



COURT MARTIAL

Citation: *R. v. Keller*, 2022 CM 2018

Date: 20221128

Docket: 202205

Standing Court Martial

3rd Canadian Division Support Base Edmonton
Edmonton, Alberta, Canada

Between:

His Majesty the King

- and -

Master Corporal H.A. Keller, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Today, Master Corporal Keller pleaded guilty to an offence contrary to section 129 of the *National Defence Act (NDA)* for conduct to the prejudice of good order and discipline.

[2] Having accepted and recorded his plea of guilty with respect to this charge, the Court must now determine and pass sentence on the charge which reads as follows:

“First Charge
Section 129 of the
National Defence Act

**AN OFFENCE PUNISHABLE UNDER
SECTION 129 OF THE NATIONAL
DEFENCE ACT, CONDUCT TO THE
PREJUDICE OF GOOD ORDER AND
DISCIPLINE**

Particulars: In that he, between March 2019 and July 2020, at 3rd Canadian Division Support Base Edmonton, did harass Private A. Mataev on the basis of his ethnic origin or religion.”

[3] The Statement of Circumstances filed in court reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. At all material times, Master Corporal Keller was a member of 1 Service Battalion, a unit based at Canadian Forces Base Edmonton, Alberta. He was a member of the Regular Force, and his trade was Material Management Technician.
2. From approximately March 2019 to July 2020, MCpl Keller was immediate supervisor to Pte A. Mataev.
3. Throughout this time, MCpl Keller made numerous racist comments towards Pte Mataev. Specifically:
 - a. During a Christmas dinner in December 2019, MCpl Keller threw a bag of chocolate gold coins at Pte Mataev and said “enjoy your gold shekels” or words to that effect; and
 - b. These incidents were witnessed by at least two witnesses.
4. Eventually, Pte Mataev asked MCpl Keller to stop making such comments, but MCpl Keller persisted; and
5. Pte Mataev has since released from the CAF.”

Joint submission

[4] In a joint submission, the prosecution and defence counsel recommend that the Court impose a sentence of a reprimand and a fine in the amount of \$800. Defence requested that the amount be payable in four monthly instalments of \$200. In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada 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”. By entering into a joint submission, the constitutional right to be presumed innocent is given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this right is one that we all stand to protect.

[5] Thus, in exchange for making a plea, Master Corporal Keller must be assured of a high level of certainty that the Court will accept the joint submission. The prosecution, who jointly proposed the sentence, will have been in contact with the victim, chain of command and is aware of the needs of the military and the surrounding community and is responsible for representing those interests. The defence counsel acts exclusively in the accused's best interests, including ensuring that the accused's plea is a voluntary and informed choice, and unequivocally acknowledges his guilt. As members of the legal profession and accountable to their respective law societies, the Court relies heavily on their professionalism, honesty, judgement, as well as their duty to the Court.

Evidence

[6] In this case, the prosecutor read the Statement of Circumstances and provided all those documents required under *Queen's Regulations and Orders for the Canadian Forces* (QR&O). The Statement of Circumstances was introduced on consent to inform the Court of the context of the incident that led to the charge. The prosecution also filed an Agreed Statement of Facts (ASOF). The victim in this case, chose not to testify or provide evidence to be considered by the Court. The defence had one witness testify, being Master Corporal Keller himself.

[7] Further, the Court benefitted from counsel's submissions to support their joint submission on sentence where they highlighted additional relevant facts and considerations.

