



## COURT MARTIAL

**Citation:** *R. v. Marshall*, 2022 CM 2008

**Date:** 20220330

**Docket:** 202120

Standing Court Martial

Halifax Courtroom Suite 505  
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Sailor 1st Class J.R. Marshall, Accused**

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

**Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act*, the Court directs that any information that could identify the persons described during these proceedings as the victim or complainant, including the persons referred to in the charge sheet as “J.C.”, “T.P.”, “A.W.”, or “T.M.” shall not be published in any document or broadcast or transmitted in any way, except when disclosure of such information is necessary in the course of the administration of justice and when it is not the purpose of that disclosure to make the information known in the community.**

### **REASONS FOR SENTENCE**

(Orally)

[1] Sailor 1st Class J.R. Marshall admitted his guilt to four charges contrary to section 93 of the *National Defence Act* (*NDA*) for disgraceful conduct and one charge contrary to section 95 of the *NDA* for ill-treatment of a person who by reason of rank was subordinate to him. Charges 1 to 4 were withdrawn by the prosecution. The particulars of charges 5 to 9 read as follows:

**“FIFTH CHARGE**  
Section 93 of the  
*National Defence Act*

**BEHAVED IN A DISGRACEFUL  
MANNER**

*Particulars:* In that he, on or about 28 June 2020, aboard HMCS Toronto, did touch J.C.’s genitals.

**SIXTH CHARGE**  
Section 93 of the  
*National Defence Act*

**BEHAVED IN A DISGRACEFUL  
MANNER**

*Particulars:* In that he, on or about 25 June 2020, aboard HMCS Toronto, did touch T.P.’s genitals.

**SEVENTH CHARGE**  
Section 93 of the  
*National Defence Act*

**BEHAVED IN A DISGRACEFUL  
MANNER**

*Particulars:* In that he, between 16 and 30 June 2020, aboard HMCS Toronto, did touch A.W.’s genitals.

**EIGHTH CHARGE**  
Section 93 of the  
*National Defence Act*

**BEHAVED IN A DISGRACEFUL  
MANNER**

*Particulars:* In that he, on or about 21 June 2020, aboard HMCS Toronto, did attempt to touch T.M.’s genitals.

**NINTH CHARGE**  
Section 95 of the  
*National Defence Act*

**ILL-TREATED A PERSON WHO BY  
REASON OF RANK WAS  
SUBORDINATE TO HIM**

*Particulars:* In that he, on or about 21 June 2020, aboard HMCS Toronto, offered T.M. money in exchange for sexual contacts.”

[2] The Statement of Circumstances filed in court is reproduced to provide a full account of the circumstances of both the offence and the offender. The Statement of Circumstances reads as follows:

**“STATEMENT OF CIRCUMSTANCES**

1. At all relevant times, LS Marshall was a Regular Force member of the Canadian Armed Forces, serving aboard HMCS Toronto and at all material times held the rank of Able Seaman.
2. LS Marshall was 25 years of age at the time of the offences.

3. The offences occurred between 16 and 30 June 2020 and involve four different complainants who were younger than LS Marshall. OS P, OS M, and OS W were all of a lower rank to LS Marshall.
4. On the night of 28 June 2020, ABC, a 22-year old complainant, reported that LS Marshall followed him around the ship, making him feel uncomfortable by making inappropriate comments of a sexual nature.
5. When AB C and LS Marshall were alone, LS Marshall grabbed the genitals of AB C and attempted to give him a “hand job”. Both parties were under the influence of alcohol at the time.
6. AB C also reported that he was sexually harassed by LS Marshall on several other occasions. LS Marshall would say things like “give me a smoke and I’ll blow yah,” or “want a handy before you go to bed?” or words to that effect.
7. AB P, a 20-year-old complainant, reported that during a night sea trial exercise, while under the supervision of LS Marshall, LS Marshall became flirtatious with him. He reported that LS Marshall told him that they should play a game to pass the time, to which he agreed. LS Marshall then placed one hand on the thigh of AB P and said “let’s play ‘red light, green light’,” and started to move his hand up towards the genitals of AB P.
8. Once AB P realized what LS Marshall meant by a game, he immediately said “red light,” but LS Marshall continued to move his hand up until he touched the genitals of AB P. AB P said “no,” and pulled away.
9. OS W, a 23-year-old complainant, reported that between 16 and 30 June 2020, LS Marshall frequently made sexual comments to him, including offering oral sex. He also reported that LS Marshall slapped him on the buttocks two or three times and touched his genitals five to ten times.
10. On 21 June 2020, OS M, a 23-year-old complainant, was on watch with LS Marshall. After mentioning that it was very dark on the bridge and that no one could see what they were doing, LS Marshall offered money to OS M if he would let him touch his penis. He persistently offered various amounts of money.
11. After initially thinking it was a joke, OS M realized that LS Marshall was serious and over the next several days, approached

