type of offence. In the first decision, *R. v. Hadley*, 2019 CM 4020, the offender, a sergeant, sent messages and photos of a sexual nature to a subordinate, an aviator. Similar mitigating circumstances were considered, such as the imposition of administrative measures on the offender and the guilty plea. However, the repetitive nature of the impugned conduct which took place while on deployment, the rank of the offender and his position of leadership at the time of the offence were considered aggravating factors. A joint submission of a severe reprimand and a fine in the amount of $3,000 was accepted by the court. In *R. v. Malone*, 2019 CM 5004, the offender pled guilty to a charge pursuant to article 129 of the *NDA* for having harassed his subordinate, a corporal, while on temporary duty, by sending images of a sexual nature to her cell phone. Counsel had divergent views on sentencing. Warrant Officer

Malone's efforts to rehabilitate himself and his continued service in the CAF mitigated his punishment. He was sentenced to a reprimand and a fine in the amount of $1,500. The prosecution also presented *R. v. Sutherland*, 2013 CM 4023. At the time of the offence, Sergeant Sutherland was an instructor at the Canadian Forces Leadership and Recruit School. The joint submission recommending a sentence of a reprimand and a fine of $1,000 was accepted. Finally, the Court gave little to no weight to the last decision presented by the prosecution, *R. v. Dryngiewicz*, 2012 CM 1016, as the nature of the charge and the circumstances surrounding the commission of the offence are too remote to be considered in the context of the present case.

[8] Contending that all relevant factors have been considered, the prosecution is of the view that the joint submission is in the public interest and would not bring the administration of justice into disrepute.

***Defence***

[9] On the defence side, counsel explained that the guilty plea is a very important mitigating factor, not only because it showed that the offender took responsibility for his actions, but it also prevented a young victim and their family from the stress and, to some extent, the trauma of testifying in court. Providing a fulsome chronology of events from the moment the complaint was made to the RCMP to the date the charge was laid by the unit eleven months later, he argues that these pre-charge delays are significant and should mitigate the sentence. Additionally, Sergeant (Retired) Kirwin is a first offender. He was released under item 5(f) (Unsuitable for Further Service) of article 15.01 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) as a result of the allegations made against him. He has several dependants, some of which he was ordered to pay child support to. Defence counsel is of the view that the *Sutherland* decision presented by the prosecution is the most relevant case that would assist this Court in making a proper determination for the sentence. From his perspective, however, but for the age of the victim in the case at bar, the *Sutherland* case is more serious, as the offender pled guilty to several charges, including a charge of disobedience of lawful command which is objectively a more serious offence.

[10] Addressing the Court's concerns related to the absence of information with respect to the nature of the inappropriate text messages that form the basis of the charge, he contends that there is no obligation to disclose such information in the context of a joint submission. He provided two cases in support of his submission, *R. v. Master Corporal Winstanley*, 2006 CM 8, a master corporal who pled guilty to a charge for accessing child pornography, and *R. v. Warrant Officer G. Charest*, 2007 CM 4010 where a guilty plea was recorded regarding two charges pursuant to section 129 of the *NDA* for accessing pornographic sites using Department of National Defence computers. In both cases, the joint submission was accepted by the trial judge even though the contentious images that formed the basis of the related charges were not introduced as exhibits.

[11] He pursued in adding that joint submissions are often the product of negotiations involving important compromises on both sides. In this particular instance, the Crown benefited greatly in avoiding a contested trial. He provided details regarding numerous and troublesome evidentiary issues in this file, including the destruction of material evidence. Ultimately, there were substantial concessions on the part of the defence when accepting the joint submission in light of the significant evidentiary issues plaguing the prosecution of the case. Furthermore, in the context of an offender who has been released, the disclosure of the text messages could cause undue harm to his prospect of securing employment in the future since courts martial's decisions are published, thus available to the public. From his perspective, the Court has enough information to make the appropriate determination, and the joint submission would not bring the administration of justice into disrepute.

***Evidence***

[12] The documents required to be introduced as exhibits in accordance with QR&O 112.51, Sentencing Procedure, and listed at QR&O 111.17, were provided to this Court. The victim also prepared a victim impact statement, which was provided to this Court by the prosecution.

***Analysis***

[13] Trial judges have limited sentencing discretion when presented with a joint submission. They cannot depart from it unless it is contrary to the public interest, or unless it would bring the military justice system into disrepute. Should the trial judge determine that the test is not met, the court must follow the steps established by the SCC before rejecting the proposed sentence, which includes providing parties with an opportunity to explain further their positions and introduce additional evidence as required.

