

COURT MARTIAL

Citation: *R. v. Barber*, 2022 CM 4005

Date: 20220307

Docket: 202210

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Master Sailor C.G. Barber, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Sailor Barber, stand up. After having accepted and recorded your pleas of guilty in respect of the two charges of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act (NDA)*, the Court now finds you guilty of these charges.

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 consisting of a fine in the amount of \$600.

[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 a court martial, 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 Master Sailor Barber. 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] Also the prosecution produced an Agreed Statement of Facts which described the personal situation of Master Sailor Barber at the time, and, to an extent, since the offence. The defence also produced exhibits pertaining to the situation of Master Sailor Barber 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, as well as by

reference to other cases at courts martial and as summary trials 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 offences committed.

[11] The Statement of Circumstances, the Agreed Statement of Facts, the submissions of counsel, the other evidence, and the information on all these documents 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 two offences:

- (a) on 1 March 2021, Master Sailor Barber was a member of Her Majesty's Canadian Ship (HMCS) *Victoria*, a submarine based at Canadian Forces Base (CFB) Esquimalt, British Columbia;
- (b) as a result of the COVID-19 pandemic, a practice of "clean cohorts" was developed for submarine crews. Crews were quarantined and tested for COVID-19 several times to ensure no presence of COVID-19 prior to operations. Once deemed "clean", the crew followed rigorous public health measures to minimize contact with non-cohort personnel;
- (c) HMCS *Victoria* went through the clean cohort process and her crew was housed ashore in early 2021 at the Wardroom on CFB Esquimalt;
- (d) on or about 12 February 2021, orders were passed, detailing the restrictions and precautions required while being housed ashore. Master Sailor Barber acknowledges knowing about the rule to wear a mask in the hallways of the Wardroom;
- (e) on 1 March 2021, HMCS *Victoria* returned to CFB Esquimalt from a sail. Prior to anyone departing the submarine, the Executive Officer (XO) made a "pipe", or announcement, to the entire submarine setting out the details of the rules to be followed at the Wardroom to maintain the "clean cohort". This included masking throughout in common areas, and limiting numbers of crew members in some places, including the smoking area. This was a reminder message, as the crew had stayed in the Wardroom previously under these rules;
- (f) a superior confirmed with Master Sailor Barber and the other members of his section that all were aware of the XO's announcement prior to them going ashore at the Wardroom;
- (g) at approximately 1600 hours that afternoon, HMCS *Victoria*'s XO exited his room into a hallway at the Wardroom. There, he came across Master

Sailor Barber in the hallway with no mask on. He directed him to wear a mask. Master Sailor Barber did so;

- (h) at approximately 1900 hours, Master Sailor Barber attended the smoking area. In the presence of four persons, including two junior sailors and chief petty officer 2nd class, Master Sailor Barber voiced his displeasure with the COVID-19 rules in the course of the conversation. He was told by the chief petty officer 2nd class present that the rules came from the submarine's command team and were passed on by the XO; and
- (i) at approximately 2100 hours the same evening, the XO entered the hallway of the Wardroom and came upon Master Sailor Barber, who, once again, was not wearing a mask. The XO again ordered him to wear a mask. Master Sailor Barber did so, and the two parted ways.

[13] As it pertains to the circumstances prevailing at the time of the offence, the Agreed Statement of Facts indicates that "In March 2021, COVID-19 vaccines were not yet available to non-medical personnel." The lawful command to all crew members to wear masks in the submarine's shore accommodation was to minimize the health risk to the crew in order to preserve its integrity as a "clean cohort" from COVID-19 infection. This was inherently related to the successful achievement of mission objectives, in this case, to maintain HMCS *Victoria* operationally ready following a repair period.

[14] I do agree with the CO's remarks made in the Statement of Facts at Exhibit 8, that in submarines, as in all other operational units, crew morale and discipline are paramount in achieving mission objectives. Disregard of orders and directives in place to protect crews against COVID-19, not only put at risk the health of Master Sailor Barber and his shipmates, but could have also greatly impacted HMCS *Victoria*'s ability to proceed to sea to conduct military operations.

[15] In the circumstances, I find that the demand imposed on Master Sailor Barber to wear a mask in the Wardroom was entirely reasonable and within the realm of what is generally expected from a member of a military force in the profession of arms. This is especially true from a person appointed master sailor, which involves an obligation to both demand and uphold a high standard of conduct in order to set an example for subordinates.

The offender

[16] Master Sailor Barber initially joined the regular force in the Royal Canadian Navy in August 2006. After basic military and technical instruction as a weapons engineer technician, he joined his first ship in October 2010 on the West Coast, where he served almost five years before leaving the service for approximately three years.

[17] Having rejoined in September 2018, he was first assigned to HMCS *Victoria* in 2019 and obtained his basic submarine qualification around the time of the offence, in March 2021. He has served in submarines since.

