COURT MARTIAL

Citation: *R. v. Nongqayi*, 2023 CM 4017

Date: 20231020
Docket: 202317

General Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

His Majesty the King

- and -

Private X. Nongqayi, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Private (Pte) Nongqayi was found guilty by the panel of this General Court Martial (GCM) of three of the four charges she faced in the trial. The guilty verdicts related to two distinct incidents. As it pertains to a first incident on 6 July 2022, Pte Nongqayi was found guilty of the first charge under section 130 of the *National Defence Act* (*NDA*) for assaulting Pte Ikezu with a weapon, contrary to section 267 of the *Criminal Code* and of the fourth charge under section 86 of the *NDA* for having fought with Pte Ikezu, a person subject to the Code of Service Discipline. As it pertains to a second incident on 2 March 2023, Pte Nongqayi was found guilty of the second charge under section 130 of the *NDA*, for uttering threats to cause death or bodily harm to Pte Welch, contrary to section 264.1 of the *Criminal Code*.

[2] Pte Nongqayi was found not guilty of the third charge under section 130 of the *NDA* for knowingly conveying to Pte Welch a threat to cause bodily harm to Pte Poirier on 27 February 2023, contrary to section 264.1 of the *Criminal Code*.

[3] Immediately following the verdicts on 27 July 2023, the sentencing hearing commenced with the prosecutor providing the Court with the documents on the career history and pay information of the offender. Both parties then requested that the sentencing hearing be postponed, to provide time to properly prepare evidence and arguments. This was a sensible request given the extraordinary situation of the offender who had spent ninety-one days in pre-trial custody and whose continued employment as a member of the Canadian Armed Forces (CAF) was likely to be subject to a review in consideration of the verdicts.

[4] The sentencing hearing reconvened on 17 October 2023. The parties readily agreed that Pte Nongqayi should not have to undergo further incarceration considering the time she spent in pre-trial custody. However, they do not agree on the sentence that should be imposed.

[5] It is my duty to determine an appropriate and fair sentence, taking into consideration the circumstances of the offences revealed by the facts heard in the course of the trial, the additional facts related to the circumstances of the offender before, at the time and since the commission of the offences, the documents introduced by both parties, the relevant precedents as well as the arguments of counsel in the course of the sentencing hearing.

The accepted facts relating to the offences

[6] The *NDA* provides at subsection 203.5(2) that following a GCM, the sentencing military judge shall accept as proven all facts, expressed or implied, that are essential to the court martial panel's finding of guilty and may find any other relevant fact that was disclosed by the evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[7] As mentioned, Pte Nongqayi was found guilty of assaulting Pte Ikezu with a weapon, namely a piece of broken glass. She was also found guilty of having fought with Pte Ikezu. The facts relating to these two infractions of 6 July 2022 are essentially the same. To find Pte Nongqayi guilty of these offences, the panel had to be convinced beyond a reasonable doubt by the version of facts offered by Pte Ikezu, which was in part consistent with facts related by Pte Nongqayi during her testimony.

[8] Pte Ikezu testified that on the evening of 6 July 2022 he was awakened in his room in quarters on Canadian Forces Base (CFB) Kingston by Pte Nongqayi and Pte K.S., requesting that he follows them to K.S.'s room. Once there, a disagreement occurred about money. At one point Pte Nongqayi got mad, smashed Pte K.S.'s hand, causing a bottle of beer to fall on the floor. She then stormed out of the room. Pte Ikezu followed her as she made her way down the stairs and through an entrance to the

building leading outside. He wanted to know what was going on. He assessed that she was then intoxicated but even angrier, supporting his observations by the facts that Pte Nongqayi had raised the volume of her voice, had a beer in her hand and had just returned from spending the night at the junior ranks mess.

[9] Upon catching up with Pte Nongqayi outside of the building, Pte Ikezu asked her why she was angry. He could not recall exactly how things began, but testified that after a few attempts, Pte Nongqayi was able to break a bottle of beer by smashing it on the ground, and they got into an altercation. She grabbed a piece of glass from the bottle she had broken and took a swing at him with her left hand towards his neck. He then grabbed her wrist and wrestled her to the ground to stop her from fighting. He admitted that he had no difficulty stopping the swinging movement of Pte Nongqayi's arm towards him. Indeed, he is much taller than her, she was drunk, and it was easy for him to grab her wrist as she swung at him with the piece of glass. Pte Ikezu could not remember any words that would have been exchanged during what he described as a short fight as the piece of glass quickly ended up on the ground. He was then able to speak to Pte Nongqayi and calm her down.

