



COURT MARTIAL

Citation: *R. v. MacKenzie*, 2021 CM 2011

Date : 20210518

Docket : 202113

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private G.R.S. MacKenzie, Offender

Before: Commander S.M. Sukstorf, M.J.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Private MacKenzie pleaded guilty to one charge contrary to section 129 of the *National Defence Act (NDA)*. Having accepted and recorded his plea of guilty with respect to the charge, the Court must now determine and pass sentence on the charge which reads as follows:

“FIRST CHARGE
Section 129 of the
National Defence Act

**CONDUCT TO THE PREJUDICE
OF GOOD ORDER AND
DISCIPLINE**

Particulars: In that he, on or about 7 June 2019, on a flight between Toronto, Ontario and Moncton, New Brunswick, did inappropriately touch A.Z.”

[2] The Statement of Circumstances filed in court reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. Pte MacKenzie joined the Canadian Armed Forces, regular force, on 18 July 2018. He is currently serving at the Canadian Forces Environmental Medicine Establishment at the Toronto detachment of the Defence Research and Development Canada Military Support Unit.

2. He is 25 years of age and he is single.

3. On 7 June 2019 Pte MacKenzie travelled from Borden, Ontario to Moncton, New Brunswick where he was to begin a new course as part of his medical technician training. On the flight from Toronto to Moncton he was seated next to the complainant, A.Z., a fellow med tech candidate whom he did not know personally.

4. The complainant was seated next to the window during the flight; Pte MacKenzie was seated next to her on the aisle.

5. The complainant was nervous during takeoff. Pte MacKenzie offered for her to hold his hand, which the complainant refused.

6. The complainant was trying to fall asleep during the flight, but she was uncomfortable. Pte MacKenzie offered that she could rest her head on his shoulder, which she did.

7. The complainant fell asleep but later awoke to find Pte MacKenzie’s hand on her lap, grabbing and rubbing her inner thigh. The complainant did not know how to react; at first, she froze. She then sat up straight but felt too scared and nervous to say anything. Pte MacKenzie removed his hand. She tried to move away and go back to sleep. Pte MacKenzie then tried to hold her hand but she pulled away.

8. A few days after the incident, the complainant mentioned to Pte MacKenzie that she was not comfortable with what had happened on the plane, which he seemed to accept. The complainant brought her concerns to her chain of command later that month.”

The joint submission

[3] In a joint submission, the prosecution and defence counsel recommend that the Court impose a sentence of twenty-one days of confinement to barracks coupled with a fine in the amount of \$2,790. In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada clarified that a trial judge must impose the sentence proposed in a joint

submission, “unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.” By entering into a joint submission, the constitutional right to be presumed innocent is given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this right is one we all stand to protect.

[4] Thus, in exchange for making a plea, the accused must be assured of a high level of certainty that the Court will accept the joint submission. The prosecution, who jointly proposed the sentence, will have been in contact with the chain of command as well as the victims, and is aware of the needs of the military and the surrounding community and is responsible for representing those interests. The defence counsel acts exclusively in the accused’s best interests, including ensuring that the accused’s plea is a voluntary and informed choice, and unequivocally acknowledges the accused’s guilt. As members of the legal profession and accountable to their respective law societies, the Court relies heavily on their professionalism, honesty, and judgement, as well as their duty to the Court.

The evidence

[5] In this case, the prosecutor read the Statement of Circumstances and provided all those documents required under the *Queen’s Regulations and Orders for the Canadian Forces*. The Statement of Circumstances was introduced on consent to inform the Court of the context of the incident that led to the charge before the Court. The Court was also provided with an Agreed Statement of Facts (ASOF) that provided those facts relevant to Private MacKenzie and his personal circumstances. Further, the Court benefitted from counsel’s submissions to support their joint submission on sentence, where they highlighted additional relevant facts and considerations. The prosecution and defence counsel also provided the Court with judicial precedents for comparison.

[6] In addition, the victim prepared for the Court a victim impact statement and requested that the prosecution read it out for the Court.

The offender

[7] Private MacKenzie is twenty-five years old. He enlisted on 18 July 2018 and so far has served for almost three years. He is currently serving as a member of the regular force and is stationed at the Canadian Forces Environmental Medicine Establishment at the Toronto detachment of the Defence Research and Development Canada Military Support Unit.

[8] Since the start of the investigation into the incident before the Court, Private MacKenzie’s career as a preventative medical technician has been put on hold and he has not progressed in completing the required training required for his military occupation.

[9] When the offender was given an opportunity to speak, he explained how hard he has worked to become a better soldier and medical professional. The ASOF reflects that Private MacKenzie's conduct and performance during counselling and probation monitoring period was found to have been satisfactory and it was recommended that Private MacKenzie continue with his career training.

[10] Aside from the incident before the Court, he has no conduct sheet or criminal record.

Purpose, objectives and principles of sentencing

[11] The fundamental purpose of sentencing in a court martial is to promote the operational effectiveness of the Canadian Armed Forces (CAF) by contributing to the maintenance of discipline, efficiency and morale, and to contribute to respect for the law and maintenance of a just, peaceful and safe society. The fundamental purpose is achieved by imposing sanctions that have one or more objectives as set out at subsection 203.1(2) of the *NDA*.