The offender

[8] Master Corporal Keller, the offender, is fifty-one years old. He enrolled in the regular force of the Canadian Armed Forces (CAF) in September of 2005 as a Material Management Technician (MMT). Before that, he served as a member of the reserve force from 1992 until 2000. He has been posted to Canadian Forces Base Edmonton since 2013 and is employed at the quartermaster store. His Member's Personnel Record Resume indicates that he has had an active career which and it was noted in the ASOF that he had participated in several operations and exercises throughout his career, which included two three-week taskings to Canadian Forces Station Alert for Operation BOXTOP in 2005 and 2006 where he assisted in the unloading of fuel from the Hercules aircraft and into the station's fuel tanks. In addition, he supported the Rim of the Pacific exercise in Hawaii for one month in July 2010 and he worked at the CAF Arctic Training Centre in Resolute Bay in Nunavut for approximately one month in each of 2013, 2014 and 2015. He is married and has no conduct sheet or criminal record.

The victim

[9] Firstly, as noted in the Statement of Circumstances, the victim was a direct subordinate to Master Corporal Keller during the material times. Master Corporal Keller made numerous racist comments towards Private Mataev and more specifically, during

a Christmas dinner in December 2019, Master Corporal Keller threw a bag of chocolate gold coins at Private Mataev and said “enjoy your gold shekels” or words to that effect. This incident was witnessed by at least two other people.

[10] The prosecution advised the Court that he has spoken with the victim in this case who indicated he was pleased to see that the matter was being pursued and that Master Corporal Keller had entered into a plea agreement whereby he assumed full responsibility for his conduct. He did not provide a victim impact statement.

The purposes, objectives and principles of sentencing

[11] The fundamental purpose of sentencing in a court martial is to maintain the discipline, efficiency and morale of the CAF. This fundamental purpose is achieved by imposing sanctions that have one or more objectives that are delineated in the *NDA* at subsection 203.1(2).

[12] Both the prosecution and the defence highlighted for the Court that on the facts of this case, the objectives of sentencing considered to be the most important are general deterrence and denunciation. The Court agrees with this assessment. In addition, on the facts of this case, the defence argued that the principle of rehabilitation is also critical given the member’s effort towards the successful completion of his remedial measures and the significant efforts he has invested to improve and educate himself.

Accounting for relevant aggravating and mitigating circumstances

[13] Pursuant to section 203.3 of the *NDA*, in imposing a sentence the Court must increase or reduce a sentence to account for any aggravating and mitigating circumstances relevant to the offence or the offender.

Aggravating factors

[14] After hearing the submissions of counsel, the Court highlights the following aggravating factors:

- (a) the victim was his subordinate. At the time of this incident, Private Mataev was a junior member and Master Corporal Keller’s direct subordinate. Lieutenant-Colonel J. Boland (Commanding Officer of 1 Service Battalion) wrote that the offences were serious and were directed at a subordinate in front of several witnesses. In his conduct, Master Corporal Keller breached the trust that should have existed between himself as a supervisor and Private Mataev, who reported directly to him. As his direct supervisor, he held a heightened requirement to ensure that Private Mataev was respected;
- (b) the breach of trust. Within the CAF, there is an implied trust internally between members, but there is also trust that extends to the Canadian

public. Brigadier-General Fletcher (Commander of 3rd Division and referral authority at the time) wrote that Master Corporal Keller's conduct was a "breach of faith with the Canadian public, the CAF chain of command and soldiers." Brigadier-General Fletcher expressed the desire that this matter proceed by court martial to reinforce the consequences for those who fail to meet the standards of trust and integrity;

- (c) the harassment is unacceptable. Brigadier-General Fletcher wrote that he believed this to be a very serious matter as there is no place within the CAF for harassment or discrimination of any kind. Failure to effectively prevent this and address the underlying issues that contribute to it, will have a lasting negative impact on our personnel and cohesion, harming not only the victim, but the CAF institution as a whole; and
- (d) the release of Private Maltaev. Although there is no evidence before the Court that Private Maltaev released from the CAF as a result of this incident or as a result of the poor leadership of Master Corporal Keller, the fact is that this incident would have negatively coloured the very short duration of his service with the CAF.