LS Marshall to tell him that his behaviour made him feel weird, and reported the incident to his Chain of Command.”

**Joint submission**

[3] In a joint submission, both the prosecution and defence counsel recommend that I impose a sentence of a sixty day custodial sentence.

[4] The joint submission before the Court is reviewed in the context of the Supreme Court of Canada (SCC) guidance in *R. v. Anthony-Cook*, 2016 SCC 43. In that decision, the SCC 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 not in the public interest”.

[5] A plea bargain occurs when counsel come together, outside the court, to discuss their respective positions in a quid pro quo manner. There is give and take required to come to a joint recommendation. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for an offender, such as Sailor 1st Class Marshall, who is clearly remorseful, to begin making amends. By encouraging plea deals, the burden on the Court is reduced and the prosecution benefits directly by not needing to take every matter to a full court martial.

[6] Logistically, coming to a meaningful resolution in a discipline matter, victims and witnesses are not required to travel and testify before the court martial. In the case of inappropriate sexual conduct, a plea bargain and a joint submission helps the healing process as it spares the victims from having to testify and be cross-examined on the incident. It also assists the defence in that the accused can assess his or her options for resolution earlier rather than later.

[7] In the case of the military justice system, the systemic benefits of joint submissions also extend to the unit. The accused's unit is responsible for providing the administrative support to both the member and the court martial. When the matters can be dealt with quickly, the unit benefits directly.

[8] The most important gain to all participants is the certainty that a joint submission brings to the process. The accused person has a lot to lose. As you heard when I did the verification of the guilty plea, by entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. Thus, in exchange for making a plea, the accused must be assured a high level of certainty that the Court will accept the joint submission.

[9] In rendering its decision, the SCC highlighted the professional responsibility of both the prosecutor and defence counsel. They are key players in the administration of our military justice system and are well placed to arrive at a joint submission that reflects the interests of the public, the Canadian Armed Forces (CAF) and the accused.

Counsel are highly knowledgeable about the circumstances of the offender and the offences, as well as with the strengths and weaknesses of their respective positions. The prosecutor is aware of the needs of the military and its surrounding community and is responsible for representing those interests.

[10] In order for the military justice system to be able to rely heavily on joint submissions emanating from plea bargains, the Court must have confidence that the negotiations are conducted in a manner that promotes and respects the rights of the accused. The submissions of both the prosecution and defence counsel have been clear that the negotiations for resolution began early and that they considered and weighed the risks with respect to both sides.

[11] Further, as defence counsel acts exclusively in the accused's best interest, he provided the Court confirmation that Sailor 1st Class Marshall's plea was a voluntary and informed choice and unequivocally acknowledges his guilt.

[12] As members of the legal profession and accountable to their respective law societies, both the prosecution and defence counsel have a duty not to mislead the Court in their submissions. As such, as the military judge presiding, and being asked to consider a joint submission, I expect that both counsel will have fulfilled their professional responsibilities in their independent roles. In effect, they are in a better position than the Court to weigh and assess relevant factors, the evidence available as well as the public interest.

