



COURT MARTIAL

Citation: *R. v. Robertson*, 2020 CM 5012

Date: 20201013

Docket: 202031

Standing Court Martial

4 Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private A.J. Robertson, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, 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in these proceedings as a victim or a complainant, including the person referred to in the charge sheet as R.R., shall not be published in any document or broadcast or transmitted in any way.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] Private Robertson pled guilty to a charge under section 93 of the *National Defence Act (NDA)*, an offence of “behaved in a disgraceful manner,” in that he kissed

R.R. and put his hands on her hips without her consent. The prosecution presented no evidence on the first charge pertaining to a sexual assault, therefore the Court found the offender not guilty of that charge. Having accepted and recorded the guilty plea on the second charge, 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 taking into consideration the offender's situation. In order to assist the Court in determining the appropriate punishment, both counsel are recommending jointly that this Court impose the punishment of a fine in the amount of \$1,900, combined with the minor punishment of confinement to barracks for a period of 21 days.

Circumstances of the offence

[2] The offender formally admitted as true the circumstances surrounding the commission of the infraction as described in the Agreed Statement of Circumstances, which can be summarized as follows. At the time of the commission of the offence, Private Robertson and R.R. were students at the Royal Canadian Electrical and Mechanical Engineers School (RCEME School), Canadian Forces Base (CFB) Borden, Ontario. Before the incident, Private Robertson and R.R. barely knew each other. On 15 May 2019, during a celebration called the "RCEME Day", Private Robertson drank six to eight alcoholic beverages at lunchtime. He continued drinking alcohol throughout the afternoon.

[3] At around 2000 hours on the same day, Private Robertson joined R.R. and her friends, two privates, at the smoking pit just outside of building A-150. The group of three immediately noticed that Private Robertson was inebriated. Private Robertson asked R.R. to come with him to a nearby barracks. Upon her refusal, Private Robertson got closer to R.R. and whispered in her ear. R.R. became uncomfortable and leaned away. Private Robertson then lifted his shirt to reveal his abdomen. R.R. then asked her two friends to come with her to her room. Private Robertson followed the group to R.R.'s room.

[4] Afterwards, the group decided to head to the smoking pit located just outside the Artisan barracks. Again, without being invited, Private Robertson followed them. At the smoking pit, seeing that Private Robertson leaned in to give her a kiss, R.R. rapidly moved in between her two friends. Private Robertson approached R.R. again and she pushed him away, keeping her arms up in protection. Private Robertson told her that he was sorry and that he would not try anything again. Believing him, R.R. brought her arms down at which point Private Robertson leaned in again to kiss her. R.R. immediately brought her arms up to protect herself, but Private Robertson grabbed hold of them and leaned in further to kiss her on the lips. R.R. managed to turn her head and Private Robertson ended up kissing her cheek instead.

[5] After that incident, one of R.R.'s friends gave a cigarette to Private Robertson and the group of three left the smoking pit in order to get away from Private Robertson. However, Private Robertson managed to find the group of three inside the laundry room

of a nearby barrack. The group left the laundry room to go to a colleague's room. Private Robertson followed them again. On their way to the room, R.R. saw someone she knew and proceeded to walk backwards to say hello. Private Robertson moved behind her and put his arms around her waist in an attempt to pull her hips back into his crotch. R.R. rapidly pulled away and Private Robertson lost his balance, hitting the wall closest to them.

[6] Arriving at their colleague's room, the group entered, Private Robertson in tow. The group of three, Private Robertson and the two colleagues began socializing and drinking alcohol. At some point, Private Robertson leaned towards R.R. who was sitting on a chair, then placed his arm over the chair beside R.R.'s leg. R.R. moved to sit on the other bed with her friends. She said aloud, "He is harassing me." Private Robertson answered, "That's what you can expect being a woman in the CAF," or words to that effect. At that point in time, Private Robertson was heavily intoxicated.