[10] Pte Ikezu was not injured in the altercation and afterwards engaged in conversation with Pte Nongqayi for five to ten minutes before she started making her way to her own barracks on foot, towards the other side of the base. He then went back into the building.

[11] Pte Ikezu returned outside approximately fifteen minutes after Pte Nongqayi had left the area to head to her own barracks. To his surprise, he then saw Pte Nongqayi trying to re-enter the building to re-engage in an argument with Private K.S. who was in his room upstairs. Pte Ikezu tried to prevent her from entering the building by spreading his hands and pushing her as she was trying to get around him. Pte Nongqayi was angry, loudly saying that, "we are not done until we are done." Pte Ikezu explained that he was trying to prevent Pte Nongqayi from re-entering the building to engage in a fight. The officer on duty arrived on the scene and ordered Pte Nongqayi to leave and head back to her barracks. She eventually complied but was subsequently observed with glass she picked up from the ground, which the duty officer thought she could use to try to hurt herself. The military police was called and eventually arrested Pte Nongqayi.

[12] It was argued that the verdict of the panel in relation to the charges arising out of the 6 July 2022, incident was not necessarily a rejection of Pte Nongqayi's version of events and of her claim of self-defence. I respectfully disagree.

[13] First, Pte Nongqayi denied voluntarily swinging her arm towards Pte Ikezu with a piece of glass, testifying that she stepped forward towards Pte Ikezu to show the piece of glass she had in her hand to demonstrate that she was serious and that he should back off and leave her alone. That testimony was not believed as the panel found beyond a reasonable doubt that the touching was intentional on her part.

[14] Second, the testimony of Pte Nongqayi gave an air of reality to a defence of self-defence which was consequently put to the panel. However, as I told the panel in my final instructions, three conditions that must be present for the defence to succeed: self-defence must originate in a reasonable belief on Pte Nongqayi's part that force is being used or threatened against her; it must have as its purpose defending or protecting Pte Nongqayi from the force that she reasonably believes is being used or threatened against her; and finally what Pte Nongqayi did based on that reasonable belief or for that purpose must be reasonable in the circumstances as Pte Nongqayi knew or reasonably believed them to be.

[15] The failure of the defence of self-defence in the trial means that the prosecution has proven beyond a reasonable doubt that at least one of these three conditions was absent. It is not possible to know how many or which conditions were absent. Members of the panel did not all have to agree on which condition or conditions were absent, as long as they all agreed that one of the conditions was absent.

[16] In these circumstances, I refuse the invitation to speculate and conclude that the most likely scenario is that the panel believed Pte Nongqayi when she said she felt threatened and used force for the purpose of defending herself from the threat she perceived, unfortunately using a level of force which was unreasonable in the circumstances.

[17] Based on the evidence of Pte Ikezu, who was necessarily believed by the panel, I find that he was also believed when he stated that his intentions were to avoid Pte Nongqayi getting in trouble with authorities by virtue of being drunk and disorderly just outside the barracks on the evening of 6 July 2022. Pte Ikezu was entirely credible when he stated his intentions in that regard at the trial. His actions corresponded with his stated intentions. In fact, Pte Nongqayi admitted during her testimony in sentencing that she had been the subject of administrative actions for misuse of alcohol starting in June 2021 and, as of the evening of the events on 6 July 2022, was manifestly already booked for a residential treatment program starting on 11 July 2022 in Toronto. It is perfectly credible then that her friend, Pte Ikezu wanted to avoid her getting in trouble again. Pte Ikezu's failure to comply with demands to back off by Pte Nongqayi is consistent with his desire to prevent her from attracting the wrong kind of attention from authorities and ensure that she calmed down and went home to her barracks instead of trying to finish an argument with Pte K.S. and obtain money from him. It is not contested that Pte Ikezu was a friend of Pte Nongqayi. He was awakened in his room to assist in setting the facts straight in relation to the argument between Ptes Nongqayi and K.S. The assertion by Pte Nongqayi that she felt threatened by Pte Ikezu and had to use force to defend herself against an attack by her friend in the circumstances was entirely unbelievable, even considering a previous assault she had suffered a year earlier. The panel was right to reject the defence. Pte Nongqayi was the aggressor in her interaction with Pte Ikezu in July 2022.

