



COURT MARTIAL

Citation: *R. v. Kenderesi*, 2022 CM 4012

Date: 20220922

Docket: 202158

General Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

His Majesty the King

- and -

Officer Cadet L. Kenderesi, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Officer Cadet Kenderesi, having accepted and recorded your plea of guilty in respect of the third charge on the charge sheet, the Court now finds you guilty of that charge for conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act (NDA)*. The prosecution has withdrawn the first charge and a stay of proceedings was ordered for the second charge.

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 severe reprimand and a fine in the amount of \$4,200.

[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 channeled 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 courts martial in performing the sentencing function attributed to me as a military judge. As recognized by the Supreme Court, 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 Statement of Circumstances which was formally admitted as accurate by Officer Cadet Kenderesi. 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* article 112.51.

[9] In addition to this evidence, the defence produced an Agreed Statement of Facts, an affidavit from Officer Cadet Kenderesi and a letter of apology that he previously read in open court.

[10] Finally, counsel made submissions to support their position on sentence based on 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

[11] The following information is relevant to understand the circumstances of the offence. At the time of the offence, the offender was a member of the reserve force, specifically the sub-component known as the Cadet Organizations Administration and Training Service (COATS). However, he had not participated in any military activities since 2017 and had last been in contact with the Canadian Forces in 2018.

[12] On 5 December 2020 Officer Cadet Kenderesi travelled from his home in East Gwillimbury, Ontario to a protest about an hour away in downtown Toronto. Protesters were gathered at Dundas Square to express their opposition to government action and restrictions designed to contain the COVID-19 pandemic.

[13] Two video clips of Officer Cadet Kenderesi's participation in the protest were posted to the Internet, which prompted an investigation and the charges that brought this trial.

[14] A video posted to Facebook shows a man standing in the back of a pickup truck bearing a banner for the group "The Line" and signs reading "No more lockdown" and "Hugs over masks". The man in the truck addresses the assembled crowd over a sound system and introduces Officer Cadet Kenderesi describing him as "an incredible serviceman to our country". Officer Cadet Kenderesi then climbs into the truck bed and accepts the microphone. He is wearing a Canadian disruptive pattern (CADPAT) uniform with a beret, webbing, a helmet slung on the webbing, and a sheathed knife attached to the yoke on his left side.

[15] Officer Cadet Kenderesi speaks to the crowd, thanking them for coming out to "tell the Government of Canada that freedom and tyranny doesn't rule Canadians". He expresses his doubts about the safety of the COVID-19 vaccines being distributed and then says "for us to take the vaccine I think it's criminal" and "I'm asking military right now serving, truck drivers, medical engineers, whatever you are, do not take this unlawful order in distribution of this vaccine...I might be in a lot of shit for doing this but I don't care anymore." Officer Cadet Kenderesi's comments meet with applause and cheers from the crowd.

[16] In another video posted to YouTube, a green Volkswagen Iltis vehicle is seen driving slowly down the street as protesters walk beside and behind it. Officer Cadet Kenderesi is driving. He is wearing a CADPAT uniform and beret. He speaks into a microphone saying "We're here in this protest...standing up for the citizens of Toronto....being in the military we have to pick and choose sides now....and we have to choose between right and wrong, between justice and injustice so I'm choosing justice

and freedom, freedom from tyranny and I'm calling upon all military personnel to do the same not to accept any unjust orders which would be giving out and distributing vaccines....We should not comply with any of these orders since we don't know...how these vaccines will act upon our bodies' health....We're asking all military including General Hillier not to comply with the government, not to be a criminal like the rest of the government. Because all those who comply will eventually have blood on your hands....It will come out the truth and you do not want to be on that side of the fence where you know you have killed or actually murdered innocent people.”

The offender

[17] Officer Cadet Kenderesi was born in Hungary and will turn sixty-one next month. He is married and has three grown children who are still living at home.

[18] Officer Cadet Kenderesi first joined the Canadian Armed Forces (CAF) reserve force as a crewman in 1978, a period of service which lasted fifty-eight days. Officer Cadet Kenderesi re-joined the reserves in 1988, completing qualifications as an infantry private, serving until 2000. He joined COATS in May 2007 and served sporadically on Class “A” Reserve service until 2013, when he went on non-effective strength.

[19] Officer Cadet Kenderesi comes before the Court without a criminal record or conduct sheet. He completed, as part of his plea agreement with the prosecution, eighty hours of charitable work with the Roman Catholic St. Elizabeth of Hungary Parish in Toronto with positive reviews from his supervisors.

[20] Officer Cadet Kenderesi has been employed with Tydell Disposal since December 2021. The president of the company describes him as a courteous hard worker that she would recommend to any employer.

The explanations by the offender

[21] In an affidavit produced by the defence, Officer Cadet Kenderesi explains that he grew up in Hungary during the repressive communist era and witnessed from an early age violent repression by governmental authorities. As a result, he is extremely fearful of perceived authoritarian government actions.

[22] In December 2020, as a result of the lockdown measures instituted in relation to the COVID-19 outbreak, Officer Cadet Kenderesi's wife was laid off, his trucking business collapsed, and he had to declare bankruptcy. His family's financial situation was very precarious.

