



COURT MARTIAL

Citation: *R. v. D'Arcy*, 2021 CM 4004

Date: 20210427

Dossier: 202015

Standing Court Martial

Canadian Forces Base Comox
Comox, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Captain N.C. D'Arcy, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Captain D'Arcy, having accepted and recorded your plea of guilty in respect of the one charge remaining on the charge sheet, the Court now finds you guilty of that charge for conduct to the prejudice of good order and discipline, contrary to section 129 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 a reprimand.

[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 Captain D'Arcy. 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. In addition, the prosecutor entered in evidence a Declaration of Impact, in the form of a letter signed by Lieutenant-Colonel Patrick Castonguay, Commanding Officer of 407 Long Range Patrol Squadron (LRP Sqn) at the time of the offence.

[9] For its part, the defence produced a letter from Major Louis St-Pierre, attesting to the good character and performance of Captain D'Arcy at 407 Sqn as well as an

Agreed Statement of Facts describing the personal situation of Captain D’Arcy before and since the offence.

[10] In addition to this evidence, counsel made submissions to support their position on sentence on the basis of the facts and considerations relevant to this case, in order to assist the Court to adequately apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed.

[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 17 May 2019, Captain D’Arcy was the Long Range Patrol Crew Commander (LRPCC) assigned to a Crew Operational Readiness Exercise (COREX), a Force Generation mission, aboard the CP140M Aurora.
- (b) The LRPCC is responsible to the Squadron Commanding Officer for a number of important functions, including the effective completion of the assigned mission and the tactical training, categorization, qualification, advancement and operation readiness state of the crew.
- (c) Pursuant BGA-100-001/AA-000, National Defence Flying Orders, a flight or a mission must be in the direct interest of DND business and is authorized only to fulfil certain purposes. The LRPCC, on behalf of the Flight Authorization Officer who authorizes the missions, must ensure that each flight is conducted only for the purpose for which it has been authorized in accordance with applicable Orders and Regulations.
- (d) The crew of the COREX on 17 May 2019 was composed of 12 personnel. Besides Captain D’Arcy as LRPCC, the aircraft was crewed by Captain Miller (First Officer), Master Corporal Rioux (Flight Engineer), Captain Frate, senior Air Combat Systems Operator - ACSO, Lieutenant Paone (ACSO), Captain Berry (ACSO) and six Airborne Electronic Systems Operators – AESOps, at the ranks of Master-Corporal to Aviator. As the LRPCC and aircraft captain, Captain D’Arcy was the final authority on the aircraft.
- (e) The flight departed at 1502Z and landed at 2139Z. The COREX was planned primarily as an exercise for the ACSOs and the AESOps, some of whom were working toward category upgrades. The mission was

designed to practice different capabilities, including identification classification runs, radar homing to surface vessels, anti-submarine warfare training and a simulated Search and Rescue (SAR) scenario, and to instruct and assess junior aircrew in executing their tasks in such events.

- (f) CYD106, a military danger area off the west coast of Vancouver Island, was the designated training area to perform the primary training objectives of the COREX. While in CYD106, following three training evolutions, Captain D’Arcy realized that he was late to check in to a personal flight scheduled for the following day and did not have reception on his cell phone in order to check in. He initiated a climb and entered a high-power mode of flight to transit towards Tofino in order to gain cell phone reception.
- (g) Captain D’Arcy explained over the flight deck intercom that he intended to head to Tofino and climb in order to get cellular reception to check in to a personal flight, adding that the training scenario could continue once he accomplished this task. About 10 minutes in the transit, he asked Captain Frate whether it was acceptable to place the SAR scenario’s “last known position” over Tofino. Captain Frate explained that the scenario he had in mind with several training objectives he needed to achieve for one of the ACSOs under training would have to be reset if they transited to Tofino. However, he then acquiesced to Captain D’Arcy’s actions.
- (h) Shortly after his discussion with Captain Frate, Captain D’Arcy continued transiting towards Tofino and climbed to a higher altitude. Approximately twenty-five minutes after initiating the transit, in vicinity of the Tofino aerodrome, Captain D’Arcy passed control of the aircraft to Captain Miller and directed him to orbit in place for approximately seven minutes while he carried out his personal task. The aircraft then proceeded back to CYD106 to carry on with the training mission, including the SAR scenario.
- (i) Some members of the crew expressed their frustration and disappointment with the decision-making that Captain D’Arcy displayed on that day.

