COURT MARTIAL

Citation: *R. v. Brandt*, 2022 CM 4006

Date: 20220328
Docket: 202215

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Corporal A.C. Brandt, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Corporal Brandt, having accepted and recorded your plea of guilty in respect of the one charge on the charge sheet, the Court now finds you guilty of that charge for having failed to self-isolate at home pending COVID-19 test results of your roommate, contrary to instructions received from your chain of command, which is an act 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 fine of $200, combined with the minor punishment of ten days of extra work and drill.

[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 virtual or physical 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 brief Statement of Circumstances which was formally admitted as accurate by Corporal Brandt. 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] 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.

The offence

[10] The following information is relevant to understand the circumstances of the offence:

(a) At the material time, the offender was a member of the regular force posted to 12 Air Maintenance Squadron;

(b) In the late evening of 8 July 2020 the offender's roommate, a Canadian Armed Forces (CAF) member at the time, sent a message to his chain of command stating that he was experiencing symptoms he believed were caused by food poisoning and that he would update his chain of command in the morning;

(c) After discussion through the chain of command, it was concluded that the offender's roommate should call 811 to report his symptoms and to book a COVID-19 test. The offender was instructed by his chain of command to remain at home pending his roommate's test results even if, in the circumstances, the offender was not required to self-isolate under the rules applicable to Nova Scotians;

(d) The next day, 9 July 2020, the offender drove his roommate to the hospital in order for the COVID-19 test to be administered. Instead of returning immediately to their residence, the offender and his roommate spent several hours outside their home. During that time they entered two restaurants in Halifax, Nova Scotia; and

(e) In the intervening period between the COVID-19 test and returning home, while the offender was driving with his roommate as a passenger, his roommate posted live videos to a social media application called SnapChat. Several live videos posted to SnapChat in sequential time show the offender and his roommate outside of their residence for a period of approximately five hours after the above-mentioned COVID-19 test was administered. Other members of the unit saw the videos, in which the offender's roommate is seen celebrating having the day off work due to COVID.

The offender

[11] Corporal Brandt is a twenty-five years old Aviation Systems Technician, currently posted to 12 Air Maintenance Squadron in Shearwater. He had joined the CAF

in Hamilton, Ontario and commenced training in September 2016. Following basic and occupational training, he has been serving with various units in Shearwater since November 2017.

[12] Corporal Brandt comes before the Court without a criminal record or conduct sheet. He was the subject of a remedial measure, a recorded warning, as a result of his conduct. He successfully completed the supervision period imposed on him and I understand that he is expected to continue serving the CAF for the foreseeable future.

Seriousness of the offence

[13] 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.

[14] Of course, a broad range of circumstances can lead to offences under section 129. In this case I have been given little information about the circumstances of the offence and therefore will limit my observations by stating that this is a case of a failure to adhere to instructions of superiors, combined with participation or at least passive acquiescence to the posting of live videos to a social media application accessible and indeed seen by members of the offender's unit, in which preventive measures to limit the risk caused by the spread of COVID-19 are met with derision. The gravamen of the offence is not the risk of propagation of COVID-19 or the provincial measures in place but rather the fact that the conduct of the offender at the time was rightfully admitted as being prejudicial to good order and discipline.

[15] Indeed, as stated a few weeks ago in the case of *Master Sailor Barber*, the risk that section 129 is meant to protect from is not COVID-19, it is prejudice to good order and discipline within the CAF. Specifically in this case, the good order and discipline of members of the CAF which must follow the orders and instructions of their chain of command to reduce the risks of contamination by COVID-19, for them and others. These orders operate independently of the health protocols in force in provinces as the CAF may well have different requirements to protect its members from infection than those applicable to the general population, especially given the unique exigencies of military service.

[16] In the circumstances, it appears obvious to me that the conduct of a member of the CAF who not only chose not to adhere to orders given to reduce health risks, but also contributed to jeopardize them by his acquiescence to the posting of live videos of the type described in the Statement of Circumstances, 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 factors

[17] With regards to aggravating circumstances, I do acknowledge and agree in large part with the submission of defence counsel to the effect that some circumstances mentioned by the prosecution are part of the offence itself. It is the case with the fact that the direction given by the chain of command was aimed at reducing the risk of infection by COVID-19, the fact that the behaviour involved some risks, especially going to restaurants where persons present may not be masked, and the fact that videos were seen by members of the unit, an element of the offence under section 129.

