COURT MARTIAL

Citation: *R. v. MacKay*, 2022 CM 5017

Date: 20220908
Docket: 202230

Standing Court Martial

Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

His Majesty the King

- and -

Petty Officer, 1st Class W.G.A. MacKay, Offender

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

Restriction on publication: Pursuant to section 183.6 of the *National Defence Act*, the Court directs that any information that could disclose the identity of the persons described in these proceedings as the complainants, including the person referred to in the charge sheet as "M.S." and the person referred to in the Statement of Circumstances as "M.E.S.", shall not be published in any document or broadcast or transmitted in any way. This order does not apply to disclosure of such information in the course of the administration of justice, when it is not the purpose of the said disclosure to make the information known in the community.

REASONS FOR SENTENCE

(Orally)

Overview

[1] Petty Officer, 1st class Mackay pled guilty to two offences of drunkenness and one offence of abuse of subordinates. The charges relate to events that happened in the second half of 2020 while the offender was serving onboard His Majesty's Canadian

Ship (HMCS) *Toronto* as part of Operation REASSURANCE from 25 July to 16 November 2020.

[2] The first two offences were committed on 13 November 2020 while the ship was alongside in Bodo, Norway. Due to COVID-19 restrictions, the crew was not allowed to visit the neighbouring town. As a morale booster, the chain of command had organized the rental of a hot tub that was placed on the jetty near the ship and made available to the ship's company. Crew members had to sign up for a thirty-minute timeslot to reserve their spot. Petty Officer, 1st Class MacKay had signed up for 2230 hours that evening. Two privates and six other crew mates had also signed up for the same timeslot. Following the completion of duties that day, the bars were opened, and alcohol was served onboard. When he arrived for his scheduled time to enjoy the hot tub, Petty Officer, 1st Class Mackay was highly intoxicated, having consumed a large quantity of alcohol. He entered the hot tub already occupied by some of those who had also reserved a spot at the same time. He sat next to M.S., one of the privates. He did not say anything to M.S. but touched her knee and thigh with his hand. She attempted to slide away from Petty Officer, 1st Class Mackay, however this did not work. Following the brief encounter, a friend of M.S. sitting on her other side noticed she looked uncomfortable and pulled her towards him, putting an end to her interaction with Petty Officer, 1st Class Mackay. Shortly thereafter, Sailor 3rd Class Milley arrived and sought to enter the hot tub for his reserved time slot starting at 2300 hours. Petty Officer, 1st class Mackay did not get up to leave the hot tub at the conclusion of his allocated time. This created a conflict between the two as Sailor 3rd Class Milley demanded that Petty Officer, 1st class Mackay leave the hot tub to make room for crew mates that had signed up for the 2300 hours time slot. This argument culminated in Petty Officer, 1st Class Mackay slapping Sailor 3rd Class Milley in the face in front of others before leaving the hot tub.

[3] The third infraction was committed during another evening of the deployment, the exact date is unknown. A crewmember of the rank of sailor 1st class, referred to as M.E.S., was on brow duty while the ship was alongside. Petty Officer, 1st Class Mackay walked past M.E.S. on the way to the smoking area, quickly grabbed her breasts with both hands and continued towards the smoking area. The touching was brief, and Petty Officer, 1st Class Mackay had moved on before M.E.S. could react. Petty Officer, 1st Class Mackay was highly intoxicated by alcohol consumption at that time. He has no recollection of this incident.

[4] Following the Court accepting and recording the guilty plea, counsel proposed a joint submission of a severe reprimand combined with a fine in the amount of $7,500. The issue for the Court to decide is whether imposing the sentence jointly recommended by counsel would bring the administration of justice into disrepute or is otherwise contrary to the public interest in the circumstances of this case. For the reasons that follow, the Court finds that the joint submission is not contrary to the public interest.

Whether imposing a severe reprimand combined with a fine in the amount of $7,500 would bring the administration of justice into disrepute or is otherwise contrary to the public interest

[5] The prosecution contended that the objective of general deterrence should be the focus of the punishment, but recognizes that Petty Officer, 1st Class Mackay's rehabilitation should not be ignored. During his submissions, he explained that the following aggravating factors were considered when deciding on the joint submission: the offences were committed on deployment, the impugned conduct was directed toward subordinates and the conduct involved the violation of the bodily integrity of two victims. The prosecution considered as mitigating that the offender pled guilty, that he acknowledged the harm done to the victims, showed remorse, and that he has a lengthy unblemished career in the Canadian Armed Forces (CAF) that included a significant number of days at sea. He also considered and accepted that the offender took positive steps to rehabilitate himself. Consequently, the prosecution is of the view that the proposed sentence will not, and should not, result in a criminal record. Otherwise, a criminal record would unduly impede Petty Officer, 1st Class Mackay's chance to secure civilian employment. The prosecution also explained that the proposed fine is higher in this case than those precedents he submitted because Petty Officer, 1st Class Mackay held a higher rank and was more senior than the majority of the offenders concerned by these cases.