### ***Assessing the joint submission***

[13] In this case, the prosecutor read a Statement of Circumstances and provided the documents required at the *Queen's Regulations and Orders for the Canadian Forces* article 112.51 supplied by the chain of command. The Statement of Circumstances was introduced on consent to inform the Court of the context of the incidents that led to the charges before the Court. Defence counsel also introduced a statement of Sailor 1st Class Marshall's personal circumstances that outlined the relevant personal facts pertaining to him so the Court can ensure that it delivers an individualized sentence specific to his circumstances.

[14] Further, the Court benefitted from the submissions from counsel to support their joint position on sentence, highlighting the facts and considerations relevant to Sailor 1st Class Marshall.

[15] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of any indirect consequence of the sentence so I may impose a punishment adapted specifically to Sailor 1st Class Marshall's circumstances and the offences committed.

### ***The offender***

[16] Sailor 1st Class Marshall is twenty-six years old and was twenty-five years of age at the time of the offences. He enrolled in the CAF in July 2016 and served continuously for five and a half years until he released in May of 2021. By all accounts, it appears that he served his country well and received positive feedback on his performance. He is currently engaged to be married and hoping to move forward in rehabilitating his life.

[17] Sailor 1st Class Marshall completed his Grade 12 at Elliot Lake Secondary School and is currently enrolled in an online real estate sales course with Humber College. He began the two-year course in January 2022. Upon completion of these proceedings, he is also considering attending Humber College in Toronto.

[18] Sailor 1st Class Marshall identifies with the lesbian, gay, bisexual, transgender and queer and two-spirited and others community. He is open about his orientation. He is single, but in a committed relationship with a partner who is currently in the process of releasing from the CAF. Sailor 1st Class Marshall admits that there were some occasions during his military service that he did not feel accepted and he did not consider the CAF to be an inclusive environment. Notwithstanding these incidents, Sailor 1st Class Marshall continues to have a positive view overall of his experiences in the CAF.

**Objectives of sentencing to be emphasized in this case**

[19] The prosecution has emphasized that all the objectives of sentencing were considered, but both he and defence counsel felt that those of greatest importance in addressing this incident are deterrence (both general and specific) and denunciation which, on the facts before the Court, I agree with.

***Parity***

[20] An important sentencing principle set out in the *NDA* at paragraph 203.3(b) stipulates that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”. The prosecution and defence counsel provided the Court with a number of judicial precedents for comparison.

[21] Although the offences of sexual assault were withdrawn by the prosecution, the same factual underpinnings have been relied upon in the particulars for the four charges of disgraceful conduct to which the accused has pleaded guilty.

[22] As I mentioned in court, the offence of sexual assault captures a very broad range of conduct within it. In *R. v. Cadieux*, 2019 CM 2019, I reinforced that notwithstanding the nature of the charge brought by the prosecution before the Court, the trial judge should ensure that a sentence imposed on similar offenders be comparable to the similar misconduct committed in similar circumstances.

[23] In considering the joint submission before the Court, the prosecution referred me to *R. v. Bankasingh*, 2021 CM 5009 where the Court considered varied facts of inappropriate sexual touching. Further, we discussed the exhaustive assessment I conducted in *Cadieux* where I canvassed the broad range of sentencing that has been provided for inappropriate sexual touching and I established that for the type of conduct that this case falls within, that a custodial sentence of sixty days was the most appropriate sentence for this level of uninvited sexual touching.

[24] I note that the one case relied upon by the prosecution, being *Bankasingh*, my sister judge Commander Deschênes also imposed a similar custodial sentence of sixty days.

[25] In making the joint submission, counsel advised the Court that they have taken into account all relevant aggravating and mitigating factors. However, prosecution did include some aggravating and mitigating factors for the record. The Court considered the following aggravating factors:

