



COURT MARTIAL

Citation: *R. v. Curativo*, 2021 CM 5017

Date: 20211005

Docket: 202152

Standing Court Martial

3rd Canadian Division Support Base
Detachment Wainwright
Denwood, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Sergeant P.J.L. Curativo, 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 that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as “J.F.”, shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Sergeant Curativo was charged with having committed an offence contrary to section 95 of the *National Defence Act (NDA)*, abuse of subordinates, in that he, on or about 19 December 2019, at Kanata, Ontario, did abuse J.F., a person who by reason of rank, was subordinate to him. The charge relates to an evening out and having dinner and drinks while on temporary duty, in the course of which the offender made crude sexual comments and engaged in unwanted touching of the victim. Having accepted and recorded the guilty plea, the Court must now determine and impose a fit and fair

sentence, proportional to the circumstances surrounding the commission of the offence and taking into consideration the offender's situation. In this context, counsel for the prosecution and counsel for the defence are jointly recommending that this Court impose a punishment of seven days' detention and a \$2,000 fine.

Facts

[2] The offender formally admitted as true the circumstances surrounding the commission of the infraction as described in the Statement of Circumstances, a document that was read in court by the prosecution. The document reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. At all relevant times, Sergeant Curativo was a Regular Force member of the Canadian Armed Forces, serving with Canadian Manoeuvre Training Centre.
2. From 15 to 21 September 2019, Sergeant Curativo was tasked to support EX-ATLAS STRIKE in Ottawa, Ontario along with other members of CMTC.
3. On 19 September 2019, Sergeant Curativo went out for dinner and drinks with other members.
4. Over the course of the evening, Sergeant Curativo consumed several alcoholic drinks and became intoxicated.
5. After having dinner, Sergeant Curativo twice told the complainant that he wanted to “suck his dick”, or words to that effect.
6. At approximately 2000, Sergeant Curativo went with the other members, including the complainant, to Burbs Pub & Eatery in Kanata. While at Burbs Pub & Eatery, one of the other members asked the complainant to keep an eye on Sergeant Curativo because he was acting inappropriately and appeared to be acting strange. As will later be described, Sergeant Curativo was on medication, Fluoxetine, which was an anti-depressant later found to be incompatible with his mental health condition at the time.
7. At approximately 2200, Sergeant Curativo and the complainant went to Wendy's Restaurant in Kanata. While they were ordering food at the front counter, Sergeant Curativo was bothering and pestering the complainant by brushing up against him, standing within his personal space, and at one point, patting him on the buttocks. The complainant felt embarrassed by the actions of Sergeant Curativo and believed some people in the restaurant were laughing at him.

8. The complainant then contacted another member from the hotel and asked him to come and pick them up, as the complainant was frustrated with Sergeant Curativo and the taxi he had called was taking too long to arrive.

9. While waiting to be picked up, Sergeant Curativo again told the complainant that he wanted to “suck his dick”, or words to that effect. The complainant told him to “get the fuck away” from him.

10. When they were picked up by two members, Sergeant Curativo and the complainant sat in the rear seats of the vehicle. While they were driving back to the hotel, Sergeant Curativo continued to bother the complainant by repeatedly poking him in the ribs and lower stomach area and grabbing at his thigh. The complainant told him to stop, saying “Stop! Get the fuck away from me” and pushed Sergeant Curativo away each time.

11. At the first opportunity provided in the courts martial process, Sergeant Curativo fully took responsibility for his conduct. Sergeant Curativo immediately sought professional assistance to address his uncharacteristic behaviour by attending counselling and psychological analysis. Through mental health assessments, it was determined that his uncharacteristic behaviour could have been caused by the mix of alcohol with an anti-depressant that may not have been right for his condition at that time.

12. Despite the mental health concern connected with the underlying offensive behaviour, Sergeant Curativo acknowledges the abuse of trust inherent in his conduct. Sergeant Curativo publicly denounces his conduct and the effect that such conduct has on the discipline, efficiency, and morale on his unit as well as on the Canadian Armed Forces generally.”

Issues

[3] The Court must now determine whether the joint submission of seven days’ detention and a \$2,000 fine meets the public interest test.

Positions of the parties

Prosecution

[4] In presenting the joint submission, the prosecution contends that the proposed sentence is a fit and appropriate sentence in this case. Counsel came to this resolution following thorough and lengthy negotiations. The prosecution affirms that this joint

recommendation is tailored to the specific circumstances surrounding the commission of the offence and to the offender's specific situation.