[23] Having close ties to the expatriated Hungarian community, Officer Cadet Kenderesi perceived in 2020 a generalized fear in this community that Canada was slipping toward the authoritarianism that he and others had fled. He swears that he and his family were terrified by the COVID-19 situation and the extraordinary government

measures. He stated that he could not sleep, felt extremely anxious and feared for his family's safety.

[24] Officer Cadet Kenderesi explained that he impulsively decided the day of the protest to attend as he was distressed and was seeking to protect his family. He said he decided to put his uniform on to display his patriotism. As he was standing in the crowd in uniform, he was singled out by organizers and asked to take the stand. He was encouraged by the nearby crowd who was simultaneously praising him and thanking him for his service.

[25] Officer Cadet Kenderesi has read a letter of apology in court at the sentencing hearing. The moment was significant and emotional for the offender. I believe it is worth quoting the letter in its entirety:

“I, OCdt Lesley Kenderesi, am writing this letter to apologize for my actions on 5 December 2020. If I could change what I did, I would. I would not involve myself in any way in the protest.

I regret attending, wearing my uniform and addressing the crowd on that day. As a Canadian Armed Forces member, I breached my oath to faithfully serve Canada by publicly undermining the Government of Canada's policy regarding the COVID 19 vaccine. It was wrong for me to present myself as a Canadian Armed Forces member to publicly express my private views. I abused the trust that comes with the privilege of wearing the Canadian Armed Forces uniform. I am sorry for the disrepute that I brought on the Canadian Armed Forces and myself by my unacceptable actions.

I regret calling upon Canadian Armed Forces to disobey orders relating to the distribution of the COVID 19 vaccine. As an officer, I had to have better judgment. It was not my place to question the orders of the chain of command. I breached a core principle of service by not supporting the lawful authority of the chain of command. I am ashamed of my public display of disloyalty. I apologize for all the harm and distrust that I caused. I did not mean any ill towards anyone. Please excuse my actions.

Further, I commit to not do anything to embarrass or caused disrepute to the Canadian Armed Forces or the Government of Canada.

Please forgive my actions and me.

God bless Canada which I hold dearest to my heart.”

[26] Officer Cadet Kenderesi states that he wants to resume a normal, anonymous, productive life.

Seriousness of the offence

[27] 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 His Majesty's service. It is therefore an objectively serious offence going to the core of the need to maintain a disciplined armed force.

[28] Of course, a broad range of circumstances can lead to offences under section 129 of the *NDA*. The circumstances of this case are unique. Although both counsel casted a large net in attempting to find useful precedents, alleging similarities in some aspects of other cases dealing with breaches of the obligation not to prejudice good order and discipline, I am respectfully unable to see any utility in referring to any of these cases given the significant differences between their respective facts and the circumstances of this case, both as it pertains to the offence and the offender. Parsing out similarities in referring to these cases would, in my view, be unhelpful and risk misleading or distracting anyone reading this decision in the future from the core of the circumstances of the offence and the offender in this case.

[29] As it pertains to precedent, suffice to say that the Court and counsel are unaware of any other instance where a CAF officer attended a demonstration against high profile government action in uniform and taking a microphone to call on members of the CAF to refuse orders to perform lawful duties in support of authorities. It has not been argued, and I agree, that this case bears no similarities with recent cases before military tribunals relating to failures by CAF members to comply with, and in some cases, undermine sanitary measures implemented by the CAF leadership in the form of military orders. I acknowledge that Officer Cadet Kenderesi stated that he is not an active advocate against vaccines. Yet, this case is not about being punished for any personal views about vaccines.

[30] The offence Officer Cadet Kenderesi pleaded guilty to, under section 129 of the *NDA*, is meant to protect good order and discipline within the CAF; specifically in this case, the good order and discipline of some members of the CAF which must follow the orders and instructions of their chain of command to assist civilian authorities in distributing vaccines. The conduct of an officer of the CAF who chooses to participate at a demonstration in uniform to publicly express his support to those who undermine the legitimacy of the efforts of civilian and military authorities to limit the spread of COVID-19 through vaccination is unacceptable in itself. It is even more unacceptable for Officer Cadet Kenderesi to incite members of the CAF to disobey orders in relation to foreseen tasks of assisting in the distribution of vaccines.

[31] I agree with the prosecution to the effect that such conduct risks damaging the discipline of CAF members by its incompatibility with the obligation of obedience and of support to lawful authority at the core of duty of all members of the military community. It also has the potential to damage the military institution in the eye of the public, notably the expectation, always fulfilled, that the CAF will perform lawful

duties imposed in support of civilian authorities. The offence here constitutes a clear and significant breach of the obligation imposed on all members of the CAF not to conduct themselves in a manner prejudicial to good order and discipline.

Aggravating factors

[32] The prosecution limited its specific submission on aggravating factors to the mention of Officer Cadet Kenderesi's many years of experience. What was meant is his years of service as a member of the CAF, with various levels of involvement or experience throughout. This is in contrast with the submission of the defence to the effect that Officer Cadet Kenderesi had not been providing meaningful service to the CAF since 2013 and occupied such a low position in the CAF as to be a mitigating factor.

