



COURT MARTIAL

Citation: *R. v. MacPherson*, 2021 CM 5018

Date: 20211019

Docket: 202057

General Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Warrant Officer J.J. MacPherson, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act*, 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in these proceedings as the complainant, including the person referred to in the charge sheet as “C.S.”, shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Warrant Officer MacPherson pleaded guilty to a charge laid pursuant to section 129 of the *National Defence Act (NDA)*, for making inappropriate sexualized comments to the complainant identified as C.S. A stay of proceedings was ordered on the first charge laid pursuant to section 130 of the *NDA*. Having accepted and recorded the guilty plea for an offence contrary to section 129 of the *NDA*, the Court must now determine and impose a fair and fit sentence, which requires that the punishment be proportional to the circumstances surrounding the commission of the offence, and that takes into consideration the offender’s situation. In this case, counsel are jointly

recommending that this Court impose a punishment of a severe reprimand combined with a fine in the amount of \$1,000.

Summary of circumstances

[2] The circumstances surrounding the commission of the offence(s) contained in the Statement of Circumstances were read in court and the document was introduced as an exhibit. Master Warrant Officer MacPherson admitted that the account of the events was true. The Statement of Circumstances reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. MWO MacPherson joined the Canadian Armed Forces, regular force in 1985. He retired in 2020. He is 56 years of age.

[NOTE: No paragraph 2 in original document.]

3. On or about 26 June 2018, MWO MacPherson attended an event at the Senior Staff Mess at CFB Kingston, Ontario. There was a change of appointment followed by a promotion ceremony.

4. Maj Marc Cormier was the master of ceremonies for the event. The complainant, a civilian employee named “C.S.”, was also present at the event and participated in the change of appointment ceremony. During the ceremony, Maj Cormier introduced her as “[Identifying information removed for publication ban purpose] the Great Dragon Slayer” and the crowd laughed. This was a trick that the complainant had previously taught Maj Cormier to help him remember her name.

5. When the ceremony was over, the bell was rung in the mess and those present began to drink and socialize. The complainant then had an interaction with MWO MacPherson.

6. MWO MacPherson made the comment “I would like to slay you” (or words to that effect) to the complainant, referencing the joke regarding her name. It was clear to the complainant that there was a sexual innuendo associated with the remark. She felt very uncomfortable but tried to ignore the comment; she was new in her job at the time and she was worried about making waves in the small military community of Kingston.

7. Maj Cormier overheard the remark. He too felt uncomfortable about what he had heard. Although he did not react at the time, in the following days he approached the complainant to speak to her about the incident. He encouraged her to make a complaint about this conduct which he found inappropriate. At the time, the complainant felt she did not want to rock the boat.

8. In early October 2018, the complainant was at the Grant Building at CFB Kingston. She did not expect to see MWO MacPherson there. Without her seeing him, MWO MacPherson approached the complainant from behind and put his hands on her shoulders. He briefly rubbed her shoulders and said her name. He then walked by her. The complainant was taken by surprise and was very startled; she did not consent to the touching.

9. The complainant eventually made the decision to come forward to report these incidents in September of 2019.”

[3] The prosecution subsequently confirmed that the complainant and the offender knew each other before the incident from previous professional interactions.

The issue

[4] The Court must now determine whether the joint submission, a severe reprimand combined with a fine in the amount of \$1,000, is contrary to the public interest test.

Evidence

[5] 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 defence introduced an Agreed Statement of Facts, which includes additional information pertaining to the offender's personal situation, such as details about his career in the military.

Victim impact statement

[6] The prosecution consulted with and advised the victim of her right to provide a victim impact statement. C.S. read her statement in court.

Apology

[7] Master Warrant Officer MacPherson read a letter where he apologized to the victim and to the Court in particular, for the conduct forming the basis of the charge to which he pleaded guilty.

The analysis

Sentencing principles of the military justice system

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

[9] The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the objectives listed at subsection 203.1(2), such as to promote a habit of obedience to lawful commands and orders, to maintain public trust in the Canadian Forces as a disciplined armed force, or to assist in rehabilitating offenders. The objectives of the sentence are dictated by the particularity of the case and of the offender.

