COURT MARTIAL

Citation: *R. v. MacDonald*, 2021 CM 4002

Date: 20210310
Docket: 202104

Standing Court Martial

4th Canadian Division Training Center Meaford
Meaford, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private G. MacDonald, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Private MacDonald, having accepted and recorded your plea of guilty in respect of the one charge on the charge sheet, the Court now finds you guilty of that charge for having quarrelled with a person subject to the Code of Service Discipline, contrary to paragraph 86(a) of the *National Defence Act* (*NDA*).

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 recommended that I impose a sentence constituted of the minor punishment of confinement to barracks for a period of fifteen days.

[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 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, avoiding the stress and expense of a trial and allowing efforts to be channelled into other matters. Furthermore, offenders who are remorseful may take advantage of a guilty plea to begin making amends. The most important benefit of joint submissions is the certainty they bring to all participants in the administration of justice.

[5] Yet, even if certainty of outcome is important for the parties, 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 a military judge. As recognized by the Supreme Court of Canada, 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 following either a trial or a guilty plea. It is the only 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 case, the prosecutor read a Statement of Circumstances which was formally admitted as accurate by Private MacDonald. It was entered in evidence as an exhibit, along with other documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51.

[9] For its part, the defence produced an Agreed Statement of Facts describing the personal situation of Private MacDonald before and since the offence.

[10] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their position 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 committed in this case.

[11] The Statement of Circumstances, the Agreed Statement of Facts, the submissions of counsel and the information on the documents entered as exhibits reveal the following circumstances relevant to the offence and the offender.

The offence

[12] The Statement of Circumstances reveals the following information as it pertains to the offence:

(a) On or about 5 March 2020, Private MacDonald, along with other members of his unit, was taking part in a training exercise outdoors, in support of his infantry qualification. The nature of the training exercise involved the digging and manning of trenches;

(b) During the early hours of 5 March 2020, Private MacDonald was part of Delta fire team in a trench with his fire team partner, Private Lauzon;

(c) Private Curwin, and his fire team partner were part of Charlie fire team and were manning a trench nearby;

(d) In the early hours of the day, between midnight and 0130 hours, Corporal Maschke was on shift supervising the members participating in the training exercise. He directed the section senior and his fire team partner, Private MacDonald, switch trenches with Charlie fire team in order to have a few hours of sleep;

(e) In response to Corporal Maschke's direction, Private MacDonald approached Private Curwin in his trench and requested that he and his fire team partner temporarily switch positions so that they could obtain some sleep;

(f) Private Curwin refused and the two engaged in a heated argument. Private Curwin was not aware of Corporal Maschke's directions;

(g) At one point during the argument, Private MacDonald obtained a handful of heavy snow approximately the size of a football, dumped it upon Private Curwin's head and stormed off; and

(h) Private Curwin reported what occurred. He had minor bruising and swelling near his eye. He was ultimately medically cleared and returned to his duties. He did not wish to submit a victim impact statement and harbours no ill-feelings towards the offender, as mentioned by the prosecutor.

The offender

[13] Private MacDonald is currently serving at the 4th Canadian Division Training Centre, at Meaford, Ontario. At the time of the offence, he had less than one year in the service since his enrolment in May of 2019. Since then, he strived towards improvement and completed a number of courses without incident, recently graduating from his Development Period level 1 in February 2021, with an award for the most improved candidate at the graduation ceremony. Private MacDonald has made good strides in his progress and career since the offence and has hopes of continuing a long career within the Canadian Armed Forces (CAF), starting with a posting to the 2nd Battalion, The Royal Canadian Regiment in Gagetown, New Brunswick in a few weeks.

[14] Private MacDonald is twenty-nine years old and single. He benefits from a supportive family and comes before the Court without a record or conduct sheet.

Seriousness of the offence

[15] The Court has considered the objective gravity of the offence in this case. The offence of having quarrelled with a person subject to the code of service discipline, contrary to paragraph 86(a) of the *NDA*, attracts a maximum punishment of imprisonment for less than two years. It is therefore an objectively serious offence going to the core of the need to maintain a disciplined armed force. Indeed, tolerating quarrels and disturbances, however minor, may lead to a belief that violence and disrespect are acceptable ways to resolve conflicts and lead to a breakdown in discipline. As stated recently in the matter of *R. v. Castagner*, 2020 CM 4010 at paragraph 25, quarrels "cannot be tolerated within the work and service environment as they compromise the necessary trust that must exist both between members of the CAF and between the CAF and the public if Canada is to maintain a professional and efficient military force."