[33] What I believe is aggravating in this case, in the context of the offence under section 129 of the *NDA*, which could have been committed by a CAF member of any rank, is the fact that Officer Cadet Kenderesi is an officer; the lowest rank as officer and in an organization which is meant to provide training and administrative support to cadets, but an officer nevertheless. Members of the COATS subcomponent of the reserve force wear the CAF uniform. They are members of the military, in this case the officer corps and this comes with obligations and duties. As someone who had been involved with the CAF on and off since 1978, had trained as a private and decided to become an officer, this could not have escaped Officer Cadet Kenderesi's attention. As an officer, Officer Cadet Kenderesi was expected to know better and lead by example. He admits as much in his apology. This is aggravating.

[34] I do note that some circumstances of the offence are particularly serious and aggravating but given the particulars of the charge in this case, I must find they are included in the offence rather than aggravating factors in themselves. This is the case with the fact that Officer Cadet Kenderesi attended the demonstration in uniform. He knew what the demonstration he chose to attend was about: protesting government actions in relation to the extraordinary situation brought about by the COVID-19 pandemic. Yet, he demonstrated a significant lack of judgment by deciding to attend in uniform. This was in fact the source of his subsequent misconduct: his decision to attend in uniform made him a prime candidate to be used by the organizers as a speaker. The decision to participate at a demonstration protesting government action in uniform was, in itself, a potential offence under section 129 of the *NDA* even before Officer Cadet Kenderesi spoke a word.

[35] Yet, he did speak and invited CAF members to disobey orders relating to distribution of vaccines. I find that in doing so, he risked undermining the execution of orders in the context of the involvement of the CAF in assistance to civilian authorities in the fight against COVID-19 at the time of the offence. In that sense, his failure in discipline 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. In the overall context surrounding the commission of the offence, I find this is aggravating.

Mitigating factors

[36] That said, the Court acknowledges the evidence presented by the defence in mitigation reveals that Officer Cadet Kenderesi was facing a difficult situation at the time of the offence: he and his family had been particularly affected by the restrictions brought about by the pandemic, he had to declare bankruptcy and was under significant emotional stress. In addition, there are other indications that Officer Cadet Kenderesi now understands the gravity of what he has done and is truly remorseful. This is illustrated by the following mitigating factors:

- (a) Officer Cadet Kenderesi'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, held on a military establishment in the presence of members of the military community;
- (b) the fact that Officer Cadet Kenderesi is a first-time offender, supporting the argument that the conduct attributed to him is out of character;
- (c) the acknowledgement of the harm caused and the apology of Officer Cadet Kenderesi, which I find to be genuine; and
- (d) the facts reveal that Officer Cadet Kenderesi is well engaged in rehabilitating himself, as evidenced by the eighty hours of community work completed, showing that he is deserving of a sentence which will not compromise his rehabilitation and have minimal consequences for his future contribution to society.

Objectives of sentencing to be emphasized in this case

[37] 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 Officer Cadet Kenderesi 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 similar type of unacceptable behaviour. In short, it must show that misbehaviour has consequences.

[38] That being mentioned, I agree with defence counsel that rehabilitation is important and that the need for specific deterrence aimed at Officer Cadet Kenderesi 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.

Assessing the joint submission

[39] As mentioned, I must assess the joint submission of counsel without assistance in the form of sentences imposed in the past for similar offences. In a way, it is a good

thing that counsel were unable to show a precedent for the type of conduct displayed by the offender in this case.

[40] I do agree with defence counsel that the sentence being proposed is not insignificant. Even if the severe reprimand, the most severe punishment imposed, would have only symbolic effects given that the accused is or will be shortly released from the CAF, it remains that the fine accompanying the severe reprimand is of a significant amount, considering that Officer Cadet Kenderesi is drawing a monthly salary of \$2,700. It is also evident to me that the joint submission in this case is the result of significant consultations between counsel and have taken into account a number of factors relevant to the principles of sentencing at play.

[41] 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.

[42] 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 sentence 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 severe reprimand with a significant fine is aligned with these expectations.

[43] As recognized by the Supreme Court, 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 and the state of the law. 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.

[44] 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.

[45] Officer Cadet Kenderesi, I believe that you displayed a significant lack of judgment in behaving as you did in December 2020. Having witnessed your apology in court, I believe you now understand the gravity of what you have done and are determined to do much better. I trust you can move on without reoffending.

FOR THESE REASONS, THE COURT:

[46] **SENTENCES** Officer Cadet Kenderesi to a severe reprimand and a fine in the amount of \$4,200 dollars. The fine will be paid by three personal cheques to the order of the Receiver General of Canada, to be handed to the Officer of the Court forthwith and dated in accordance with the following terms of payment of the fine: \$3,000 is payable forthwith, \$500 is payable on 28 October 2022 and \$700 is payable on 28 November 2022.

Counsel:

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

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Officer Cadet L. Kenderesi