[18] The CO of HMCS *Victoria* worked with Master Sailor Barber directly and indirectly since taking command in June of 2019 and the time of the offence. Master Sailor Barber proved to be a very reliable member of the Fire Control Section, on whom the team could always count to support various maintenance activities both alongside and at sea. Master Sailor Barber continued to be available to sail on HMCS *Victoria* despite a hectic and fluid schedule following the submarine's return to sea after a maintenance period. Master Sailor Barber proved to be a good worker who showed enthusiasm towards anything related to the submarine's weapons system, his main area of expertise.

[19] Master Sailor Barber was subjected to remedial measures as a result of his conduct in March 2021. He was placed on a recorded warning for conduct and completed a monitoring period of six months' assessment. He was assessed by the Acting Combat System Engineering Officer in June 2021 to be an extremely knowledgeable technician who makes insightful recommendations and develops courses of action pertaining to fire control systems while excelling at coordinating the work and training requirements of his subordinates. His peers and subordinates appreciate the care and consideration he has shown to their needs. Master Sailor Barber was commended by the XO in October 2021 for his display of dedication and determination, which were key in *Victoria*'s success in trials in the course of September 2021.

[20] Master Sailor Barber comes before the court without a criminal record or conduct sheet. At thirty-five years of age, he has demonstrated the potential to continue making a significant contribution to the Royal Canadian Navy in the future.

Seriousness of the offence

[21] 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. Of course, a broad range of circumstances can constitute offences under section 129.

[22] At the sentencing hearing, I have been provided by the prosecution with a number of court martial precedents involving junior members committing offences of disobedience with minor or no actual consequences on operations. The defence submitted precedents demonstrating similar circumstances but involving more senior members. Also, defence counsel referred the Court to one incident which would have occurred at CFB Valcartier where students on a training course were found to have violated an order to wear masks on base and were sentenced to fines of approximately \$400 at summary trials. There were little detail on these obviously unreported cases, but mention of them was made, along with the other cases provided by counsel, to show that the proposed

sentence in this case is within the range of sentences imposed in the past for similar violations.

[23] I have also been informed of the result of the case of Lieutenant(N) Chami, (*R. c. Chami*, 2022 CM 5002) who has pleaded guilty to one count under section 129 on 25 January 2022 for having failed to isolate while waiting for the result of a COVID-19 test, contrary to orders given by the Canadian Armed Forces (CAF) chain of command. He had taken that test in October of 2021 after receiving information to the effect that he had potentially been exposed to COVID-19 during a hockey match the previous week. He was experiencing mild symptoms at the time. While waiting for test results, he attended a selection board where other CAF members were present.

[24] The military judge accepted a joint submission of counsel and sentenced Lieutenant(N) Chami to a severe reprimand and a fine in the amount of \$2,600. The *Chami* case is once again a precedent which shows significant differences from the circumstances of the offences and the offender here. However, I believe it is important to mention it as it is the only known court martial case so far which pertains to the violation of an order issued for the protection of the health of the members of the CAF under the threat of COVID-19.

[25] I do agree with counsel that the circumstances of the offences in this case are included in the category of offences where failure to adhere to instructions of superiors is observed. This is a conduct which was admittedly prejudicial to good order and discipline. As stated by the prosecution, the conduct has had no consequences on the risk for which the order was given, namely the propagation of COVID-19 within the crew of HMCS *Victoria* while lodged in accommodations on base as a “clean cohort”. That being acknowledged, I am not prepared to agree that the offences are at the low end of the spectrum of possible offences under section 129 of the *NDA*.

[26] Indeed, the risk that the infraction at section 129 is meant to protect from is not COVID-19; it is the prejudice to good order and discipline. Specifically, this case deals with the good order and discipline of a submarine crew which, although ashore, is unquestionably in an operational environment in the circumstances where they are being directed to be housed in a military establishment despite being in home port, close to their residence, their friends and family, for the very purpose of minimizing the risk of contamination from COVID-19 in order to ensure that their submarine’s ability to proceed to sea is not impeded.

[27] In the circumstances, it appears obvious to me that the conduct of a member of the crew who chooses not to adhere to the order of wearing a mask, a well-known measure meant to protect against infections, is a significant breach of the obligation imposed on all members of the CAF not to conduct themselves in a manner which prejudices good order and discipline.

Aggravating factor

[28] The circumstances I have just highlighted, pertaining to the protection of the health of crew members as part of the “clean cohort”, constitutes a significant aggravating factor in the circumstances of this case as argued by the prosecutor. The circumstances are much more severe than any other member who would have violated an order to wear a mask in a Department of National Defence or CAF facility.

[29] That said, there are two more aggravating circumstances in this case. As argued by the prosecution, Master Sailor Barber is an experienced junior leader who should have known better. His record reveals that he was instructed in COVID-19 awareness in May 2020. He was aware of the procedure in place, as announced by the XO of his ship, and as a master sailor was expected to lead by example, which he clearly did not do in the circumstances of both offences in this case. In addition, he had voiced his disagreement with the health measure imposed, in the presence of subordinates, earlier on the same day. As a junior leader, he was expected to lead by example and not only adhere to the norms of conduct but support them in relation to subordinates. He failed to do so in the circumstances and that is aggravating.