[14] When considering a joint submission, trial judges must determine if it would cause an informed and reasonable public to lose confidence in the institution of the courts or would be contrary to the public interest. In order to be able to make this determination, trial judges are required to be informed of the circumstances surrounding the commission of the offence. There are no requirements to provide every single minute detail of the event. However, to assist the court in making its determination in compliance with the public interest test, information that goes to the heart of the circumstances surrounding the commission of the offence should be provided to the court.

[15] This brings us to the matter raised by the Court on its own motion with regard to the scarcity of information pertaining to the content of the text messages, both in the particulars of the charge and in the Statement of Circumstances. These documents refer to sending "inappropriate text messages" to the victim, without particularizing the content nor the nature of the text messages. No further detail was provided during the sentencing hearing. This paucity of information may very well have a detrimental effect

on the decision-making ability of this Court. Indeed, not being privy to the content nor the nature of the text messages makes it difficult for this Court to assess the gravity of the circumstances surrounding the commission of the offence.

[16] This issue is distinguishable from the situation presented by defence counsel in *Winstanley*, where there was an admission that the contentious images constituted child pornography material, allowing the trial judge to make his determination without seeing the images. The same goes for the *Charest* decision, where the documents introduced as exhibits, including the charge sheet, specified that the image forming the basis of the charge was pornographic material. To say it plainly and figuratively, this is rather the case of a trial judge not being informed of what the image is about.

[17] In the context of a joint submission, the SCC, in *Anthony-Cook,* established the public interest test, which was developed initially in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, Ontario Ministry of the Attorney General, Queen's Printer for Ontario, 1993, pages 327-30 and chaired by The Honourable G. Arthur Martin, known as the *Martin Report* (see paragraph 29 of *Anthony-Cook*). Before the *Anthony-Cook* decision, the Court of Appeal of Quebec (CA Que) accepted and quoted excerpts of the *Martin Report* in providing, to some extent, guidance on the standard counsel should follow with regard to the sufficiency of information to provide to the trial judge in support of their recommendation. In *Douglas c. R.*[1], 2002 CanLII 32492 (QC CA), the CA Que allowed the appeal because the trial judge erred when rejecting the joint submission he deemed "unreasonable" in part because he erroneously took into consideration an aggravating factor that had not been established by the Crown. At paragraph 45 of this comprehensive decision, the CA Que referred to the following passages of the *Martin Report*:

> The Committee is of the view that the record created in sentencing proceedings should not be sparse, but, rather, must always fully support the submissions made … In encouraging the sentencing judge to place appropriate emphasis upon a joint submission, the Committee is thereby placing a corollary obligation upon counsel to amply justify their position on the facts of the case as presented in open court.
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> …
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> The sentencing judge will not, in the Committee's view, have committed any error in principle in accepting a joint submission, as recommended above, provided he or she arrives at the independent conclusion, based upon an adequate record, that the sentence proposed does not bring the administration of justice into disrepute and is otherwise not contrary to the public interest.
> [My emphasis.]

[1] At paragraph 31 of the *Anthony-Cook* decision, the SCC rejected the approach adopted in *Douglas*, because the CA Que treated the fitness and public interest tests as essentially being the same. The SCC implicitly concurred with the remainder of the *Douglas* decision, particularly regarding the sufficiency of information to be provided by counsel when presenting a joint submission.

[18] The Court added at paragraph 52 of its decision:

> Moreover, I agree with the Martin Report, cited earlier, that the reasonableness of a sentence must necessarily be evaluated in the light of the evidence, submissions and reports placed on the record before the sentencing judge.
> [Emphasis removed.]

[19] Accordingly, it falls on counsel to ensure that all relevant circumstances are taken into consideration in reaching their agreement. They also have the obligation to ensure that sufficient information is provided to the trial judge so he or she can make the appropriate determination. The unequivocal purpose of the *Anthony-Cook* decision is to support joint submissions that meet the public interest test by imposing a high threshold for trial judges before rejecting the joint recommendation, in order to provide certainty to accused persons and counsel, which ensures efficiency within the criminal justice system. This, however, does not imply that trial judges should abscond their judicial duties by blindly relying on counsel. Trial judges must be satisfied that they have sufficient knowledge of the circumstances surrounding the commission of the infraction to make their determination.

[20] In its guidance for trial judges on the approach they should follow when they are troubled by a joint submission, the SCC established in paragraphs 53 and 54 of *Anthony-Cook* that:

> [53] [W]hen faced with a contentious joint submission, trial judges will undoubtedly want to know about the circumstances leading to the joint submission — and in particular, any benefits obtained by the Crown or concessions made by the accused. The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission, even though it may appear to be unduly lenient . . ..
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> [54] Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge.
> [My emphasis.]