[6] Defence counsel submitted that Petty Officer, 1st Class Mackay's conduct was not premeditated, that it was out of character. The offender's personal records show in fact that he rose quickly in the ranks and he has no previous convictions. Counsel for the defence also contended that Petty Officer, 1st Class Mackay suffered stress injuries with severe substance abuse, which were a significant factor in the commission of the offences. His rehabilitation efforts are remarkable, and he is committed to recovery. He regrets the harm caused. Almost two years have passed with no signs of recidivism. Consequently, Petty Officer, 1st Class Mackay presents a very strong potential for rehabilitation. Hence, his punishment should not impede his rehabilitation.

The applicable principles for joint submissions

[7] Turning to the applicable principles, the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, established the public interest test. The public interest test requires that the joint submission be rejected only when it is so unhinged from the circumstances of the offence and the offender, that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. In other words, in light of the circumstances of the case and of the offender, the joint submission is either so severe, or so lenient, as the case may be, that accepting it would bring the administration of the military justice system into disrepute. Consequently, a joint submission should not be rejected lightly. This high threshold means that the sentencing judge has limited discretion when

considering a fair and fit sentence and must exhibit restraint when considering rejecting a joint submission.

[8] Guilty pleas in exchange for joint submissions are a necessary part of the administration of both criminal and military justice. When properly conducted, plea resolutions benefit not only the accused, but also the victims, witnesses, counsel, and the administration of justice generally. When accused persons plead guilty, the stress and legal costs associated with trials are mitigated. For those who are truly remorseful, a guilty plea offers an opportunity to begin making amends. For many accused persons, maximizing certainty as to the outcome is a critical aspect of their decision to plead guilty because it provides a level of comfort. Thus, generally, accused persons will not give up their right to a trial on the merits and all the procedural safeguards it entails, unless they have some assurance that the agreements entered into with the prosecution will be honoured. The prosecution also relies on the certainty of joint submissions to see a fast and fair resolution of its case.

[9] Furthermore, both the prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of the party they represent. Counsel has an in-depth knowledge of the circumstances of the offender, as well as the strengths and weaknesses of their respective positions. In addition to their professional and ethical obligations and accountability toward their respective client, the Court and the public in general, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest. They are, in this context, expected to have considered the sentencing principles of the military justice system, in particular the fundamental purpose of sentencing, which is to maintain the discipline, efficiency and morale of the CAF. Both counsel are required to ensure that their joint submission is proportionate to the gravity of the offence and the degree of responsibility of the offender.

Circumstances of the offender

[10] Having addressed the applicable principles, the Court considered the personal situation of the offender. The documentary evidence listed at article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces* reveals that he is thirty-nine years old. He is married and has two young children. His seventeen-years of service includes four deployments and 929 days at sea. He received a Canadian Joint Operations Command commendation for his leadership and professionalism while serving as the second in command of HMCS *Charlottetown's* naval boarding party. He is also the recipient of several service decorations. He received the following medals: Article 5 NATO Medal for Operation ACTIVE ENDEAVOUR, South-West Asia Service Medal ALLIED FORCE, Operational Service Medal – EXPEDITION, General Campaign Star – SOUTH-WEST ASIA; Queen Elizabeth II's Diamond Jubilee Medal; Canadian Forces' Decoration, and the Special Service Medal - NATO. He has no previous conviction. It is fair to say that he had a successful career up to the commission of the offences.

[11] As for his efforts toward rehabilitation, following his repatriation from HMCS *Toronto* in November 2020, he sought treatment for addictions and other concerns regarding his general mental health. Since November 2020, he attends group therapy and cognitive behavioural therapy appointments with psychologists, social workers and registered mental health nurses. From March to May 2022, he completed the Concurrent Trauma and Addictions Program, an inpatient treatment program at the Edgewood Treatment Center in Nanaimo, British Columbia. On 9 July 2021, he was formally diagnosed with operational stress injuries by his psychiatrist. He was diagnosed with post-traumatic stress disorder and a severe substance use disorder. His psychiatrist is of the opinion that the likelihood he will regain fitness for deployments and operational environments is extremely low. A permanent medical category application has been submitted by his medical officer. This means that it is likely he will be medically released from the CAF.

