COURT MARTIAL

Citation: *R. v. Bruce*, 2020 CM 5011

Date: 20201006
Docket: 202042

Standing Court Martial

2nd Canadian Division Support Base Valcartier
Detachment St-Jean
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private J.M. Bruce, Offender

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

Order restricting 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by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant shall not be published in any document or broadcast or transmitted in any way.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] The offender, Private Bruce, pled guilty to a charge under section 129 of the *National Defence Act* (*NDA*), an offence of conduct to the prejudice of good order and discipline for having verbally and physically harassed the complainant, A.P. Having

accepted and recorded the guilty plea, the Court must now determine and impose a fair and fit sentence which entails that the punishment must be proportional to the circumstances surrounding the commission of the offence and that takes into consideration the offender's situation. In order to assist the Court in determining the appropriate punishment, both counsel are jointly recommending that this Court impose a punishment of a reprimand combined with a fine in the amount of $3,000.

Circumstances of the offence

[2] The circumstances surrounding the commission of the offence contained in the Statement of Circumstances were read in court and have been admitted as true by the offender. In summary, during the relevant period, Private Bruce was a regular force candidate on Basic Military Qualification (BMQ) course at the Canadian Forces Leadership and Recruit School (CFLRS), Saint-Jean-sur-Richelieu, Quebec. On 14 September 2019, Private Bruce accepted an invitation from A.P., another candidate on BMQ, to accompany her on a day trip to Montreal. During the bus ride to Montreal, Private Bruce made flirtatious comments to A.P. and while they were touring the city, Private Bruce made sexually suggestive comments about women's bodies and asked A.P. questions about her sexual history and sexual preferences, causing her to feel uncomfortable.

[3] On the bus ride back to CFLRS, Private Bruce moved closer to A.P. so their legs were touching. He then put his hand on her thigh. She asked him to move over. He complied, but continued asking A.P. inappropriate questions such as asking the colour of her bra or how she looks in lingerie. He then touched her neck with his fingers. She asked him to stop, which he did. When they finally returned to CFLRS, they parted ways.

[4] The next morning, Private Bruce joined A.P. in the laundry room. She was sitting on a chair cleaning her boots and he was sitting on the floor in front of her doing the same. At one point, he stood up, walked over to her and whispered in her ear that he now knew the colour of her bra. This caused A.P. to feel uncomfortable. Later that day, Private Bruce walked in A.P.'s room and sat on her bed while she was cleaning her room. At one point, as she was facing the wall, he slapped her right buttock. She told him, "What the fuck, stop doing that!" or words to that effect. Shortly after, he got behind her and grabbed her left breast with his right hand. She said to him, "Hey! Why did you do that?", but he gave no response. Minutes later, in an effort to get away from Private Bruce, A.P. left her room to mop the hallway floor. Private Bruce came in from behind while she was mopping and slapped her buttocks again. He left before she could confront him.

Issues

[5] The Court must now determine whether the joint submission, a reprimand combined with a fine in the amount of $3,000, meets the public interest test.

Position of the parties

Prosecution

[6] In his submissions, the prosecution contends that he took into consideration the fundamental purposes of sentencing when deciding on the joint submission. He affirms that these fundamental purposes shall be achieved by imposing a sanction that has for objectives for this specific case to maintain public trust in the Canadian Armed Forces (CAF) as a disciplined armed force, to denounce unlawful conduct, to deter others from adopting the same conduct and to assist in reintegrating this offender into military service. The prosecution explains that there were a lot of efforts spent to arrive at an appropriate resolution, which involved consultation with the victim. He mentions the young age of the offender which militates toward providing Private Bruce with the opportunity to pursue his career in the military.

[7] He explains that he identified and took into consideration the following aggravating factors:

(a) the offender had participated in harassment prevention training just before committing the infraction, therefore he should have known his conduct was inappropriate;

(b) the offender's conduct involved repeated acts toward the victim;

(c) the offender demonstrated a lack of self-reflection at the time of the offence, since he did not take the opportunity to amend his behaviour;

(d) there was substantial harm to the conduct of military training, as additional training was required. For example, the offender had to repeat the BMQ; and

(e) at 25 years of age when the infraction was committed, the offender was older than the average age of BMQ candidates. He therefore should have shown more maturity as a more senior course candidate.

[8] He also considered the following mitigating circumstances:

(a) Private Bruce is a first offender. As result, he could be allowed to pursue a career in the CAF;

(b) he is at the debut of his career, having enrolled just over a year ago;

(c) he pled guilty to the charge, which demonstrates some degree of remorse. The guilty plea also spared the victim from the emotional cost associated with testifying while saving the military justice system from a costlier trial; and

(d) the offender has prepared an apology for the victim. He also wrote an essay, which shows some self-reflections post conduct and a desire to amend his conduct. This essay was deemed to be satisfactory by his chain of command.

