



COURT MARTIAL

Citation: *R. v. Russel*, 2022 CM 4014

Date: 20221004

Docket: 202223

Standing Court Martial

5th Canadian Division Support Base Gagetown
Oromocto, New Brunswick, Canada

Between:

His Majesty the King

- and -

Colonel D.A. Russel, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Colonel Russel, having accepted and recorded your plea of guilty in respect of charge one 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)*.

[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 reprimand and a fine in the amount of \$500.

[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 (CSD) and military tribunals 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 CSD 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 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 Colonel Russel. 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] For its part, the defence produced an Agreed Statement of Facts, which sheds some light on the particular circumstances of Colonel Russel before, at the time and since the commission of 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 and of precedents in other cases, 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 offender, the offence and its aftermaths

[11] The Statement of Circumstances, the Agreed Statement of Facts, the submissions of counsel and the information on the documents entered as exhibits reveal the following circumstances relevant to the offence and the offender.

[12] Inspired by his father who served as Army Chief Warrant Officer, Colonel Russel enrolled in 1987 as an artillery officer. In the more than thirty-four years which followed, Colonel Russel has been employed in a variety of command and staff positions. These include: troop commander during the Oka crisis; a six-month tour to the United Nations Disengagement Observer Force in the Golan Heights, gunnery instructor and Regimental Command Post Officer; service in assistance to civil authorities after the 1997 Manitoba floods; command of an artillery battery culminating in an operational tour in Afghanistan; Deputy Commanding Officer of the Royal Canadian Artillery School; Chief of Staff of the Combat Training Centre in Gagetown; Command of the 4th Air Defence Regiment during its transition to a general support regiment and Director of the Canadian Army Land Warfare Centre where he earned a Canadian Army Commander's Commendation.

[13] At the time of the offence, Colonel Russel had been posted for almost two years in the position of Effects and Influence Branch Officer at the North Atlantic Treaty Organization (NATO) Allied Joint Forces Command in Naples, Italy. In this position, he was also the Regional Canadian Contingent Commanding Officer for Italy within Formation Europe, commanding all Canadian Armed Forces (CAF) members posted to positions in Italy and Romania, approximately 70 personnel in total.

[14] The Statement of Circumstances and Agreed Statement of Facts reveal the following information as it pertains to the offence:

- (a) on 15 June 2021, Colonel Russel sent an e-mail invitation to members of his unit and their families to a boat excursion in the vicinity of Naples, Italy. The intent was to welcome members and their families to an unofficial event of boating and swimming aimed at building cohesion and good morale for unit members, and especially for those newly posted into the unit;
- (b) the event occurred on 21 June 2021, a statutory holiday in the local area. Six boats were rented. One boat was occupied by Colonel Russel, Master Warrant Officer Spence, and their spouses. The remaining boats were occupied primarily by newly posted members to Canadian Forces

Support Unit (Europe) Detachment Naples and their families. One major from the United States military was also in attendance;

- (c) the boats departed the marina at approximately 0900 hours and toured the local area for the day. They returned at approximately 1800 hours. At some point in the late afternoon, as the boats were in a line, Colonel Russel sped up to position his boat the front in order to direct the boats to their next location. As he passed the three boats nearest the front, Colonel Russel pulled one side of his bathing suit down exposing one buttock partially “mooning” the occupants of the three boats. Witnesses estimate he was at a distance of twenty-thirty metres. While there were children on the excursion, none were onboard any of the three boats who could see Colonel Russel’s buttock;
- (d) some members of the CAF on the excursion who witnessed the incident found it offensive, and felt that a CAF member of his rank ought to know better. Others considered it to be a harmless joke. Some of the CAF members who had seen the incident were newly posted to Naples and had never met Colonel Russel before the excursion.

[15] The Agreed Statement of Facts reveals that the incident itself was a misguided attempt at humour. During his thirty-four-plus year military career, Colonel Russel has hosted hundreds of military personnel and their families and has always tried to make people laugh and have fun as a counterweight to hard work and difficult situations. At no point did Colonel Russel intend to offend, demean or belittle anyone.

[16] Although he did not receive any direct comments or complaints about the incident, Colonel Russel was informed by his chain of command a few days after the event that a complaint had been made.

[17] As a result, Colonel Russel was the subject of remedial measures, especially a Recorded Warning. He was also tasked with conducting, and did conduct, group ethical training with those under his command. His superior noted that he had demonstrated humility and a desire to move forward towards rebuilding and maintaining his credibility and trust as a leader. The monitoring period was completed successfully on 18 March 2022.

[18] Despite these proceedings and the aforementioned administrative consequences, Colonel Russel was not relieved of command and retained his post for the remainder of the duration of his posting to Naples, Italy.

[19] Colonel Russel accepts that however well-intentioned his actions were, the result was inappropriate and carried the risk of negatively affecting the good order and discipline of his unit.

[20] Immediately after being informed that a complaint had been made, Colonel Russel made a personal apology to those who had participated in the event. Later, he apologized to his entire staff. It is worth repeating the text of the apology Colonel Russel gave to the Canadian military community in Naples with his wife by his side:

“Good afternoon everyone,

I owe you all an apology. When I planned a boat trip with my wife on 21 June, I extended the invitation to friends and newcomers to tag along. I wasn't thinking clearly when I made a bad joke. I now realize that what I did was not funny to some, and inappropriate.

It was never my intention to cause anyone distress. Looking back, I can clearly see that I didn't think things through before I decided on that course of action. Further, it is concerning that I am your CO. I have already apologized to those who were present. As most of you know me, I like to make people laugh as I am a bit of a joker. Lesson learned, I'll be sure to weigh my sense of humor against my sense of what is acceptable and choose something that isn't controversial. I will not make this mistake again.