[18] That being said, I do believe that the circumstances of the offence and the offender in this case reveal two aggravating factors. Firstly, the fact that Corporal Brandt had received COVID-19 awareness training at the time of the offence and, as a CAF member, was expected to know better and lead by example. Secondly, the adherence by CAF members to the highest norms of conduct was especially important in the context of the involvement of the CAF in assistance to provincial authorities in the fight against COVID-19 at the time of the offence. In that sense, the offender did not only fail to comply with and undermine respect for any order, his failure in discipline is related to an order which has a direct link to the ability of the CAF to perform operations, including operations in support of the efforts of authority to control a deadly disease. Contributing to videos which downplayed the importance of preventive measures related to COVID-19, risk downplaying the importance and respect owed to these operations and colleagues involved in them.

Mitigating factors

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

(a) Corporal Brandt'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) The fact that Corporal Brandt is a first-time offender; and

(c) The performance by Corporal Brandt following the offence, revealing that he is well engaged in rehabilitating himself and deserving, at his young age, of a sentence which will have minimal consequences for his future success both as a member of the CAF and a citizen.

Objectives of sentencing to be emphasized in this case

[20] 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 Corporal Brandt 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.

[21] That being mentioned, I agree with defence counsel that rehabilitation is important and that the need for specific deterrence aimed at Corporal Brandt is reduced in his circumstances. As mentioned, he is well engaged in his rehabilitation and the sentence imposed must not compromise the efforts he has made with his recent performance.

Assessing the joint submission

[22] The submissions from counsel made a few references to previous court martial cases while keeping in mind that the broad range of conduct captured by a charge under section 129 of the *NDA* and the unique circumstances of this case make it difficult to find a precedent exactly on point.

[23] These cases reflect situations where relatively minor disciplinary offences were sanctioned by sentences ranging from a severe reprimand combined with a fine to minor punishments. For instance, in *R. v. Fischl*, 2020 CM 2007, a private was sentenced to a $200 fine for failing to perform fire piquet. In the case of *R. v. Heisler*, 2015 CM 4009, I sentenced a bombardier serving with the 1 Royal Canadian Horse Artillery in Shilo to a severe reprimand and a fine of $1,200, essentially for having obtained permission from his superior to be excused from work under false pretence. The sentence was the result of a contested sentencing hearing. Also, last year in *R. v. Bobu*, 2021 CM 5007, the military judge accepted a joint submission of counsel and sentenced an officer cadet at the military college in St-Jean to the minor punishment of fourteen days' confinement to barracks for inappropriate conduct towards opposing female colleagues during water polo matches. Earlier this month, I presided over the trial of *Master Sailor Barber* who had pleaded guilty to two charges of conduct to the prejudice of good order and discipline, contrary to section 129 of the *NDA*. I reluctantly agreed to endorse a very lenient joint submission of counsel and sentenced Master Sailor Barber to a fine of $600 for having failed to wear a mask meant to limit the potential spread of COVID 19, despite clear orders, on two occasions, in the common area of the quarters where he and colleagues were essentially quarantined as a submarine crew in anticipation of training at sea.

[24] I have also brought the attention of counsel to 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. The sentencing military judge accepted a joint submission and sentenced Lieutenant(N) Chami to a severe reprimand and a fine of $3,600. The circumstances of the offence of the *Chami*

case bear some similarities with this case, although they are more severe and the responsibility of an officer for the offence is greater than for a junior member such as Corporal Brandt.

[25] The case law discussed with counsel show that their joint submission is within a range of similar sentences for similar offences. 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.

[26] 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 and have a direct impact on the offender. The sentence being proposed, combining the punishments of a fine with a minor punishment, is aligned with these expectations. It is to be noted that I did take judicial notice of the rules applicable to the administration of minor punishments at the offender's unit and I am satisfied that the extra work and drill will be performed in accordance with QR&O 108.35.

[27] 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.

[28] 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.

[29] Corporal Brandt, I accept the submission of your counsel essentially to the effect that your conduct of July 2020 reveals a lack of judgement on the part of an otherwise

promising young technician. I believe your performance since the offence reveals that you have learned a lesson and are determined to do much better. The execution of the sentence will provide another occasion to show that you are grateful for the opportunity to redeem yourself. From there, I trust you can move on without reoffending.

FOR THESE REASONS, THE COURT:

[31] **SENTENCES** Corporal Brandt to fine of $200 payable forthwith and the minor punishment of extra work and drill for a period of ten days.

Counsel:

The Director of Military Prosecutions as represented by Major M. Reede

Major F.D. Ferguson, Defence Counsel Services, Counsel for Corporal A.C. Brandt