[9] The prosecution mentions that, in accordance with *NDA* subsection 249.27(1), no record would be created for this conviction. Nevertheless, he contends that the joint submission is within the range of punishment, explaining that a $3,000 fine for a private is a harsher punishment compared to a higher-ranking member of the CAF who receives a higher pay. He views the joint submission as a significant punishment, adding that the sentence must be tailored to the offender. The joint submission is the least severe punishment that will maintain discipline and morale within the CAF and the unit.

[10] In applying the principles of the Supreme Court of Canada decision dealing with joint submissions, *R. v. Anthony-Cook*, 2016 SCC 43, he explains that the joint submission meets the public interest test. He concludes by saying that harassment is a conduct that is unacceptable and will not be tolerated.

Defence

[11] Alluding to the same principles established in *Anthony-Cook*, defence counsel explains that the proposed sentence is in the public interest for several reasons. The offender made efforts to accept responsibility for his actions, therefore the Court should be thoughtful as to whether the offender has learned from his actions and will amend his conduct. She contends that denunciation and deterrence are the most important objectives in the case at bar. However a youthful, first offender should be given every opportunity for rehabilitation without undue impediment. She echoes the prosecution's argument that the offender should be given an opportunity to move forward with his career. The recommended fine is a very significant fine for a private, therefore the proposed sentence meets the objective of specific and general deterrence since others will think twice before adopting such conduct.

[12] She also explains that Private Bruce will provide an apology to the victim during these proceedings. Furthermore, the offender has prepared an essay on the subject of sexual misconduct. The steps the offender took are not only evidence that he has learned from his conduct; he showed courage and bravery by pleading guilty and for publicly apologizing. The Court should account for the offender's essay where he shows his own vulnerability.

[13] In responding to the prosecution's submissions regarding aggravating factors he identified in this case, defence counsel contends that aggravating factors should not only be elements one might find to be distasteful about the commission of the offence, or elements that form part of the commission of the offence; rather, aggravating factors listed in the legislation or circumstances surrounding the commission of the offence that were proven or admitted and are serious additional elements that attract a more severe punishment, may be considered as aggravating factors. For example, she questions

whether the offender's participation in harassment prevention training would constitute an aggravating factor, or whether it is part of an essential element that forms part of the commission of the infraction. She contends that the offender's participation in this training is irrelevant, as all are presumed to know that committing an offence is wrong. She does recognize as aggravating that the impugned conduct took place over two days. As for prosecution's submission that the commission of the offence caused significant harm to the unit since additional military training was required as a result, defence contends that this was based on a decision made by the offender's chain of command, which detrimentally impacted the offender. Consequently, such decision should not fall on the offender's shoulders, but instead be deemed to be a mitigating factor pertaining to adverse consequences on the career of the offender. She also contends that there is no evidence beyond a reasonable doubt that the offender's conduct caused the victim to fail the FORCE evaluation test. She argues that the young age of the offender at the time of the offence, at 25 years old, should be considered. He is also a first offender. His apology and his essay show he is remorseful.

[14] Defence mentions *R. v. Grant*, 2017 CM 1016 and *R. v. Wellowszky*, 2016 CM 1011 as supporting court martial decisions to demonstrate that the joint recommendation is within the range of punishment.

Evidence

[15] The Court examined and considered the Statement of Circumstances, the content of which was agreed to by the defence, as well as the documentary evidence listed at article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and provided by the prosecution, in accordance with article 112.51 of the QR&O. The victim impact statement was read in court by the prosecutor. Finally, the Agreed Statement of Facts introduced by the defence, which includes additional information pertaining to the offender situation, was examined by this Court, as well as a document written by the offender titled: "What I Have Learned about Operation Honour in the Past Year" dated 2 October 2020.

[16] I have also considered the offender's apology.

Analysis

[17] When determining a sentence, the Court must be guided by the sentencing principles contained in the *NDA*. Subsection 203.1(1) establishes the fundamental purposes of sentencing, which are:

> (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
>
> (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[18] Section 203.2 of the *NDA* provides for the fundamental principle of sentencing:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[19] When both the prosecution and defence counsel agree on an appropriate sentence to recommend, commonly referred to as a joint submission, it is implied that these statutory sentencing principles were considered by both parties during the plea negotiation. Furthermore, counsel have an in-depth knowledge of the circumstances of the offence and defence counsel is privy to the offender's personal situation. Joint submissions provide many benefits to the accused, the participants, the unit and the military justice system as a whole. They assist in limiting the resources normally required to support a trial by court martial. A guilty plea offers accused persons an opportunity to take responsibility for their actions and tend to show that they are indeed remorseful. The Supreme Court of Canada in *Anthony-Cook*, in recognizing these many benefits, has established the public interest test for trial judges dealing with a joint submission. It entails that joint submissions should not be departed from by trial judges. However, if the joint submission would cause an informed and reasonable public to lose confidence in the institution of the courts or would be contrary to the public interest, only then should the sentencing judge follow certain steps before considering rejecting the recommendation. This means that I have limited sentencing discretion in this case.

[20] 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.

[21] 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 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.