[10] Finally, section 203.2 of the *NDA* provides for the fundamental principle of sentencing:

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

Role of counsel

[11] It is part of counsel's mandate, in representing their respective client, to recommend to the Court a sentence that they deem fit and fair. Counsel have a comprehensive and complete knowledge of the circumstances surrounding the commission of the offence, and defence counsel is also aware of the offender's personal situation. When considering an appropriate sentence to recommend to this Court, counsel will often times engage in resolution discussions. The Supreme Court of Canada (SCC) recognized in *R. v. Anthony-Cook*, 2016 SCC 43 that properly conducted, these resolution discussions permit the system to function smoothly and efficiently.

Benefits of a joint submission

[12] Joint submissions provide many benefits to the accused, the victims, the participants, the unit, and the military justice system. 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. Moreover, as stated in *Anthony-Cook* at paragraph 36, "for those who are truly remorseful, a guilty plea offers an opportunity to begin making amends. For many accused, maximizing certainty as to the outcome is crucial — and a joint submission, though not inviolable, offers considerable comfort in this regard." Indeed, when an accused person pleads guilty, he or she gives up their right to a trial on the merits, together with all the procedural safeguards it entails.

[13] Additionally, when a joint submission is accepted by the Court, victims and witnesses are spared “the emotional cost of a trial” (*R. v. Edgar*, 2010 ONCA 529 at paragraph 111). Some victims may find comfort from a guilty plea, given that it “indicates an accused’s acknowledgement of responsibility and may amount to an expression of remorse” (*Anthony-Cook* at paragraph 39).

Public interest test

[14] In recognizing these many benefits, the SCC in *Anthony-Cook* has established the public interest test for trial judges dealing with a joint submission. It dictates 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. In other words, even if I am of the view that a different punishment would be warranted, I must exhibit restraint and reject the joint submission only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the military justice system.

Aggravating factors

[15] In the present case, when determining whether the proposed punishment meets the public interest test, the Court has considered the following aggravating factors:

- (a) the rank of the offender and his level of experience and seniority in the Canadian Armed Forces (CAF). At the time of the commission of the offence, the offender was of the rank of master warrant officer, the second-highest rank of the non-commissioned officers’ corps, which carries great responsibility such as leading by example at all time. The conduct was unbecoming of any CAF member, but it is particularly troublesome for a member of the rank of master warrant officer; and
- (b) the impact of the conduct on the victim. It takes courage for a victim to come forward to report conduct that makes one feel uncomfortable, particularly when the subject of the conduct is of a higher rank. The victim explained now feeling reluctant to engage with CAF members and she is now generally guarded in her interactions with others, fearing she would receive inappropriate attention. She no longer attends military social events with her husband and her marital relationship is now strained as a result. She explained having panic attacks and experiencing fear. Her career has stalled as she has missed professional opportunities. It is apparent that the conduct had a significant and long-lasting effect on the victim.

Mitigating factors

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

- (a) the Court considered that Master Warrant Officer MacPherson has no criminal convictions. The Court gave little weight to the one entry on his conduct sheet for an unrelated offence contrary to *NDA*, section 129 committed in 2016;
- (b) the offender pleaded guilty before this Court, dispensing with the need for the victim to have to testify and live through the stress that a testimony in Court often causes. Further, more resources would be required to sustain a longer, costlier trial, effectively saving the Court, counsel and the unit supporting the Court considerable time; and
- (c) Master Warrant Officer MacPherson apologized to the victim publicly, in open court. His apology seems honest and sincere. It is apparent that he had time to reflect and accepted responsibility for his conduct, having learned from this experience.

The offender's situation

[17] The offender is fifty-six years old. He enrolled in the CAF on 26 July 1985 and was promoted to the rank of master warrant officer on 15 September 2012. Throughout his career in the military, he has been a part of multiple exercises and operations, including: Operation SNOWGOOSE in Cyprus, from August 1992 to February 1993; United Nations Protection Force Yugoslavia from June 1993 to June 1994; Stabilisation Force in Bosnia from April 2000 to September 2000; Operation ARGUS in Afghanistan from August 2005 to August 2006 and the operational support hub (OSH) Southwest Asia in Kuwait from April 2013 to December 2013. While occupying the role of the camp sergeant major at the OSH Southwest Asia in Kuwait, he also acted as the assistant defence attaché who briefed the Canadian Ambassador on the General Dynamics project to sell light armoured vehicles III to the Kuwait military.