[12] The prosecution emphasized that, in their negotiations, she and defence counsel closely considered the objectives set out therein and, given the circumstances here, crafted a sentence that would facilitate the offender's reintegration back into the CAF. She also emphasized denunciation and deterrence. Specific deterrence relates to the offender personally so that he never engages in this type of conduct again, but there is also a wider message of general deterrence to ensure that other members also never engage in this type of conduct.

Aggravating and mitigating factors

[13] In imposing a sentence, the Court shall increase or reduce a sentence to account for any aggravating and mitigating circumstances relevant to the offence or the offender. After hearing the submissions of counsel, the Court highlights the following aggravating factors:

- (a) Sleeping victim. The inappropriate touching occurred when the complainant had fallen asleep during the flight and was particularly vulnerable. It was during that time that her personal space needed to be the most respected.
- (b) Unwanted touching. Although the complainant had placed her head on the offender's shoulder, she had already indicated that she did not wish to hold his hand. Yet, despite this, the offender proceeded to touch her.
- (c) Victim impact statement. In her statement, the victim explained that the incident affected her mental health and has significantly affected her relationship with men in general. She provided examples of how it has affected her both in her work life as well as personal life.

- [14] The Court notes there are several mitigating factors that must be highlighted:
- (a) Guilty plea. Private MacKenzie's plea of guilty for the offence as described in the Statement of Circumstances must be given its full weight. His guilty plea has saved the Court, counsel and the unit supporting the Court considerable time.
 - (b) Victim did not have to testify. Importantly, the offender spared the victim from having to come before the Court and engage in a public trial where she would have to testify.
 - (c) Personal reflection and rehabilitation. The guilty plea shows that the offender has reflected on the misconduct and assumed responsibility for what he did. The actions taken to improve his personal circumstances and to seek help reflects genuine remorse and willingness to correct any concerning behaviours. Notably, when the victim approached him after the incident, he listened and did not contest her concerns.
 - (d) Rehabilitation. After the incident was reported, Private MacKenzie was placed on counselling and probation for a period of six months which he successfully completed. During this period, he invested in gaining personal insight into his own behaviour and its effect on his fellow CAF members. In doing so, he reviewed CAF policies regarding conduct and discipline as well as statements of ethics and values. Private MacKenzie was also required to make several presentations on these topics.
 - (e) First-time offender. The offender has no conduct sheet or previous criminal record. This is the first disciplinary hearing of any type for him.
 - (f) Indirect impact on his career. Since these incidents were reported and investigated, the offender's training has been halted.

Parity

[15] In sentencing, the law requires that the sentence imposed be similar to sentences imposed on similar offenders for similar offences. The Court was provided with the following courts martial to consider: *R v Corporal Priemus*, 2006 CM 2013, *R. v. Duvall* 2018 CM 2027 and *R. v. Bernier*, 2015 CM 3015.

[16] In short, based on the case law and the submissions made by counsel, the sentence recommended in the joint submission is within an acceptable range for the type of punishment historically awarded for this type of offence.

Comments

[17] Private MacKenzie, your guilty plea is particularly important because it reflects your willingness to step forward to assume personal responsibility. It reveals that you recognize that you crossed the line with your conduct. I am comforted by your personal investment into rehabilitation and I am hopeful that it has made a difference. This is critical. Your actions reflect a breakdown of your personal discipline, as well as a betrayal of the loyalty owed to a colleague who was vulnerable. This can never happen again.

[18] If you are successful after your administrative review, you will begin your journey to become a medical professional, a role that provides you with the privilege of working in a specialist occupation which demands on a daily basis more discipline, respect and discretion than other professions. You will be required to work with people and patients who will be in vulnerable situations and your self-discipline and loyalty will be critical to the work you will do. You must understand that this type of behaviour is completely unacceptable not just because society has said so, but in the military operational perspective, it also whittles away the confidence of colleagues and patients with whom you must work with.

Conclusion

[19] After considering counsel's submissions in their entirety and all the evidence before the Court, I must ask myself whether the proposed sentence would, if reviewed by the reasonable and informed CAF member, as well as the public at large, be viewed as a breakdown in the proper functioning of the military justice system. In other words, would the acceptance of the sentence cause the general public to lose confidence in the military justice system?

[20] I agree with counsel that a fine in the amount of \$2,790 for a private is indeed significant as it amounts to 60 per cent of your monthly pay. Importantly, the twenty-one days of confinement to barracks will give you some time to reflect on your shortcomings and it will send a message to the larger community that this type of inappropriate conduct is unacceptable and will be punished.

Sentence

[21] Considering all the factors, the circumstances and gravity of the offence, the consequence of the finding and the sentence, the Court is satisfied that counsel have discharged their obligations in making their joint submission. The recommended sentence is in the public interest and does not bring the administration of military justice into disrepute.

FOR THESE REASONS, THE COURT:

[22] **FINDS** Private MacKenzie guilty of the first and only charge on the charge sheet.

[23] **SENTENCES** the offender to twenty-one days of confinement to barracks coupled with a fine in the amount of \$2,790 to be paid forthwith.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner

Major A. Gelinas-Proulx and Captain C. Da Cruz, Defence Counsel Services, Counsel for Private P. MacKenzie