The offender

[13] Captain D’Arcy joined the Canadian Armed Forces (CAF) in Vancouver in September 2012 as a pilot. He has served with 407 Squadron, here at Canadian Forces Base Comox since 2014 and obtained the qualifications required for the important role he is playing with the Squadron today, as well as several other qualifications and participation in exercises. He was deployed for three months on Operation IMPACT in

2016 where he flew over Iraq and Syria. He is currently lead pilot on a crew at 407 LRP Sqn and a LRPPC, which is the highest category attainable for a Long Range Patrol pilot.

[14] Major St-Pierre reports that Captain D'Arcy has been a leader amongst pilots at 407 Sqn and has set a strong example, providing valuable training and mentorship to squadron pilots in both administration and flight operations. Skilled and knowledgeable, Captain D'Arcy fosters a team environment amongst the squadron aircrew, and consistently works to increase the capabilities of his peers. His contribution as the Chief Flight Safety Officer (FSO) for 407 Sqn since 2018 is much appreciated as this constitutes a very demanding and important secondary duty in which he has shown great motivation, capability and ownership of the program. He consistently follows up with his findings and challenges his superiors and peers to ensure that flight safety measures are implemented and maintained.

[15] Captain D'Arcy is thirty-three years old. He is married and has a daughter. He comes before the Court without a record or conduct sheet. He is currently in the process of transferring to the Reserve Force and has been selected to take on a FSO role with 19 Wing Air Reserve Flight. Captain D'Arcy is remorseful for his actions, states that he has learned his lesson and is intent on leading by example in the future for his peers and subordinates alike.

Seriousness of the offence

[16] The Court has considered the objective gravity of the offence in this case. The offence of conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*, attracts a maximum punishment of dismissal with disgrace from Her Majesty's service. It is therefore an objectively serious offence going to the core of the need to maintain a disciplined armed force.

[17] Of course, a broad range of circumstances can lead to offences under section 129. That is where the declaration of impact by Lieutenant-Colonel Castonguay becomes helpful to assist the Court to better understand to what extent the conduct admitted by Captain D'Arcy was prejudicial to good order and discipline. The alleged prejudice was multi-faceted.

[18] First, Captain D'Arcy lost the confidence of his commanding officer, who could no longer appoint him as a LRPPC with full confidence that he would exercise sound judgement, apply swift and adequate decision-making, follow and enforce policies and directives, uphold the CAF ethos and ethics and maximize the use of air assets. Indeed, the actions of Captain D'Arcy, in using precious and limited aircraft and crew training time while airborne for his own personal affairs, undermined all of these expectations.

[19] Second, the actions of Captain D'Arcy undermined the necessary confidence that subordinates must have in their superiors and in the chain of command. The leadership role of the LRPPC has to be recognised and respected for the Long Range

Patrol crew to be an effective team, operating in an environment conducive to positive cooperation. The actions of Captain D'Arcy were observed by his commanding officer as causing a loss of trust by his crew and colleagues locally as well as in the fleet. In Lieutenant-Colonel Castonguay's view, the respect and confidence by the leadership in the unit were eroded as a result of these actions, which would make any crew under his leadership to be ineffective.

[20] Finally, the impact of the misuse of the aircraft was assessed as significant as it included time for the crew airborne, fuel required to keep the aircraft in a hold as well as airframe hours which are closely tracked and required for the life of the aircraft. Such misuse of an important asset caused concerns fleet wide which required involvement and effort to manage and mitigate.