Aggravating factors

[16] The circumstances of the offence and the offender in this case reveal an aggravating factor namely that the quarrel caused injuries, albeit minor, to a fellow soldier.

Mitigating factors

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

(a) First, Private MacDonald's guilty plea today, which avoided the expense and energy of running a trial and demonstrates that he is taking full responsibility for his actions in this public trial in the physical and virtual presence of members of his unit and of members of the broader military community;

(b) Second, the fact that Private MacDonald is a first-time offender; and

(c) Third, the promising performance by Private MacDonald during his training here in Meaford, especially the improvement he displayed, which bodes well to a promising future career in the infantry.

Objectives of sentencing to be emphasized in this case

[18] The circumstances of this case require that the focus be placed on the objectives of denunciation and deterrence in sentencing the offender. Specifically, the sentence proposed must be sufficient not only to deter Private MacDonald from reoffending, but must also denounce his conduct in the community and act as a deterrent to others who may be tempted to engage in the same type of unacceptable behaviour. In short, it must show that misbehaviour has consequences. At the same time, I cannot lose sight of the objective of rehabilitation: as highlighted by counsel for the offender, the sentence proposed must not compromise the efforts invested by Private MacDonald to rehabilitate himself, especially as he progresses in his training and joins a front-line unit.

Assessing the joint submission

[19] The submissions from counsel contained references to numerous previous cases, which provided some assistance in determining that the sentence being proposed is within the very broad range of sentences imposed in the past. It has been said previously that minor punishments, including specifically confinement to barracks, are unusual punishments to be imposed at courts martial. Although it may be statistically true, it does not make confinement to barracks inadequate or otherwise suspect. It is an entirely acceptable punishment and is, as specified at Note (D) to QR&O article 104.13, a particularly appropriate vehicle to correct the conduct of service members who have committed service offences of a minor nature while allowing those members to remain productive.

[20] Confinement to barracks is an appropriate punishment in the circumstances of this case to address misconduct committed on the spur of the moment, which caused very minor injuries to a member who harbours no ill feelings towards the offender.

[21] It is also a punishment which has a significant deterrent effect, both specific and general. Indeed, it has a direct impact on the offender who experiences the additional confinement, accompanied by extra work and drill for an equal term, in a manner that is

usually much more personal than a fine for instance. It is also a punishment that is usually visible within unit lines and with which others can associate and reflect.

[22] 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. That being said, I wish to congratulate counsel on coming up with a joint submission for a punishment that is entirely appropriate, and the unit, the 4th Canadian Division Training Centre, for being prepared to commit the resources necessary for administrating this punishment, a commitment which may have made confinement to barracks less attractive in some environments in the past.

[23] As stated earlier, I may depart from the joint submission of counsel only if I consider that the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

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

[25] As recognized by the Supreme Court of Canada, trial judges must refrain from fidgeting with joint submissions 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 and victims. 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, including ensuring that the accused's plea is voluntary and informed. 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, as they have demonstrated in this case.

[26] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the aggravating and mitigating factors mentioned previously, I have no hesitation in concluding that the sentence being jointly proposed would not bring the administration of justice into disrepute or would otherwise be contrary to the public interest. It must, therefore, be accepted.

[27] Private MacDonald, I agree with your counsel to the effect that you have made a wrong choice on the spur of the moment and that you are truly remorseful. I am confident you now understand the potential impact of your offence on discipline and

that you are now ready to move forward with your career, especially at this key moment of joining a front-line unit. From what I have been told about you, I believe you have made the right choice by joining the CAF. However, I hope that this experience with the military justice system taught you that in order to take advantage of the tremendous opportunities offered by a career in the CAF, you must avoid at all times any behaviour that would show disrespect to colleagues, superiors and subordinates. I wish you the best for the continuation of your career and I am hopeful that you will not reoffend.

FOR THESE REASONS, THE COURT:

[28] **SENTENCES** Private MacDonald to the minor punishment of confinement to barracks for a period of fifteen days.

Counsel:

The Director of Military Prosecutions as represented by Major M.-A. Ferron and Major A. McGarva

Captain D. Mansour, Defence Counsel Services, Counsel for Private G. MacDonald