[5] He emphasizes the seriousness of this type of offence, which he contends is committed in the Canadian Armed Forces (CAF) with troubling regularity. He submits that the direct and indirect effects of such conduct on the complainants and on the CAF are generally significant. The commission of an offence of abuse of subordinates strikes at the very core of morale and discipline of the CAF. It compromises the military structure of the chain of command. As a result, he submits that general deterrence should be an important objective to consider when imposing the sentence in this case. He contends that the detention would ensure the offender's rehabilitation while having a denunciatory effect.

[6] The prosecution considered as aggravating the sexualized and persistent conduct toward the victim as well as the effect of the conduct on the victim and on discipline and morale in the CAF. The offender's rank was also an aggravating factor. In mitigation, he considered the guilty plea, which is an indication of remorse, the absence of a conduct sheet as well as Sergeant Curativo's medical history. In recommending this punishment, he relied on two cases to demonstrate that the range of punishment for this offence includes detention (see *R. v. Misiaczyk*, 2016 CM 3018 and *R. v. Snow*, 2015 CM 4003). He also relied on cases where a less severe punishment on the scale of punishments was imposed (see *R. v. Quirk*, 2006 CM 1023 and *R. v. McKenzie* 2014 CM 2017).

[7] The prosecution concludes that general deterrence and the offender's rehabilitation should be at the forefront of considerations. A sentence of seven days' detention with a fine of \$2,000 would meet these objectives while having a denunciatory effect.

[8] The Court expressed concern that the joint submission was outside the range of punishment and asked the prosecution whether a reduction in rank was considered as an appropriate sentence during the plea negotiations. The Court further sought submissions on two cases that it considered more relevant to establish the range of punishment for this type of offence involving a similar sexualized conduct: *R. v. Euper*, 2018 CM 2012 and *R. v. Duhart*, 2015 CM 4023. In an attempt to distinguish these two cases from the case at bar, the prosecution contended that these latter cases were less serious as no sexual touching was involved.

Defence

[9] Defence contends that the punishment of reduction of rank, which he considered, would have more dramatic effects on the offender. In fact, it would be more punitive than a short period of detention. He referred to court martial cases imposing confinement to barracks, such as *R. v. Bobu*, 2021 CM 5007 which guided him in the determination of the appropriate detention period to recommend.

[10] In support of the joint recommendation, defence counsel explained that Sergeant Curativo demonstrated good conduct in the military before and after the incident forming the basis of the charge. The offender sought medical help when required. In this regard, the circumstances surrounding the commission of the infraction, as provided by the prosecution in the Statement of Circumstances, demonstrate that Sergeant Curativo had a reduced blameworthy state of mind during the commission of the offence as a result of the mental health issues that he was suffering from at the time. He also explained that the offender has shown remorse. He also recognized the presence of aggravating factors such as the abuse of authority, the sexualized and persistent conduct and the objective gravity of the offence. Finally, he argues that the joint recommendation is not contrary to the public interest of the CAF or society at large. It addresses the need for general deterrence, since he believes that a punishment involving a reprimand would not address this objective appropriately.

Evidence

[11] 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 Court also considered the following documents introduced by the defence: six letters of reference; a listing of the offender's volunteer activities; documents related to the offender's medical history; and a physician's reported dated 1 October 2021.

[12] Sergeant Curativo also read a letter of apology in which he formally apologized to the victim and his family for the harm done. He also apologized to the members of his unit, which he felt he has let down.

Analysis

[13] When determining a sentence, the Court must be guided by the sentencing principles contained in *NDA* subsection 203.1(1) which 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.

[14] Section 203.2 of the *NDA* provides for the fundamental principle of sentencing as follows:

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

[15] 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. Counsel have 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 military justice 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 tends to show that they are indeed remorseful. The Supreme Court of Canada (SCC) in *R. v. Anthony-Cook*, 2016 SCC 43, 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 person 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.

[16] 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.

[17] 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.

Objective gravity of the offence

[18] In determining whether the proposed punishment of seven days' detention and a \$2,000 fine meets the public interest test, I have considered the objective gravity of the offence. An offence under section 95 of the *NDA* is punishable by imprisonment for less than two years or to less punishment. A component of that offence is the abuse of trust and authority aspect that it entails. The commission of this type of offence has a significant impact on morale and discipline. It is partly for this reason that an abuse of rank or other position of trust or authority was recognized by Parliament as an aggravating circumstance that a service tribunal imposing a sentence shall take into consideration when imposing a sentence (see subparagraph 203.3 (a) (i)).

Aggravating factors

- [19] The Court also considered the aggravating factors specific to this case:
- (a) The conduct was sexualized and persistent. It included, amongst other things, touching the buttocks and thighs of the victim. The offender also ignored the complainant's repetitive requests to stop the conduct that continued sporadically over the course of several hours. In other words, although the degree of force involved was minimal, the offender effectively tormented, over the course of an evening, a brother in arms who was also a subordinate by rank, someone whose well-being should have been a priority.
 - (b) And the impact on the victim, as described in his victim impact statement. The victim felt embarrassment and humiliation when the conduct happened, as he perceived others present in the public place were laughing while watching the conduct unfold. Although it is not clear if this was related to the commission of the infraction or other issues he was experiencing at the time, the victim described in his statement feeling stressed, unmotivated and paranoid when going to work. In any event, the complainant showed courage in coming forward and denouncing a superior. He mentioned in his statement being motivated by the need to protect his own subordinates.