The offence

[22] As established by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd*., [1989] 1 S.C.R. 1252 at page 1284 of the decision:

> When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[23] In the military context, harassment is even more insidious, because it not only erodes the trust and esprit de corps within the unit, it has the potential of detrimentally affecting operational effectiveness of the unit and of the CAF as a whole. It also brings discredit to the institution and to its members.

Aggravating factors

[24] In determining whether the proposed punishment of a reprimand combined with a fine in the amount of $3,000 meets the public interest test, I have considered the aggravating factors specific to this case:

(a) the conduct of the offender entailed a series of actions which escalated over a period of two days beginning with flirtatious words, culminating with several incidents of sexual touching, where the offender ignored the victim's protests. The offender demonstrated a lack of self-reflection at time of the offence;

(b) this happened where the victim was particularly vulnerable, away from her unit, alone with the offender after he accepted her invitation; and

(c) the victim impact statement: A review of the victim impact statement confirms that the victim experienced some emotional consequences as a result of the offender's conduct. It had an effect on her self-esteem, how she views herself, doubting her capacity to achieve simple tasks.

[25] With respect to the prosecution's submission regarding aggravating circumstances, I do not accept that there was substantial harm related to the conduct of additional training which was required as a result of the offender's conduct. No doubt that having the offender repeat his BMQ did cause some inconvenience to the unit, but there is no evidence that it constituted substantial harm. I also do not accept that the offender's age was an aggravating factor. In fact, there is no evidence that there was any age gap with the other candidates. This statement is made on the assumptions that, since a person of 16 or 17 years of age can enrol in the CAF, the majority of BMQ candidates are of this age. Furthermore, even if this were true, I do not consider the age gap to be important enough to be considered an aggravating factor.

Mitigating factors

[26] The Court also accepted counsel's submissions regarding mitigating circumstances and took the following factors into consideration:

(a) this is a first offender;

(b) the offender accepted responsibility for his actions by pleading guilty before this Court, dispensing with the need for the victim to have to

testify, and where more resources would be required to sustain a longer, costlier trial;

(c) the offender had to recommence the BMQ, delaying his career advancement; and

(d) he apologized publicly to the victim. He also wrote an essay that does expose the offender's newly found understanding of the consequences of such conduct, and of the issue of harassment generally. It also exposes, to use defence counsel's words, the offender's own vulnerability with respect to his personal experience with such matter.

The offender's situation

[27] The offender is 26 years old. He enrolled in the CAF on 25 July 2019. He is now a private (Basic), having completed the BMQ. He is single and has no dependant. Having been a CAF member for just over a year, the offender's records are sparse. He does not have a conduct sheet.

Parity

[28] Having considered the circumstances surrounding the commission of the offence and the personal situation of the offender, the Court briefly looked at precedents for similar offences to determine whether the joint submission is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The court reviewed the two cases submitted by the prosecution, and also considered *R. v. Malone*, 2019 CM 5004, where the offender, a warrant officer (WO), pled guilty to a charge pursuant to section 129 of the *NDA* for sending images of a sexual nature to his subordinate's cell phone. Counsel had divergent views on sentencing. There was no touching involved and the conduct took place over a short period of time. WO Malone was sentenced to a reprimand and a fine in the amount of $1,500. The Court also considered *R. v. McCabe and Gibson*, 2010 CM 2008 where a punishment of a severe reprimand with a fine in the amount of $4,000 was imposed on Leading Seaman McCabe who had engaged in repeated touching of one of the complainants. A severe reprimand and a fine in the amount of $3,000 was imposed on Corporal Gibson. Finally, the Court considered *R. v. Duhart*, 2015 CM 4023 where a severe reprimand and a fine of $4,000 were imposed. After a brief review of these precedents, the Court concludes that the joint recommendation meets the parity principle.

Conclusion

[29] The Court reviewed the documentary evidence introduced as exhibit and considered counsel's submissions. It is apparent that they carefully assessed the offender's specific circumstances when they arrived at their joint submission. Counsel overall identified and considered the most relevant aggravating and mitigating factors surrounding the commission of the offence. Counsel properly addressed the applicable

principles and objectives of sentencing in this case. I am therefore satisfied that the documents introduced as exhibits provided 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 and specific deterrence as well as reintegration of the offender into military life are met with the proposed sentence. Consequently, the Court finds that the joint recommendation is not contrary to the public interest and would not bring the military justice system into disrepute.

[30] Finally, in reading the offender's essay, it is clear that he has accepted responsibility for his actions and understands the consequences of his conduct. In light of the specific circumstances of the offender, including the post-offence conduct, the Court is of the view that the offender has the potential to continue his career in the CAF.

FOR THESE REASONS, THE COURT:

[31] **FINDS** Private Bruce guilty of one charge under section 129 of the *NDA*.

[32] **SENTENCES** the offender to a reprimand combined with a fine in the amount of $3,000, payable in a monthly instalments of $500 starting 1 November 2020.

Counsel:

The Director of Military Prosecutions as represented by Major J.D.H. Bernatchez

Major F.D. Ferguson, Defence Counsel Services, Counsel for Private J.M. Bruce