[18] As it pertains to the events of 27 February 2023 and the threat allegedly made to hurt Pte Poirier, the non-guilty verdict on the third charge revealed that the panel was

not convinced beyond a reasonable doubt by the testimony of Pte Welch to the effect that when in her room in the company of Pte Fredette, she had heard Pte Nongqayi utter a threat to hurt Pte Poirier. Contrary to the submission made by the defence, this finding does not necessarily mean that the panel believed the version offered by Pte Nongqayi in her testimony to the effect that she never said these words. As explained in my instructions, it was open to the panel not to believe Pte Nongqayi and still be left with a reasonable doubt by Pte Nongqayi's testimony or by the rest of the evidence or even the lack of evidence. That's the instruction mandated by *R. v. S. (W.D.)*, 3 S.C.R. 521. From the way the threat was described by Pte Welch, the panel may well have found that Pte Fredette should have been aware of the threat as she was also present in the room when it was allegedly made. Yet, Pte Fredette was not called to testify. Also, the panel may well have wondered why Pte Welch, if she took the threat seriously and trusted her chain of command as she testified to in cross-examination, did not report the threat to superiors immediately or did not warn Pte Poirier that a threat to hurt her had been made. There were plenty of grey areas about the testimony of Pte Welch on that charge to ground a reasonable doubt in the mind of the panel.

[19] The not-guilty finding on charge 3 brings into question the panel's opinion of the reliability or credibility of Pte Welch. Yet this did not prevent the panel to find guilt on the second charge of uttering threats to cause her death or bodily harm. The offence was committed during a conversation between Pte Nongqayi and Pte Welch in the room they shared in barracks at CFB Kingston. As explained in my instructions to the panel, there was little disagreement as to the context of the discussion which both participants agreed took place. The sequence of events was not the subject of significant dispute at trial. Pte Welch came back in her room after work. Pte Nongqayi was there having an alcoholic drink while sitting at her desk. She asks Pte Welch not to tell the staff that she is drinking in barracks if they ask. Pte Welch refuses, saying she will not lie to the staff.

[20] There is disagreement as to the words exchanged next. Pte Welch's testimony is to the effect that Pte Nongqayi told her, "I'll fucking beat you or fucking kill you," while the words Pte Nongqayi admitted in her written statement to police, produced in evidence, were to the effect that she said, "I know where you sleep." Both witnesses testified that Pte Nongqayi then took her knife out of its sheath and showed it to Pte Welch before replacing it without exchanging words. Pte Welch departed to go study then came back later and chatted with Pte Nongqayi before going to sleep. Pte Welch said the tone used by Pte Nongqayi was serious while Pte Nongqayi's position was that she was joking and there was no threat. Considering the guilty verdict, I conclude that the panel did not believe the words were meant as a joke. Members of the panel were convinced beyond a reasonable doubt that the words constituted a threat. They may well have reached this conclusion because of the context of the conversation, specifically the disagreement about reporting the drinking and the knife being shown. The prosecution's alternative position at trial was that even if the panel had a reasonable doubt about whether Pte Nongqayi uttered the words attributed to her by Pte Welch, the question of whether a threat had been made could be answered affirmatively based on the context of the conversation.

[21] I am prepared to admit, for the purpose of sentencing, that the threat made by Pte Nongqayi did not include the words, "I'll fucking beat you or fucking kill you" but rather, "I know where you sleep." This is the option most favourable to the offender, accepting that consistent with the guilty verdict, the other elements of context, specifically the showing of the knife and the tone used, were compelling to the effect that a threat had been made.

[22] A final important element of the circumstances of the offences is the fact that Pte Nongqayi was arrested by the military police on 6 July 2022 following the incident involving Pte Ikezu. She was released with conditions after a few hours in custody. She was arrested again following the 2 March 2023, threat incident and was ordered to be retained in custody by a military judge until 2 June 2023, when she was released with conditions by myself. She spent ninety-one days in pre-trial custody.

Position of the parties

Prosecution

[23] The prosecution submits that Pte Nongqayi should be sentenced to imprisonment for a period of sixty days and dismissal from His Majesty's service, adding that the Court should suspend the execution of the punishment of imprisonment given the length of the pre-trial custody already served by Pte Nongqayi following the commission of one of the offences in this case. The prosecution considers that the circumstances call for the application of the principles of denunciation and deterrence in sentencing the offender. The proposed sentence is described as the minimum required to highlight the gravity of the offences and to signal that the conduct of the offender is such a departure from the acceptable conduct of CAF members that it requires separating the offender from the institution by dismissing her.