Mitigating factors

- [20] The Court accepted counsel's submissions regarding mitigating circumstances. Therefore, the following factors were taken into consideration:
- (a) The reduced blameworthy state of mind of the offender at the time of the commission of the offence. It was determined through mental health assessments that Sergeant Curativo's uncharacteristic behaviour that evening would have been partly caused by the mix of alcohol with an antidepressant that may not have been right for his condition. The evidence also demonstrates that the offender was suffering from mental health issues during the same period. In considering the whole of evidence presented in the context of this sentencing hearing, the Court accepts that Sergeant Curativo had a reduced blameworthy state of mind when he committed the offence (see *R v Crossman*, 2013 CM 1010 at paragraph 16).
 - (b) The offender immediately sought professional assistance to address this uncharacteristic behaviour by attending counselling and psychological analysis.
 - (c) During the sentencing hearing, Sergeant Curativo indicated that he regretted his actions and apologized to the victim while reading his letter. This admission of responsibility occurred in a very formal and public

forum of this court martial. The offender also consistently shared his remorse with his health care providers, as evidenced by Exhibit 8. His post-offence conduct is indicative of the existence of genuine signs of remorse. He has taken full responsibility for his conduct toward the victim;

- (d) He has no conduct sheet and has served the CAF for over fourteen years with increased responsibilities.
- (e) And at the first opportunity provided in the court martial process, he took full responsibility for his conduct by signaling his intent to plead guilty, abandoning his right to have a contested trial, which saved important financial and personnel expenses particularly for the victim who would have had to testify. Counsel for the defence also informed the Court that the evidence of an expert would have been required.

[21] Ultimately, Sergeant Curativo assumed responsibility for engaging in this misconduct toward a subordinate. His guilty plea, apology and exemplary conduct before and after the commission of the offence are encouraging signs that he is on the path of rehabilitation.

The offender's situation

[22] Sergeant Curativo is thirty-four years old and he is single. He completed high school and joined the CAF in 2007 as a reserve force member. He component-transferred to the regular force in 2008 and then completed basic training. He was promoted to his current rank in January 2018. He was posted to Canadian Forces Base (CFB) Shilo from 2009 to 2019 from which he deployed to Afghanistan in 2013 for six months, and to the Ukraine from 2015 to 2016 for eight to nine months. He was posted to CFB Wainwright in August of 2019. Prior to these proceedings, he had an unblemished service history. The Court considered the six reference letters signed by superiors, subordinates, colleagues and friends within the CAF who have observed his work ethic, pro-social behaviour, dedication to others and to his community. They all attest to Sergeant Curativo's unwavering care for others and his continued positive attitude despite his upcoming trial by court martial. Sergeant Curativo has received the following medals and military decorations: General Campaign Star – SOUTH-WEST ASIA; the Special Service Medal – EXPEDITION; and the Canadian Forces' Decoration. In addition, he has a commendable history of volunteer service.

[23] In addition to these proceedings, he has lost training and deployment opportunities. He has been struggling with severe depression and other mental health issues for many years, with the most notable downward trend beginning in 2015, coinciding with his return from two back-to-back deployments. By 2018, it was confirmed that he was dealing with a long standing depression and was self-medicating with alcohol. His medication has been adjusted and is now properly fitted to his condition. He has taken great strides to maintain sobriety and avoid self-medicating

with alcohol, and continue with counselling and attending regular health care evaluation.

Parity

[24] When deciding whether to accept the joint submission, the Court is required to consider the parity principle, which relates to the principle where an offender should be punished similarly to offenders who have committed similar offences in similar circumstances. The Court has relied on cases pertaining to section 95 and section 129 offences involving sexualized conduct. For example, in *Euper*, the offender admitted his guilt to one charge contrary to section 95 of the *NDA*, by making unwanted and inappropriate sexually suggestive comments and by placing his hands on the upper body of the victim, and rubbing her shoulders without her consent. The Court accepted the joint submission of a reduction in rank to corporal and a fine in the amount of \$1,500. In *Duhart*, the offender, a sergeant, made several sexualized comments and gestures to two subordinates. Sergeant Duhart was found guilty of one charge pursuant to section 95 and three charges pursuant to section 129 *NDA*. After a contested sentencing hearing, he was sentenced to a severe reprimand and a fine of \$4,000. The Court notes that the touching involved in *Duhart*, however, was less invasive than in the case at bar. In *R. v. Malone*, 2019 CM 5004, a reprimand and a fine in the amount of \$1,500 was imposed after a contested sentencing hearing. Warrant Officer Malone had sent several images and messages of a sexualized nature to his subordinate's cell phone, but no touching was involved.