[18] Master Warrant Officer MacPherson is a Royal Military College (RMC) graduate. In 2020, he was presented with a Bachelor of Military Arts and Science degree with a minor in Political Sciences. He had previously received an RMC diploma for the Army Technical Warrant Officer Programme. Additionally, Master Warrant Officer MacPherson has been awarded the following decorations, awards, and certificates: Canadian Forces' Decoration with second clasp; Commander of the Canadian Joint Operations Command Commendation for his tour in Afghanistan; Royal Canadian Artillery Colonel Commandant Commendation for his service as deputy project director on the Lightweight Towed Howitzer Project; the 125 Anniversary of the Confederation of Canada Medal; and the Canadian Peacekeeping Service Medal. In 2018, he was presented with a Canadian Defence Academy award at the unit farewell, given to the most personable, outgoing and laid-back male member of the unit.

[19] Master Warrant Officer MacPherson was not placed on any type of administrative action following the incident. He retired from the CAF on 25 August 2020, with a release under Item 5(a), after thirty-five years of service. He is planning on incorporating a consulting company to use his experience in project management and defence contracting, in order to work with the defence industry.

[20] He has a spouse who is his only dependent.

Parity

[21] Having considered the circumstances surrounding the commission of the offence and the offender's personal situation, the Court examined precedents for similar offences to determine whether the joint submission is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishment that would be appropriate in the case at bar.

[22] The Court considered the cases submitted by both counsel. In *R. v. Duhart*, 2015 CM 4023, a severe reprimand and a fine of \$4,000 was imposed, and in *R. v. Renaud*, 2020 CM 4004, after a contested trial, the offender was sentenced to a severe reprimand and a \$2,500 fine. Both cases, referred to by the prosecution, were significantly more serious, involving repeated conduct that equated to a pattern of conduct of the offender. The Court also considered the two cases presented by the defence. In *R. v. Bourque*, 2020 CM 2009, a sentence of a \$200 fine was imposed, whereas in *R. v. Hunt*, 2019 CM 4009, the offender was sentenced to a severe reprimand. The Court notes the presence of mitigating circumstances in these last two cases that are not present in the case of Master Warrant Officer MacPherson.

[23] I further considered the case of *R. v. Malone*, 2019 CM 5004, where the offender, a warrant officer, pleaded guilty to a charge pursuant to section 129 of the *NDA* for sending images of a sexual nature to a subordinate CAF member's cell phone. Counsel had divergent views on sentencing. Warrant Officer Malone was sentenced to a reprimand and a fine in the amount of \$1,500.

[24] After a brief review of these precedents, the Court concludes that the cases submitted by counsel pertained to similar conduct, with some circumstances differing from the case at bar that would explain why in the cases submitted by the prosecution the punishments were more severe, and in the case submitted by the defence, the punishments were more lenient. The Court therefore finds that the joint recommendation is within the range of punishment for this offence. That is sufficient to allow the Court to conclude that the proposed sentence is not unfit. Consequently, the joint recommendation meets the parity principle.

Conclusion

[25] The Court reviewed the documentary evidence introduced as exhibits and considered counsel submissions. It is apparent that they carefully assessed the circumstances of the case when they arrived at their joint submission. Counsel 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. I am therefore satisfied that the documents introduced as exhibits provided this Court with a complete picture of both the offence and the offender's situation and I accept counsel's position that the need for denunciation and general deterrence are met with the proposed sentence. 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.

[26] It is unfortunate that a CAF member of the offender's rank, experience and accomplishments should conclude his formal connection to the CAF on this note, after thirty-five years of service that included participation in a number of deployments where at times he occupied noticeable positions. But for his misconduct, he would have left with all the recognitions his accomplishments deserve. On a positive side, Master Warrant Officer MacPherson has recognized that his conduct was inappropriate; he apologized publicly and he is clearly ready to move on. The Court is hopeful that he will follow a new professional and personal path that will lead to a successful outcome for himself, his family and Canadian society.

FOR THESE REASONS, THE COURT:

[27] **FINDS** Master Warrant Officer MacPherson guilty of one charge under section 129 of the *NDA*.

[28] **SENTENCES** him to a severe reprimand combined with a fine in the amount of \$1,000, payable no later than 5 November 2021.

Counsel:

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

Major M. Melbourne, Defence Counsel Services, Counsel for Master Warrant Officer MacPherson