- (a) repeated offences of similar acts over the course of two weeks, where Sailor 1st Class Marshall ought to have known that his advances were not welcome;
- (b) deployed at sea – the incidents unfolded on a warship in the very work environment where the complainants deserved to feel safe and secure working alongside one another;
- (c) imbalance of age and rank – at the time of the incident, the accused was only twenty-five years old, but he was also older and more senior in rank than the complainants. He should have been aware of the values of the CAF and should have known that inappropriate touching was wrong and would threaten the morale, cohesion and operational effectiveness of the CAF; and
- (d) impact on the CAF and unit – requirement for respect – the incident itself reflects a lack of respect for his colleagues and subordinates. Not only did he exercise poor judgement by invading their personal space, with inappropriate touching, his actions made them feel uncomfortable. Their response to his invitations would have made it clear that his advances were not welcome. He violated a fundamental tenet of trust that must exist in serving together in such close confines as on a ship. Every one of us must ensure that our fellow members' integrity and dignity are respected at all times and that they feel comfortable serving within their work environment. The type of conduct that he displayed had a clear detrimental effect on the work environment. When people are uncomfortable in their workplace, the CAF as a whole loses because we are not able to draw on everyone's contribution.

[26] The Court considered the following mitigating factors:

- (a) first time offender. The offender has no conduct sheet or previous criminal record. This is the first disciplinary hearing of any type for him;
- (b) the strongest mitigating factor in his favour is his guilty plea and the rationale behind it. Based on his actions and evidence before the court, he genuinely shows remorse for the conduct. His guilty plea has helped the victims in that they do not have to testify and it also avoids a lengthy trial; and
- (c) he has already been released from the CAF and is moving on with his life in a career outside of the CAF. The Court recognized that he has already paid a very steep price for his conduct.

[27] Sailor 1st Class Marshall, you violated one of the most important obligations of members of the CAF. The military ethos is clear and transparent. It demands the ultimate of respect and integrity by every member in everything we do. However, the Court also notes that you fully accepted responsibility for your conduct and that your admission of guilt is a sincere expression of remorse.

### **Conclusion**

[28] After considering counsel's submissions in their entirety and all the evidence before the Court, I must then ask myself whether the proposed sentence would be viewed by the reasonable and informed CAF member, as well as the public at large, as a breakdown in the proper functioning of the military justice system.

[29] As a serving CAF member, I am conscious of the ongoing concerns of sexual harassment, inappropriate behaviour and sexual assault. It takes significant courage for a victim or complainant to come forward to his or her chain of command to report conduct that has made him or her feel uncomfortable. The recognition of the ongoing sexual misconduct throughout the CAF has started a long overdue and necessary conversation on a journey of addressing misconduct and triggered the required healing, all intended to ensure that the CAF offers a safe and respectful work environment for all its members. It aims to hold everyone accountable, but it also places special responsibility on the chain of command to ensure that harmful and inappropriate behaviour is stopped in its infancy.

[30] Stopping inappropriate sexual behaviour in its infancy is not an easy task. The chain of command and prosecutorial authorities must quickly respond to the full range of unacceptable conduct. A failure to address even the smallest instance of inappropriate behaviour is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every CAF member.



[31] The joint submission before the Court recognizes that the charged misconduct must be addressed and resolved at the appropriate level.

[32] As a result of careful negotiations between the prosecution and defence counsel, Sailor 1st Class Marshall pleaded guilty to four charges under section 93 of the *NDA*, offences for disgraceful conduct and accepted responsibility for his actions as well as one charge contrary to section 95 of the *NDA* for the ill-treatment of a subordinate. Section 93 of the *NDA* criminalizes conduct that is “shockingly unacceptable” and is punishable up to imprisonment for a term not exceeding five years or to less punishment. Courts martial have historically found that facts akin to sexual misconduct fall within the realm of shockingly unacceptable conduct. The maximum sentence that exists for a section 93 offence is significant and is a reflection of the seriousness of the offence. As I explained to Sailor 1st Class Marshall during the plea verification process, although the offence is a *NDA* offence, it is still captured within the *Criminal Records Act*, re-enforcing its seriousness on the spectrum of conduct.

[33] Considering all of the factors, the circumstances of the offences and of the offender, the indirect consequence of the finding and the sentence, the gravity of the offence and the previous character of the offender, I am 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 justice into disrepute.

**FOR THESE REASONS, THE COURT:**

[34] **FINDS** Sailor 1st Class J.R. Marshall guilty of charges 5, 6, 7, 8 and 9.

[35] **SENTENCES** him to sixty days of imprisonment in custody.

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**Counsel:**

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

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