I hope you'll forgive me. Sylvie and I have truly enjoyed our time here so far and for those who know me, believe that I truly want your experience to be as, or more enjoyable as we come through this Pandemic together. I hope to rebuild, maintain, and improve your trust and confidence in me as we move forward.”

[21] Colonel Russel has been recently posted to the transition unit at CFB Galetown, in preparation for retirement commensurate with personnel of his rank and status with similar years of service.

Seriousness of the offence

[22] The Court has considered the objective gravity of the offence in this case. The offence in 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.

[23] Of course, a broad range of circumstances can lead to offences under section 129. The Court acknowledges that the circumstances of the behaviour itself in this case is of a minor nature. The events reveal a lack of judgement in the course of a festive and relaxed unofficial outing. However, the rank and position of the offender at the time brings the conduct under a specific light for the purpose of discipline. Indeed, the lack of judgement by a senior officer and commanding officer generates specific risks of prejudice to good order and discipline as acknowledged in this case. As such, the conduct needed to be sanctioned.

Objectives of sentencing to be emphasized in this case

[24] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation and general deterrence in sentencing the offender. This is not a case where specific deterrence is significant. Here, the sentence proposed must be sufficient to denounce Colonel Russel's conduct in the community, acting as a deterrent to others who may be tempted to engage in a similar type of unacceptable behaviour, specifically misjudging what kind of jokes are acceptable for senior officers to make, in the presence of subordinates.

[25] Although the sentence must show that misbehaviour has consequences, the circumstances of this case also reveal the need to keep in mind the objective of rehabilitation. Indeed, the sentence must not compromise the successful steps that Colonel Russel has taken to rehabilitate himself as a senior officer and commanding officer, notably through his apologies and his post-offence conduct.

Aggravating factors

[26] The circumstances of the offence reveal a number of aggravating factors which explain why the conduct needed to be subject of formal charges, dealt with in today's proceedings. Indeed, Colonel Russel was, at the time of the offence, serving as a senior officer in a NATO headquarter, representing Canada in a foreign state; he was a commanding officer for over seventy CAF members; although in a social outing, the offence was committed in the presence of subordinates who were engaged in a first interaction with him and in the presence of a foreign officer from the United States.

Mitigating factors

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

- (a) Colonel Russel's guilty plea today, which avoided the expense and energy of running a trial and demonstrates that he is taking responsibility for his actions in this public trial in the presence of members of the military community;
- (b) the collaboration of Colonel Russel with authorities in the investigation;
- (c) fact that Colonel Russel has no record and is a first-time offender who has had an unblemished career of over thirty-four years in the CAF thus far;
- (d) the genuine acknowledgement by Colonel Russel to those involved and those under his command, repeated in court, that he had made a mistake and his apology to those involved in the incident as well as those serving under his command; and

- (e) the fact that Colonel Russel has obviously rehabilitated himself and consequently deserves a sentence which will recognize the efforts he has made and will have minimal consequences on potential contribution to society in the future.

Assessing the joint submission

[28] In the context of arguments to demonstrate that the joint submission was within a range of similar sentences for similar offences, the prosecution brought a number of cases to my attention, showing that the proposed sentence fits in an acceptable range for similar cases, although no case is the same. Indeed, it has been noted that none of these cases involve an offender of the rank of colonel as we have here. Yet, the military cases dealing with improper jokes such as *R. v. Hunt*, 2019 CM 4009 and *R. v. Avon*, 2016 CM 4007 resulting in punishments of severe reprimands, reprimands or fines, as well as the civilian “moaning” precedents for indecency under the *Criminal Code* resulting in suspended sentences or discharges and, in a labour case, a reprimand and warning, all reveal that the sentence being proposed here is within the range of sentences imposed for similar behaviour in the past. 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.

[29] In determining whether that is so, I must ask myself whether the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances 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 punishments of a reprimand and a fine being proposed are aligned with these expectations. In combination with the fact that these proceedings have taken place following the decision to sanction the behaviour involved with a charge under the CSD, the sentence proposed is well suited to meet the objectives of denunciation and general deterrence, without having a lasting effect detrimental to rehabilitation of the offender.

[30] As recognized by the Supreme Court of Canada, trial judges must refrain from tinkering with joint submissions if their benefit can be maximized. 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.

[31] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the aggravating and mitigating factors mentioned previously, I conclude that the sentence being jointly proposed would not bring the administration of justice into disrepute nor would otherwise be contrary to the public interest. I will, therefore accept it.

[32] Colonel Russel, at this stage of my decision, I usually try to convey to offenders my views on the gravity of what they have done, the need to recognize their mistake and the importance of moving forward with a positive contribution to the CAF and society without reoffending. I am convinced that this is not necessary in your case. You have demonstrated a full understanding of your error and its consequences. From the moment you were informed that your actions may have offended, you have dealt with the situation in an exemplary manner, accepting responsibility as a leader should do and moving forward positively. I can understand why your superiors trusted you to remain in command despite the offence.

[33] I hope this serves as a model for others who may find themselves in similar situations in the future. In that sense, I do not believe that the events of June 2021 should define your otherwise impressive career. I do not think you are leaving the CAF under a black cloud and I invite you to consider today's proceedings as simply the required final step in the formal acceptance of your responsibility. For what it is worth, as you move forward with the rest of your life away from the CAF, I believe you should look back at this court martial as another instance where you acted and lead honourably, as you have done throughout your military career.

FOR THESE REASONS, THE COURT:

[34] **SENTENCES** Colonel Russel to a reprimand and a fine in the amount of \$500 payable forthwith.

Counsel:

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

Lieutenant-Colonel A.H. Bolik, Defence Counsel Services, Counsel for Colonel D.A Russel