Mitigating factors

[15] However, as counsel pointed out, there are several mitigating factors that must be highlighted:

- (a) the guilty plea. Master Corporal Keller's plea of guilty for the offence as described in the Statement of Circumstances must be given its full weight. His guilty plea has saved the Court, counsel and the unit supporting the Court considerable time. Importantly, it also spared Private Mataev from having to travel from Toronto to Edmonton to testify. Master Corporal Keller took the stand as a witness, and it was clear that he is extremely remorseful. He took advantage of the opportunity to express his sincere regrets on the public record;
- (b) the offender has no conduct sheet or previous criminal record;
- (c) the positive letters of support. The Court was provided with letters of support from Warrant Officer Mullen, a previous supervisor who commented favourably on Master Corporal Keller's work as a MMT as well as his positive attitude. In addition, the Court learned from Ms Toews, social worker, that Master Corporal Keller has been fully engaged in all aspects of his therapy and that upon completion of his prescribed treatment program, she anticipates a very positive outcome and positive gains;

- (d) the offender's personal challenges. Between October 2021 and January 2022, as a result of the complaint in this matter, Master Corporal Keller was placed in an isolated position at the Battalion Library, a decision which caused Master Corporal Keller stress. This incident and the corresponding referral to court martial have placed strain on his relationship with his spouse and he is currently on medical employment limitations related to physical health conditions requiring regular access to medical services; and
- (e) the other administrative consequences. In January 2022, Master Corporal Keller was informed by his chain of command that a Notice of Intent to Recommend release would be initiated. Master Corporal Keller wrote a statement objecting to this decision which resulted in a remedial measure initiating counselling and probation from 8 March to 8 September 2022. Master Corporal Keller wrote a 1000-word essay on the importance of being cognizant of other people's beliefs and heritage as a requirement of this remedial measure. He has successfully completed his counselling and probation and told the Court that he has gained valuable insight and education which makes him feel even worse regarding his conduct.

Parity

[16] Paragraph 203.3(b) of the *NDA* stipulates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[17] The prosecution relied upon the following case law: *R v. Cribbie*, 2018 CM 3008; *R. v. Sangha*, 2020 CM 2011; *R. v. Dryngiewicz*, 2012 CM 2011.

[18] The defence relied upon the following case law: *R. v. Desjardins*, 2017 CM 3002 and *R. v. Betts*, 2017 CM 3010.

Conclusion

[19] As the Court often expresses to people who come before it; we all make poor choices at one point in our lives, and it is how we deal with our mistakes that governs our success moving forward. Master Corporal Keller, you conducted yourself in a manner that did not meet the standard expected of any member within the CAF. When this happens, we have three choices. We can let it define us, let it destroy us or let it strengthen us.

[20] You took the stand today to express your remorse. It takes humility to admit when one has erred and be willing to make amends. I commend you on having invested significant time and effort in rehabilitating yourself. This provides the Court with confidence that you understand your personal responsibility to check your own actions against the standard expected of every member and officer serving in the CAF. We

must all be aware that unconscious biases exist around us and consequently, we must all be open to changing our behaviour when we recognize that it is offside of the standard expected.

[21] In short, you have assumed responsibility, and you have strengthened yourself as a person and as a leader. You must continue to work along this path and not let this destroy you. The evidence suggests that you have chosen the path of rehabilitation and I highly encourage you to stay on that path.

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

[23] Considering all the factors, the circumstances and gravity of the offence, the consequence of the finding and the sentence, the Court is indeed satisfied that counsel have discharged their obligation in making the 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:

[24] **FINDS** Master Corporal Keller guilty of the one charge contrary to section 129 of the *NDA*.

[25] **SENTENCES** Master Corporal Keller to a reprimand and fine in the amount of \$800, payable in four monthly instalments of \$200 commencing in the month of January 2023. In the event you are released from the CAF for any reason before the fine is paid in full, the then outstanding balance is to be paid the day prior to your release.

Counsel:

The Director of Military Prosecutions as represented by Major B.J. Richard

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
Counsel for Master Corporal H.A. Keller