[12] He has been sober since the commission of the offences. Further, he has apologized in open court to the victims for his conduct.

Aggravating factors

[13] As for the circumstances surrounding the commission of the offences, I agree generally with the aggravating factors listed by the prosecution; the offences were committed while he was deployed on board ship on Operation REASSURANCE. The charge involve the violation of the bodily integrity of subordinates. Logically, his actions led to a breach of trust of those who suffered harm, including Sailor 3rd Class Miller who was slapped in the face in front of others, and those who witnessed his actions on these occasions. Additionally, his rank and experience in the CAF also constitute aggravating factors.

[14] Sadly, the case of Petty Officer, 1st Class Mackay is not unique at courts martial, on the contrary. Indeed, sexual misconduct committed by CAF members in circumstances where the perpetrator, or the victim, or both, have engaged in binge-drinking at messes, is a frequent occurrence. How many cases will it take for the chain of command to take firm action to address this issue and ensure that not only serving restrictions exist, but that they are indeed enforced?

Mitigating factors

[15] Turning to the mitigation factors, I accept counsel's positions regarding the relevant mitigating factors of this case: the offender pled guilty, saving the Court, participants and the public at large effort, time and resources. I also agree that the offender showed genuine signs of remorse and that at the time of the commission of the offences, he was dealing with mental health challenges and substance abuse. This was a very emotional time for Petty Officer, 1st Class Mackay, particularly as the offences were committed when the demands on him caused by the increased operational tempo due to the pandemic were extremely high. In addition, on 13 November 2020, Petty Officer, 1st Class Mackay had a video call with his mother who was hospitalized, and

critically ill. During this call, he said "goodbye" as he believed his mother would die shortly after. Following the call, he drank excessively. The hot tub incidents followed that same evening.

[16] Petty Officer, 1st Class Mackay's situation at the time led his chain of command to encourage him to seek social and spiritual support services to mitigate the effects of operational stress injuries. An operational stress injury letter was added to his personnel file following this deployment.

Parity

[17] Now turning to the parity principle, court martial cases similar to the circumstances of this case provided by the prosecution that were considered, *R. v. Bruce*, 2020 CM 5011; *R. v. Mitchell*, 2018 CM 4020; *R. v. Duhart*, 2015 CM 4023; and *R. v. McCabe and Gibson*, 2010 CM 2008. Noting that some of these cases relate to article 129 charges, I am nevertheless satisfied that the circumstances of these cases were comparable to the case at bar. I therefore conclude, comparing the punishments imposed for these cases, that the joint submission is within the range of punishment for offenders in similar situations who pleaded guilty to similar offences.

Objectives

[18] Thus, considering the offences to which he pled guilty, and considering the circumstances surrounding this case, the fundamental purpose of sentencing shall be achieved by imposing a sanction that has the objectives of deterring others from adopting the same conduct, as well as denouncing unlawful conduct. At the same time, I do believe that the offender's rehabilitation should not be compromised by the punishment to be imposed. The evidence provided demonstrates that his chances of rehabilitation are very high. Therefore, I agree that Petty Officer, 1st Class Mackay should not, in the circumstances, be burdened with a criminal record.

Conclusion

[19] Consequently, reviewing the record and the evidence before me, and considering the applicable sentencing principles, I find that the joint submission is not so 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 other words, I do believe that a reasonable person aware of the circumstances would expect the offender to receive a sentence which expresses disapprobation for the failure in discipline involved and have a personal consequence for the offender. The sentence proposed, composed of the punishments of severe reprimand and a fine in the amount of $7,500, is aligned with these expectations.

FOR THESE REASONS, THE COURT:

[20] **FINDS** Petty Officer, 1st Class MacKay guilty of the two offences of drunkenness, and one offence of ill-treatment of a person who by reason of rank was subordinate to him.

[21] **SENTENCES** him to a severe reprimand and a fine in the amount of $7,500. The fine is payable with the first payment of $1,500 due at next pay, with monthly instalments of $1,000. In the event you are released from the CAF for any reason before the fine is paid in full, the outstanding balance is to be paid the day prior to your release.

Counsel:

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

Major A. Gelinas-Proulx, Director Defence Counsel Services, Counsel for Petty Officer, 1st Class W.G.A. MacKay