Defence

[24] The defence submits that Pte Nongqayi should be sentenced to a reprimand or a severe reprimand and a fine in the amount of $2,500. It is, in the view of defence counsel, an outcome that is in line with previous sentences imposed in similar cases and respects the principles of restraint and rehabilitation, especially given the fact that Pte Nongqayi has already undergone punishment in the form of pre-trial custody.

Evidence at the sentencing hearing

[25] The facts revealing the circumstances of the offences were obtained during the proceedings held before the panel of the GCM in July 2023. No other facts relating to the offences were offered during the sentencing hearing.

[26] As it pertains to the circumstances of the offender, the prosecution entered in evidence the documents mandated at QR&O paragraph 112.51(2), namely a statement as to particulars of service of the offender, her career summary in the form of an MPRR

(Member's Personnel Record Résumé) and a copy of Pte Nongqayi's pay guide. The offender has no conduct sheet, revealing that Pte Nongqayi is a first-time offender with no previous record.

[27] The prosecution also produced the following documents:

(a) a victim impact statement from Pte Welch describing the emotional impact that the conduct of the offender had on her as well as fears she holds for her security; and

(b) a Military Impact Statement in the form of a letter by the Commandant of the Canadian Forces School of Communications and Electronics (CFSCE) generally describing the impact of the offences on the leadership and staff of the school as well as the extra work that had to be accomplished to ensure the safety of Pte Nongqayi and others around her, both at the unit and within CFB Kingston.

[28] The prosecution called one witness on sentencing: Captain (Capt) Parrett, the adjutant at CFSCE since August 2023, who explained the administrative actions undertaken by the school in relation to Pte Nongqayi, following the verdicts of this GCM. He explained that the leadership at CFSCE has lost confidence in the capacity of Pte Nongqayi to improve her conduct up to a satisfactory level corresponding to what is expected from members of the CAF. Consequently, a recommendation was forwarded to the office of the Director of Military Careers Administration (DMCA) at National Defence Headquarters (NDHQ) to the effect that Pte Nongqayi should be released from the CAF under item 2(a) of the Table to QR&O article 15.01 for unsatisfactory conduct. Since September 2023, CFSCE has been sending regular updates to DMCA on the conduct of Pte Nongqayi to facilitate the administrative review. Capt Parrett was not able to give any details as to the timing of the resolution of the administrative review by DMCA.

[29] For its part, the defence produced the following documents:

(a) an Agreed Statement of Facts outlining the mental health and substance use disorders suffered by Pte Nongqayi; and

(b) a document listing the medical category and Medical Employment Limitations applicable to Pte Nongqayi for the purpose of an administrative review of her career to be performed by DMCA.

[30] The defence also called Pte Nongqayi to testify as to her difficult background as a child and her service in the CAF since joining in January 2020. She discussed the courses she has taken and her struggles with alcohol, which started after she had been sexually assaulted by a fellow soldier at CFB Kingston in June 2021. She has outlined her plans to stay sober and hopes to continue in the CAF in a different occupation, if possible.

The circumstances of the offender

[31] Pte Nongqayi was born in South Africa in 2002. She testified having been abandoned at a very early age on the side of the road by a mother who could no longer take care of her because of illness. After spending about seven years in an orphanage, she was adopted by a Canadian family in 2010 and moved to British Columbia (BC). Unfortunately, she was subjected to mistreatment in that environment, suffering physical and emotional abuse. By fifteen or sixteen years of age, she was spending very little time at home, sleeping on friends' couches. Yet, she finished high school despite bullying and being exposed to racial slurs at the school she attended.

[32] Pte Nongqayi joined the CAF on 27 January 2020 and attended basic training at the Canadian Forces Leadership and Recruit School in St-Jean until she and her colleagues were sent home at the outbreak of the pandemic in March 2020. She went back to BC until she was ordered to report at CFSCE in Kingston in mid-August 2020. She completed Basic Military Qualification (Land) in October 2020 and then went on to further training with CFSCE at CFB Kingston, specifically driving vehicles. In the summer of 2021, Pte Nongqayi, while off duty, was the victim of a sexual assault allegedly committed by another CAF member following an evening of celebration on CFB Kingston, an event which had significant detrimental effects on her mental health. She started drinking heavily at that point and was delayed by one month to be loaded on an important career course. She was first referred to medical services at the end of June 2021 for alcohol misconduct. She nevertheless persisted and successfully completed her Fundamental Signals Operator course in the fall of 2021.