[21] In other circumstances, the absence of details pertaining to the content of the text messages may have very well been fatal to this Court accepting the joint submission. Nevertheless, as a trial judge, I can rightfully assume that counsel considered all relevant circumstances when arriving at their joint submission. In this instance, counsel went further and were thorough in providing reasons justifying their choice not to include the details of the content of the text messages. When asked by the Court why these details were not revealed, the prosecution answered candidly that this joint submission hinges on parties' agreement that this information would not form part of the prosecution's evidence. He also, in his submissions, alluded that the case suffered evidentiary flaws. Defence counsel's provision of details in this regard makes a compelling case for the Court to accept the recommendation despite the absence of information pertaining to the content of the text messages. Furthermore, the Court is comforted by the fact that the text messages were also seen and examined by the Royal Canadian Mounted Police and the MP in the course of their respective investigations.

Both organizations determined that there was insufficient evidence to support the laying of a charge under the *Criminal Code*. This constitutes independent evidence that fills a crucial gap and assists in completing a picture as to the nature of the text messages. But for these unique circumstances, the absence of the details regarding the nature of the text messages may have caused this Court to consider rejecting the joint submission in light of the absence of information pertaining to material circumstances. I conclude therefore that taking holistically, the circumstances surrounding the offence, as well as those surrounding the investigations that followed, their outcome and the significant evidentiary issues identified by counsel in their submissions, provide enough information and rationale for the Court to apply the public interest test.

[22] In this regard, the public interest test ensures that joint submissions are afforded a high degree of certainty. Accused persons who plead guilty promptly are able to minimize the stress and trauma of witnesses who would have had to testify, which is particularly true for a young victim and their family. It also assists in resolving cases despite the presence of evidentiary issues. Additionally, a guilty plea offers accused persons an opportunity to begin making amends. It is an indication of remorse and shows that the offender is accepting to take responsibility for his actions.

[23] The Court has thoroughly looked at the circumstances of the case and the situation of the offender. This agreement was reached despite the presence of evidentiary issues, therefore a more lenient sentence is appropriate. The Court accepts counsel's position that the following aggravating factors are to be considered when assessing the proposed sentence:

(a) the age of the victim, who was only 14 years old at the time of the offence;

(b) the impact that the commission of the offence had on the victim and on their family, which is described in the victim impact statement. It is saddening to see such a young person experience this type of event;

(c) the circumstances in which the offence was committed. The offender met the victim at the victim's residence, at the invitation of the father, a CAF member;

(d) the offender's 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 from them that they would lead by example. The offender's actions are not those expected of someone of this rank and seniority; and

(e) the conduct affected morale and trust within the unit.

[24] The following mitigating circumstances were also considered:

(a) the guilty plea, which is an indication of remorse and shows that the offender is accepting responsibility for his actions. It also prevented a young victim and their family from having to experience the stress of having to testify in Court. This guilty plea was offered having full knowledge of the presence of important evidentiary issues. The guilty plea in this instance mitigates greatly the sentence;

(b) the conduct of the offender was limited in time; and

(c) the offender was released as a result of the allegations, he is currently unemployed and has several dependants.

***Offender***

[25] Sergeant (Retired) Kirwin is 36 years old. He joined the Regular Force on 26 September 2000 and is the recipient of the following medals and decorations: Canadian Peacekeeping Service Medal, NATO Medal for Former Yugoslavia, Canadian Decoration and Special Service Medal NATO. He has no conduct sheet. He has several dependants and is required to pay child support for some of them. He was released as a result of the commission of this offence and is currently unemployed.

***Parity***

[26] Counsel addressed the applicable principles and objectives of sentencing in this case. Specifically, paragraph 203.3(b) of the *NDA* requires parity in sentencing, which means that the sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The cases provided by the prosecution confirmed that their joint submission is within the range of punishment and meets the parity principle. Therefore, I accept that this joint submission is in the public interest and that it does not bring the administration of justice into disrepute.

**FOR THESE REASONS, THE COURT:**

[27] **FINDS** the offender guilty of a charge under article 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline.

[28] **IMPOSES** a sentence of a severe reprimand and a fine in the amount of $1,000, payable in monthly instalments of $100 starting 1 April 2020.

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**Counsel:**

The Director of Military Prosecutions as represented by Major R.G. Gauvin

Lieutenant-Commander B.G. Walden, Defence Counsel Services, Counsel for Sergeant (Retired) D.C. Kirwin