[7] Eventually, the group decided to head to the smoking pit. Private Robertson followed them. While heading to the smoking pit, Private Robertson moved behind R.R. and put his hands on her hips in an attempt to bring her close to his body and embrace her. R.R. immediately pushed him away. Shortly after the group arrived at the smoking pit, R.R. walked away and entered a barracks to get away from Private Robertson. Once inside the barracks, R.R. started running and saw that Private Robertson was running after her. She became suddenly very worried and scared of what would happen if he were to catch her. As she turned a corner in the hallway, she saw another friend. She asked him to accompany her back to her room. Seeing R.R. with another person, Private Robertson turned around and left the barracks.

[8] On 16 May 2019, a complaint regarding the 15 May 2019 incident involving Private Robertson and R.R. was made to the Military Police Unit Borden. On 16 May 2019, Private Robertson was ordered by his company sergeant-major to move out of the Personnel Awaiting Training Platoon's barracks and into the base transient quarters for the weekend. After the incident, R.R. did not see Private Robertson again.

Issue

[9] The Court must now determine whether the joint submission, a punishment of a fine in the amount of \$1,900, combined with the minor punishment of confinement to barracks for a period of 21 days, complies with the legal requirements as set out in the Supreme Court of Canada (SCC) decision, *R. v. Anthony-Cook*, 2016 SCC 43.

Positions of the parties

Prosecution

[10] The prosecution contends that, although the joint submission of a fine in the amount of \$1,900 combined with 21 days' confinement to barracks is lower on the range of punishment, this sentence meets the public interest test, in light of the

circumstances surrounding the commission of offence and of the offender's situation. In support of his submissions, he mentioned that several factors influenced his position, affirming the joint submission was the product of rigorous negotiation between the parties. He confirmed he was informed by all relevant circumstances of the offence. Evidentiary issues affecting the prosecution of the case, some of which included potential breaches of the offender's *Charter* rights, such as the issue pertaining to the impugned Chief of Defence Staff Order which is still ongoing, were considered to be a substantial aspect of the prosecution's position. He also considered the victim and the commanding officer (CO)'s respective views. The prosecution explained that he was informed of the principles established in *R. v. Balint*, 2011 CM 1012 where the then-Chief Military Judge stated that the imposition of minor punishments, typically used at summary trial, is conditional on the personal knowledge of the offender by his or her own CO. In the absence of such a particular relationship, it is the duty of counsel to provide the information that is so critical when imposing any minor punishment at courts martial. Furthermore, mentioning *R. v. Bourque*, 2020 CM 2009, the prosecution explained that he considered the indirect consequences of the finding on the offender. He contended that this resolution would allow the offender and the victim to move on and pursue their respective careers. The guilty plea also represents an economy of resources for the military justice system. He explained that he considered the effects of section 249.27 of the *NDA* on the offender, as the latter will be subjected to a criminal record as a result of this conviction.

[11] From a prosecutorial perspective, the following four sentencing objectives provided for at section 203.1 of the *NDA* should prevail when examining the proposed sentence: deterrence, denunciation, rehabilitation and to promote a habit of obedience. He also explained how a fine combined with a confinement to barracks would address various aspects of the particular circumstances of this case. This joint submission would address the issue of the disciplinary breakdown of the offender, who violated the integrity of a fellow soldier. More particularly, the fine aims at denouncing the conduct, addressing the objective of general deterrence while assisting in rehabilitating Private Robertson, an approach established by the presiding judge in *Balint* at paragraph 22 of the decision. Referring to "A review of Bill C-77" by retired Military Judge Jean-Guy Perron, a document provided to the Court as part of his submissions, the prosecutor contends that a punishment of confinement to barracks as a minor punishment is similar to a punishment of detention, since it involves a form of deprivation of liberty.

[12] The prosecutor contends that this offence is objectively serious. Additionally, Private Robertson was disrespectful toward his peer, violating her physical integrity on at least three occasions. He also found aggravating the fact that the victim had to flee and seek help from other Canadian Armed Forces (CAF) members who had to intervene in order to protect the victim from the action of the offender. The offence also occurred on base. Further, the prosecution was informed of the circumstances of the offender, in particular his guilty plea and the fact that he is a first-time offender. His apology reflects genuine remorse. As for his rehabilitation, the prosecution noted the remedial measure, which was imposed for a period of six months and completed in 2019.