[33] There was a gap in the training progression of Pte Nongqayi between December 2021 and October 2022, a period during which she was employed, along with others at CFSCE, on various taskings while awaiting to be loaded on training courses. It is during that period that she had to face administrative measures related to her alcohol consumption and that the offences of July 2022 occurred. Shortly thereafter, Pte Nongqayi left Kingston to attend a residential treatment program at Bellwood Health Services in Toronto to assist her in resolving her issues of alcohol addiction. She attended Bellwood from 11 July to 29 August 2022. Her discharge documents indicate that she was diagnosed with severe alcohol use disorder, severe cannabis use disorder, severe major depressive disorder, and post-traumatic stress disorder. As it pertains to cannabis, Pte Nongqayi does not feel she has a cannabis use problem and consequently has indicated to the staff at Bellwood that this did not need to be addressed.

[34] Pte Nongqayi testified that she benefitted from the therapy at Bellwood and that she was able to abstain from the consumption of alcohol from August 2022 until February 2023, the approximate time of the offence of uttering threats she was found guilty of. During that time, she was undergoing her Development Period 1 Signal Operator career course and was closely monitored by health services and her chain of command. Unfortunately, she was taken off that course a few weeks before graduation in February 2023 due to a physical injury. This caused her distress and appeared to have

contributed to her relapse as it pertains to alcohol consumption. Following her arrest in March 2023, Pte Nongqayi spent ninety-one days in pre-trial custody, mainly at the Canadian Forces Service Prison and Detention Barracks (CFSPDB) at CFB Edmonton. While there, she had access to support from addiction counsellors and mental health professionals. Obviously, she could not consume alcohol. Upon returning to Kingston in early June 2023, she was employed awaiting the start of the GCM on 19 July 2023. She refrained from consuming alcohol until the evening of the guilty findings when she drank to the point of passing out.

[35] Since the trial, Pte Nongqayi has been employed outside of her unit to perform administrative tasks. As mentioned previously, her unit, CFSCE, has lost faith in her ability to overcome her difficulties and meet CAF expectations. The adjutant of CFSCE since August 2023 testified that he is aware of reports to the effect that her conduct has not been satisfactory at her place of employment. However, he did not entertain a supervisory relationship with her, and she has not been the object of charges in relation to misconduct. The recommendation for a release stands with DMCA and they are kept apprised of any developments. The leadership at CFSCE is also aware that Pte Nongqayi's current terms of service expire on 26 January 2024, and they do not expect that any new period of employment will be offered to her.

[36] Pte Nongqayi's medical file reveals that on 10 August 2023 she was assessed as having entered the military with significant mental health difficulties that were exacerbated by circumstances within the military. On that date, a mention has been made to the effect that Pte Nongqayi has not committed to a maintenance plan as it pertains to her alcohol consumption such as participation with support groups. An entry dated 8 September 2023 in the document, informing the unit of the medical category and medical employment limitations applicable to Pte Nongqayi for the purpose of an administrative review of her career, lists several employment limitations which are obviously incompatible with continued service as a member of the CAF. Nevertheless, Pte Nongqayi states in her testimony that she would like to continue serving, albeit in another military occupation. She reports that she has continued with medical treatment for alcohol addiction and that she has been sober for a week now, thanks to a medication which limits the effect of alcohol on her. She is optimistic about maintaining that progress and remaining sober for the foreseeable future.

Analysis

The purpose and objectives of sentencing

[37] The purpose, objectives, and principles applicable to sentencing by courts martial are found at sections 203.1 to 203.4 of the *NDA*, reproduced at QR&O article 104.14. As provided at section 203.1 of the *NDA*:

> **203.1 (1)** The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.

> **(2)** The fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of the following objective:
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> **(a)** to promote a habit of obedience to lawful commands and orders;
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> **(b)** to maintain public trust in the Canadian Forces as a disciplined armed force;
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> **(c)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
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> **(d)** to deter offenders and other persons from committing offences;
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> **(e)** to assist in rehabilitating offenders;
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> **(f)** to assist in reintegrating offenders into military service;
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> **(g)** to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
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> **(h)** to provide reparations for harm done to victims or to the community; and
>
> **(i)** to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[38] The objectives that a just sanction must try to achieve are mainly associated with the CAF, but also include considerations reaching outside the bounds of the military, for instance, the maintenance of public trust and acknowledgement of the harm done to victims who may belong to the larger civilian community.