[30] I also believe that the repetition of the offence by Master Sailor Barber after having been told by the XO himself to wear his mask constitutes another aggravating circumstance. It is important to note that the XO did announce the measure to be followed by the crew as stated in the Agreed Statement of Facts. The XO exercises command authority over everyone but the CO on and in relation to HMCS ships as provided for in QR&O and Maritime Command Orders. Not only did Master Sailor Barber violate the directive announced by the XO to the entire crew, he violated the direction given by the XO to him personally a few hours before he was seen in the hallway of the Wardroom without a mask at 2100 hours on 1 March 20221.

Mitigating factors

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

- (a) first, Master Sailor Barber’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 Master Sailor Barber is a first-time offender;
- (c) third, the performance by Master Sailor Barber at the time and shortly following the offences as revealed by the evidence that I did mention previously; and
- (d) finally, I wish to consider as mitigating the significant potential that, at thirty-five years of age, Master Sailor Barber has to contribute to the

mission of the Navy and to Canadian society in the future, including the contribution he has made in the past.

Objectives of sentencing to be emphasized in this case

[32] 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 Master Sailor Barber from reoffending, but must also, and most importantly, denounce his conduct in the community and act as a deterrent to others who may be tempted to engage in the same type of behaviour. In short, it must show that misbehaviour has consequences. At the same time, though, 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 Master Sailor Barber to rehabilitate himself with his excellent performance onboard the submarines, especially between June and October 2021.

Assessing the joint submission

[33] As mentioned, the submissions from counsel made reference to precedents from military tribunals, but none of these cases were exactly on point, reflecting the broad range of conduct captured by charges under section 129 of the *NDA* and the unique circumstances of this case.

[34] That said, the precedents seem to indicate that a fine in the amount of \$600 is within the range of sentences or punishments imposed for offences of this nature. 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.

[35] 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 sufficient disapprobation for the failure in discipline involved and also have a direct impact on the offender. It cannot be said that the sentence being proposed will not meet these expectations, even if I find it to be relatively low in the circumstances of this case.

[36] As recognized by the Supreme Court of Canada, however, 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, as required, 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.

[37] I realize that there has been negotiations between counsel to arrive at a resolution in this case. There were six charges on the Charge Sheet. I have no reason to believe that counsel have misstated anything to me in their submissions today. That said, since the Supreme Court has spoken in detail about joint submissions in *Anthony-Cook* in 2016, I have never been so close to engage in the process of requiring further submissions from counsel with a view to consider if the joint submissions should be jumped and replaced by a more severe sentence. I am not sure that the sentence proposed will meet the important objective of general deterrence and denunciation in this case. However, these doubts are insufficient to meet the test that I must apply in evaluating the joint submission. As I said before, to reject a joint submission I have to conclude that the sentence being jointly proposed would bring the administration of justice into disrepute or will otherwise be contrary to the public interest. Considering the circumstances of the offence and of the offender, the applicable sentencing principles and the aggravating and especially the mitigating factors going to Master Sailor Barber mentioned previously, I am not convinced that the sentence would bring the administration of justice into disrepute, therefore, it is my duty to accept the joint submission.

[38] Master Sailor Barber, in light of the submission of your counsel, your career record and the evidence that was presented to me, I accept that your conduct of a year ago reveals a lack of judgement on one occasion. You are an extremely promising technician. I trust that your performance since the offence shows that you have learned a lesson and that you are determined to do much better.

[39] That said, I am very concerned about the repetition of the offence after having been told by the XO to wear your mask. I have to tell you that recognizing the negotiations that took place, you should be thanking your counsel for her skills, because if I had found you guilty of the offence of disobedience of a lawful command in relation to what happened at 2100 hours on 1 March 2021, I would have seriously considered sending you to detention to give you an occasion to reflect on the importance of obeying lawful commands.

[40] You are a submariner. You work in an environment—I do not need to tell you that—that is unforgiving. There is no place for disobedience of lawful commands. Now you have an opportunity though to redeem yourself and I am confident you can do that. You need to understand that at your level, being a good technician is not sufficient. I am sure the Navy can use your skills to make you a petty officer and even more. As you envisage the next step, you need to see yourself as a member of the command team. And

as such, you must support the authority of superiors at all times. You will be judged not so much on your technical skills but increasingly on the judgement you display, demonstrating that others, peers and superiors, can trust you. Do not let people lose trust in you.

FOR THESE REASONS, THE COURT:

SENTENCES Master Sailor Barber to a fine in the amount of \$600, payable in full no later than 1 April 2022. Should the offender be released from the CAF prior to the fine being paid in full, any unpaid amount will be due on the date of release.

Counsel:

The Director of Military Prosecutions as represented by Major G. Moorehead

Lieutenant-Commander F. Gonsalves, Defence Counsel Services, Counsel for Master Sailor C.G. Barber