[25] These precedents seem to indicate that this joint submission, which includes a short period of detention, would be outside of the range or, at least, at the higher end of the spectrum. Nevertheless, this does not automatically imply that the joint submission is contrary to the public interest test. The range is only a factor to consider in the determination of a fit and fair sentence, as expressed by the SCC in *R. v. Lacasse*, 2015 SCC 64, at paragraph 69, "The sentencing ranges must in all cases remain only one tool among others that are intended to aid trial judges in their work."

[26] This is particularly true for the jurisprudential value of decisions where joint submissions were accepted, because of the very limited discretion of the Court in the determination of the sentence in such cases. Therefore, consideration of these cases to establish a range should be done with this caveat in mind. For this reason, I find the cases submitted by the prosecution to be of limited assistance. Additionally, in *Misiaczyk*, the offender was a warrant officer who violently punched several times the victim in the face. The victim was a corporal. It took approximately three weeks for the injuries to the complainant's eyes and lip to fully heal. The physical force involved was high and the offender in this case had no underlying mental health issues. The other cases also offer similar circumstances of application of force. Thus, they are hardly comparable to form an appropriate range for the case at bar.

[27] That said, the SCC further stated in *Lacasse* that :

[58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.

[28] I accept that, in the case of Sergeant Curativo, the impact of a reduction in rank would have a harsher effect on the offender as a serving member in comparison to seven days' detention. In fact, I adopt the comments made by my colleague in *Euper* in regard to the harsh effect that a reduction of rank would have on a serving member, at paragraph 28:

Although on its face, a reduction in rank, a strictly military punishment, might not seem significant, it is important to note that its imposition is reserved for the most serious offences. If Sergeant Euper was still serving, it would carry significant career implications earmarked by financial loss and damage to his professional standing.

[29] Although it seems to create an unusual situation where counsel felt the need to go higher on the scale of punishments in determining the appropriate sentence, the evidence they submitted in support of their joint submission coupled with their compelling arguments, and the Court being informed of the principles established by the SCC in both *Anthony-Cook* and *Lacasse*, the Court is satisfied that the proposed sentence of seven days' detention, combined with a \$2,000 fine, would not be contrary to the public interest.

[30] I conclude that in the particular circumstances of this case, I accept counsel's submission that the focus in sentencing should be placed on the objective of general deterrence, as the sentence imposed should deter others in a similar situation from engaging in the same prohibited conduct. I also have to be mindful of the objective of rehabilitation in this case, as the sentence to be imposed should not have an extensive detrimental effect on the efforts the offender will have to make to reintegrate as a productive member of his unit, the Army and the CAF. While the joint recommendation meets the objective of general deterrence, the seven day detention also seeks to rehabilitate the offender by re-instilling in him the habit of obedience through a regime of training that emphasizes the institutional values and skills that distinguish CAF members from other members of society (see QR&O article 104.09, Note A).

Conclusion

[31] After a review of the documentary evidence introduced as exhibits and having considered counsel's submissions, it is apparent that they 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. Counsel properly addressed the applicable principles

and objectives of sentencing in this case. I am, therefore, satisfied that the documents introduced as exhibits provided to this Court with a complete picture of both the offender and the offence and I accept counsel's position that the need for general deterrence is met with the joint recommendation today.

[32] Sergeant Curativo is young. He has made a productive, professional and personal contribution since the commission of this offence and he has shown genuine remorse; has publicly apologized and has made decisive steps in seeking medical treatment. Despite standing accused, he has continued to work hard, performed well as a CAF member and exhibited a positive attitude. He is also a dedicated Canadian citizen, volunteering outside of his professional commitments. The Court encourages him to continue his progress in order to better himself; in fact, there seems to be no impediment for this member to successfully pursue his military career. The Court accepts the joint recommendation as it is not contrary to the public interest and would not bring the military justice system into disrepute.

FOR THESE REASONS, THE COURT:

[33] **FINDS** Sergeant Curativo guilty of one charge under section 95 of the *NDA*.

[34] **SENTENCES** him to detention for a period of seven days and a fine in the amount of \$2,000.

[35] This sentence was passed on 5 October 2021 at 1525 hours.

Counsel:

The Director of Military Prosecutions as represented by Major C.R. Gallant

Mr. J. Stuffco, Stuffco Law, 9844 – 106 Street, Edmonton, Alberta, Canada, Counsel for Sergeant P.J.L. Curativo