Objectives to be applied in this case

[39] In my opinion, the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence, both general and specific, in sentencing the offender.

[40] It is obvious that the objective of denunciation of the conduct must be at the forefront of what the sentence must accomplish in this and any case where violence is offered to other CAF members in a military environment such as the barracks in this case. Members of the CAF are expected to respect and trust each other, an essential ingredient to be able to work as part of a team. Offences of violence must be denounced as they undermine the trust and respect, essential ingredients to ensure the discipline, morale and efficiency in the military.

[41] In addition, it is primordial not only that the sentence denounces the conduct, but also that it is of sufficient severity to deter others from engaging in the same type of behaviour.

[42] The deterrent aspect the sentence must also meet the specific deterrence of Pte Nongqayi. Indeed, the conduct which Pte Nongqayi engaged in is troubling, in several

ways. The circumstances of the offence of July 2022 reveal a significant loss of control of herself due to an episode of drunken anger because of a conflict about money. She was angry at Pte K.S., yet unleashed at her friend Pte Ikezu, who was simply trying to help her not get in trouble again with alcohol misconduct. It is rightly preoccupying for the leadership of any unit of the CAF when a member displays erratic behaviour of a violent nature like that. It is especially the case when the source of the erratic behaviour in this case, misuse of alcohol, does not appear to be under control.

[43] It is in that context that I read the words of the Commandant of CFSCE to the effect that significant efforts had to be deployed since 2022 to keep Pte Nongqayi and the people around her safe. It also justifies the words of Pte Welch in her victim impact statement as it pertains to fears for her safety in Pte Nongqayi's vicinity.

[44] The need for specific deterrence is also highlighted by the fact that after getting arrested in July 2022 and released on conditions, an episode immediately followed by attendance at a residential treatment program which provided Pte Nongqayi with the tools to manage her alcohol issues, a major source of her behavioural problems, the offender failed to learn. After having to be taken off her course due to an injury, no doubt a very bad news, she started drinking again. On the evening of 2 March 2023, while drinking, she engaged her roommate in a conversation about her wishes that her alcohol consumption in barracks not be disclosed. When confronted with the refusal of her roommate to lie to the authorities to cover for her, she resorted to threats of violence. There is a pattern here: difficulties lead to alcohol consumption which leads to violence. The pattern reproduced itself, thankfully partly, when Pte Nongqayi was confronted with the bad news of the guilty verdicts by the panel of the GCM on 27 July 2023: she drank to the point of passing out.

[45] It is particularly important that I consider the circumstances of the offender with an open mind, based on the evidence before me. That evidence shows that the mental condition of Pte Nongqayi deteriorated when she was the unfortunate victim of the allegedly criminal behaviour of another CAF member who sexually assaulted her. She has borne the weight of that violation of her physical integrity for over two years, and it is hoped that after her testimony at the criminal trial last week in civil court in Kingston, she will be in a position to start rebuilding herself. I also realize that Pte Nongqayi has gone a long way since she was born in South Africa and has found ways to make a life for herself, despite significant adversity. The challenges she has had to overcome provide a context for her conduct. They do not excuse it, however.

[46] Regardless, I cannot lose track of the objective of rehabilitation for Pte Nongqayi, although the road to rehabilitation is going to be long and arduous. It must start for Pte Nongqayi in recognizing the harm done and her responsibility for it. I believe she has the capacity to engage on this road, starting with gaining control over her alcohol problems. Even though her future lies probably outside of the CAF, given her medical condition, specifically her mental health challenges, she appears to me as a bright young person who can make a future for herself. The sentence I impose must not

prevent that rehabilitation from having the potential to materialize. However, the sentence must also primarily meet the objectives of deterrence and denunciation.

[47] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence.

Main principle of sentencing: proportionality

[48] The most important of these principles is proportionality. Section 203.2 of the *NDA* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In conferring proportionality such a privileged position in the sentencing scheme in the *NDA*, Parliament acknowledges the jurisprudence of the Supreme Court of Canada which has elevated the principle of proportionality in sentencing as a fundamental principle in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37 of this case, LeBel J. explains the importance of proportionality in these words:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.
>
> . . .
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[49] The principle of proportionality thus obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender. Respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process.