Defence

[13] Referring to the leading case pertaining to dealing with a joint submission, the *Anthony-Cook* decision, defence counsel mentions that serious considerations were given to the offender's situation before arriving at a joint submission. He also refers to section 718 of the *Criminal Code*, the equivalent of section 203.1 of the *NDA* which relates to the applicable sentencing principles, particularly to denounce unlawful conduct, to deter individuals from committing the offence, to rehabilitate the offender and promote a sense of responsibility. He assures the Court that both counsel have considered all relevant factors, and focussing on mitigating factors, explains that the offender showed remorse in many ways. When he learned of what happened that evening, he felt really bad. He recognized his wrongdoing. He cooperated with the investigators and indicated his intention to plead guilty at the earliest opportunity. He did not want the victim to have to testify in court. He did not talk to the victim following the incident, but wanted to apologize. As a result of his conduct that day, Private Robertson managed his alcohol consumption and sought mental health assistance. Furthermore, once the allegations were brought to the attention of the chain of command, Private Robertson was moved out of the barracks. Finally, the offender does not have a conduct sheet. This is an isolated event that was out of character for the offender. Defence counsel contends that the joint submission which includes a confinement to barracks, would have a deterrent effect on the offender.

Offender speaking to sentence

[14] The Court offered Private Robertson an opportunity to speak before rendering its decision. Private Robertson expressed his disgust of himself upon learning of his conduct that night, since he could not remember what happened as a result of his intoxication. He mentioned being particularly troubled and frightened when he found out he chased the victim that night. During his address to the Court, the offender apologized directly to the victim, who was attending through video conference.

Evidence

[15] The Court examined and considered the Agreed Statement of Circumstances, 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 prosecution also provided a document titled: "Defaulters" and is referenced as Annex A to 2 Svc Bn SI 308 dated April 2017. It was admitted by the defence that this document is issued under the authority of the offender's CO. There was also a copy of DAOD Form 5019-4A titled Remedial Measures and dated 23 October 2019. The victim read her statement in court via telecommunications means. Finally, the defence introduced an undated document referring to the offender's biography where the offender speaks to the events that unfolded on 15 May 2019, as well as a copy of the offender's resume.

Analysis

[16] When determining a sentence, the Court must be mindful of the fundamental purposes of sentencing, which 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. These fundamental purposes shall be achieved by imposing just sanctions that have one or more of the objectives listed at subsection 203.1(2) of the *NDA*. Additionally, the Court shall be guided by the fundamental principle of sentencing: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” found at section 203.2 of the *NDA*.

[17] 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. However, although counsel have an in-depth knowledge of the circumstances of the offence and defence counsel is privy to the offender’s personal situation, it is up to the Court to determine whether they have considered all relevant factors.

[18] 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 SCC 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.

[19] 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.

[20] Counsel recommends that a fine in the amount of \$1,900 be imposed, combined with a minor punishment, a confinement to barracks for 21 days, the latter punishment being a minor punishment set out at section 146 of the *NDA*. Minor punishments are not common occurrences at courts martial, thus an examination of the applicable rules is therefore required.

Confinement to barracks

[21] Article 104.13 of the QR&O sets out conditions for the imposition of minor punishments, which includes confinement to ship or barracks. It provides that the CO of a base, unit or element shall ensure that rules governing persons undergoing minor

punishments are issued; that the rules are made known to those persons and that they are enforced. It also provides the minor punishments that a court martial may impose are subject to the conditions prescribed in the table to article 108.24 of the QR&O (Powers of Punishment of a Commanding Officer). This table confirms that a fine may be accompanied by the imposition of this punishment, however it limits to 21 days the maximum period that can be imposed, and it can only be imposed on officer cadets, master corporals, corporals and privates. It includes extra work and drill for an equal term. In accordance with article 108.37 of the QR&O, the offender undergoing such punishment shall not, without the specific permission of the CO, be permitted during the hours he is not on duty, to go beyond the geographic limits prescribed by the CO in standing orders.