Aggravating factors

[21] The prosecution submits and I agree that the circumstances of the offence and the offender in this case reveal an aggravating factor, namely the fact that Captain D'Arcy abused the position of trust and authority in which he was placed as LRPCC by using the aircraft to further a personal purpose.

Mitigating factors

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

- (a) First, Captain D'Arcy'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 Captain D'Arcy is a first-time offender; and
- (c) Third, the performance by Captain D'Arcy as a pilot in the last seven years and his significant contribution to 407 Sqn and the maritime patrol community before and since the offence.

Objectives of sentencing to be emphasized in this case

[23] 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 Captain D'Arcy 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 that have been made by Captain D'Arcy to

rehabilitate himself within 407 Sqn, 19 Wing and the community, especially as he transitions to the Reserve Force.

Assessing the joint submission

[24] The submissions from counsel made no reference to previous court martial cases, the prosecutor mentioning the difficulty of finding cases where the misuse of assets was similar to the present case. The reason for the difficulty is in my view, with the outmost respect, that due consideration has not been given to previous aviation cases.

[25] As mentioned to counsel, the case of *R. c. Ex-capitaine M. Loiselle*, 2002 CM 27 provides an example of misuse of an aviation asset, in this case a CH 146 Griffon helicopter. The sentencing decision itself does not include the detail of the circumstances. The transcript of the court martial reveals that Captain Loiselle, on three flights between St-Hubert and Valcartier, Quebec, caused, while acting as aircraft captain or first officer, the aircraft to land at a farm near Trois-Rivières to load building materials. These which were subsequently flown to a hunting camp that the offender was in the process of building approximately thirty minutes north. They were dropped from a low altitude, before the aircraft carried on with whatever mission it was conducting. The contested sentencing hearing resulted in a reprimand and a fine of \$1,000 in consideration of what was assessed as a significant delay in the investigation. The prosecution requested a severe reprimand and a \$1,500 fine. The court in *Loiselle* distinguished other cases that had been previously decided at courts martial and summary trials by superior commander, also involving CH 146 helicopters in the same time frame, on the basis that these cases involved low flying in violation of flying orders and safety rules. Indeed, Captain Savaria (*R. c. Capitaine E.J.M. Savaria*, 2000 CM 66) had been sentenced at court martial to a severe reprimand and a fine of \$2000 for two flights to salute patrons of a well-known bar atop Place Ville Marie in downtown Montreal and to salute his parents. Captains Lemaire-Martin and Lavigne were sentenced to fines of \$1000 and \$1250 respectively, imposed by superior commanders, in relation to a flight below the Confederation Bridge on 9 August 1998.

[26] These non-exhaustive precedents provided some assistance in determining that the sentence being proposed is not outside of the range of sentences imposed in the past.

[27] In any event, 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 the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

[28] 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. The sentence being proposed is aligned with these expectations.

[29] As recognized by the Supreme Court of Canada, trial judges must refrain from tinkering 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 they are 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.

[30] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the aggravating and mitigating factors mentioned previously, I cannot conclude that the sentence being jointly proposed would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. It must, therefore, be accepted.

[31] Captain D'Arcy, your counsel submits that your conduct of 17 May 2019 reveals a lack of judgement on the part of an otherwise reliable and high-performing officer. I accept that, while pointing out that your actions had a negative impact on the efficiency and morale in your squadron and beyond. It is so because any display of bad judgement on the part of someone specifically entrusted to exercise good judgement is certain to leave superiors and subordinates alike in doubt about whether they can trust that person. By your wrong choice of actions you have allowed people to doubt you. Trust is a most important asset in your line of work. I am confident that you have now learned, following the incident and these proceedings, how easily it can be lost and that you are determined not to let that happen again.

FOR THESE REASONS, THE COURT:

[32] **SENTENCES** Captain D'Arcy to a reprimand.

Counsel:

The Director of Military Prosecutions as represented by Major M.-A. Ferron and Captain C.J. Fukushima

Major F. Ferguson and Lieutenant-Colonel D. Berntsen, Defence Counsel Services,
Counsel for Captain N.C. D'Arcy