[22] Although the effect of a confinement to barracks involves depriving the offender of his liberty, it still constitutes a minor punishment that aims at instilling discipline by imposing tasks unique to military life during a relatively short period of time. As explained by the notes in the relevant QR&O, the goal of minor punishments is to correct the conduct of service members who have committed a service offence of a minor nature while allowing those same members to remain productive members of the unit. They also specify that the role of rules for the administration of these punishments is vital. These rules are the vehicle through which the CO may tailor, to meet unit requirements, a program of extra work and drill to improve the military efficiency and discipline of offenders. However, such rules should not be severe enough to transform the nature of the confinement into a disguised detention.

[23] Upon being queried by the Court, the prosecution confirmed he was satisfied that the governing instructions, provided as exhibits, would not unduly deprive the offender's liberty as to equate to a detention. Although the rules themselves are fairly restrictive of the defaulter's liberty by imposing a strict schedule, they do allow for certain movements. The Court is therefore satisfied that, with this information and the evidence introduced by counsel in relation to Private Robertson's personal and professional situation, counsel have provided the essential information this Court needs to properly assess the minor punishment component of the joint recommendation in light of the rehabilitative part of the punishment, as stated in the *Balint* case.

Aggravating factors

[24] In determining whether the proposed punishment meets the public interest test, I have considered the aggravating factors specific to this case:

- (a) The conduct was repetitive, and escalated to the point where the offender chased the victim inside the building when she was initially alone. This caused the victim to be very worried and scared of what would happen if the offender was to catch her;
- (b) There was touching of a sexual nature;

- (c) A review of the victim impact statement indicates that although the victim does not seem to have suffered emotional trauma from the offender's conduct, it did have a professional impact on her; and
- (d) The offender was very intoxicated to the point that he did not remember what happened that night in relation to the victim.

Mitigating factors

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

- (a) The offender is a first-time offender;
- (b) The offender accepted responsibility for his actions by pleading guilty before this Court; he did signal his intent to do so at the very first opportunity, dispensing with the need for a longer and costlier trial; and
- (c) A remedial measure was imposed on him as a result of the commission of the offence.

Other factor

[26] The prosecution mentioned that the existence of evidentiary issues in the file leaned toward a more lenient sentence. Unfortunately, no further details were provided. Nevertheless, the Court accepts that the prosecution's case presented certain challenges. Also, the views of the victim and CO were taken into consideration – in the context of a minor punishment, which is a rare occurrence at courts martial, and which is administered by the CO, it was important that the CO's perspective on this matter be sought. I accept counsel's view that deterrence, rehabilitation and promoting a habit of obedience are the most important objectives for this case.

The offender's situation

[27] The offender enrolled in March 2018. He is 41 years old. He is single and has no dependents.

Parity

[28] The Court reviewed the cases submitted by the prosecution, along with other cases such as *R. v. MacDonald*, 2010 CM 1018 and *R. v. Foo*, 2010 CM 3002, where a severe reprimand with a fine over \$2,000 was imposed. However in these two cases, there were aggravating circumstances that are not present in the case at bar, such as more invasive touching, or where the offender was superior in rank. Thus, the proposed sentence meets the parity principle.

Conclusion

[29] The Court is satisfied that counsel carefully assessed the offender's specific circumstances when they arrived at their joint submission. They also identified and considered the relevant aggravating and mitigating factors surrounding the commission of the offence, and properly addressed the applicable principles and objectives of sentencing in this case. Furthermore, the evidence and submissions of counsel provide sufficient information for the Court to make its determination on the propriety of imposing the minor punishment of confinement to barracks. It is apparent that the imposition of this punishment alone for this offence would not have been sufficient, and would not have met the public interest test. However combined with a fine, which is higher on the scale of punishments, the recommended joint submission is in the public interest and does not bring the administration of justice into disrepute. Private Robertson's heartfelt apology is a strong indication that he is indeed remorseful. He accepted responsibility for his actions. The joint recommendation gives him a chance for reintegration into military life. 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.

FOR THESE REASONS, THE COURT:

[30] **FINDS** Private Robertson guilty of one charge under section 93 of the *NDA*.

[31] **SENTENCES** the offender to a fine in the amount of \$1,900, payable forthwith, combined with the punishment of 21 days' confinement to barracks.

Counsel:

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

Major B. Tremblay, Defence Counsel Services, Counsel for Private A.J. Robertson