Other principles

[50] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss other principles relevant to the determination of the sentence, which are listed as the paragraphs of section 203.3 of the *NDA* as follows:

> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .

A number of aggravating circumstances are listed in this section, none of them being applicable here.

> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

That is known as the principle of parity.

> **(c)** an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
>
> **(c.1)** all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;
>
> **(d)** a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces;
>
> **(e)** any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

Those paragraphs embody the principle of restraint, especially for Aboriginal offenders.

[51] I will now go over these factors, in light of the circumstances of this case.

Aggravating and mitigating factors

[52] As provided in the enumeration of principles of sentencing, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender. Yet, one aggravating or mitigating factor, in isolation, cannot operate to increase or decrease the sentence to a level that would take it outside of the range of what would be an adequate sentence.

[53] In taking these factors into consideration, the Court must keep in mind the objective gravity of the offences. The most objectively severe of the offences here is the assault with a weapon, punishable by a maximum of ten years of imprisonment. The offence of uttering a threat is punishable by five years and the offence of fighting under section 86 of the *NDA* is punishable by imprisonment for less than two years. I agree with the submission of the prosecution to the effect that the commission of the fighting offence is not to be taken into account in imposing the sentence given that the facts underlying the fighting are the same as those supporting the offence of assault with a weapon.

[54] The circumstances of the offences and the offender in this case reveal in my view two aggravating factors. The first is the failure of Pte Nongqayi to learn from her arrest and release under conditions on 6 July 2022 after committing an act of violence while under the influence of alcohol. She committed another offence involving verbal violence and alcohol on 2 March 2023. The second aggravating factor is the impact of the offence on the victim and the military community. While it is true that there have been no injuries from the assault, the level of violence attempted was high and Pte Nongqayi appeared to have lost all control of herself. The psychological impacts are real. The incident generated genuine concerns for safety of Pte Nongqayi and those around her and instilled fear in Pte Welch.

[55] I realize that in coming to this conclusion I am not accepting as aggravating some factors mentioned by the prosecution. The number of victims is not aggravating, as it is simply a result of the basic circumstances of having two distinct incidents and two offences. The use of a knife while expressing the threat is not, in the specific circumstances here aggravating as the presence of the knife is one of the circumstances which made the words I accept as having been said, namely, "I know where you sleep" to have been a threat and intended as such. Finally, although the offences were arguably committed in a training environment as Pte Nongqayi and the victims were members of a training school, they occurred on evenings, in or near the barracks, at moments when the offender was not even undergoing a training course and had no leadership responsibilities as instructor. In this context, it would be improper to consider the training environment as aggravating.

[56] The Court also considered the following as mitigating factors arising either from the circumstances of the offence or the offender:

(a) first, the fact that Pte Nongqayi must be treated as a first-time offender with no criminal record; and

(b) second, the ninety-one days Pte Nongqayi spent in pre-trial custody from early March to early June 2023, which must have the effect of decreasing the severity of the sentence that will need to be imposed in this case.

[57] In line with the remarks made previously when discussing the objectives of sentencing to be privileged in this case, I have made a conscious decision to limit the list of mitigating factors that I accept, as I am unable to make the direct link on the evidence between the sexual assault, the alcoholism and the offences that defence counsel has made in submissions. Life no doubt threw a curve ball at Pte Nongqayi in June 2021. Yet, being a victim does not provide a licence to resort to violence, especially towards innocent persons who have nothing to do with that assault. Pte Nongqayi has been given the tools to realize that she has control over what she needs to do to come back to the surface from the depths of despair she experienced. It is up to her to make the right decisions. I believe she has not demonstrated that she is sufficiently engaged in that rehabilitative route to benefit from a mitigating factor.

Parity and sentencing range

[58] The next principle to be considered is the principle of parity. The sentencing options available to a court martial are found at section 139 of the *NDA*. The punishment of reduction in rank is not available in this case as the offender is already at the lowest rank on the scale.

[59] In submissions, the prosecution referred to some court martial cases where offenders having engaged in acts of violence such as assault were sentenced to imprisonment. They include the cases of *R. v. Officer Cadet S.R.M. Warren*, 2008 CM

2005, where an Officer Cadet was sentenced to twenty-one days' imprisonment for breaking the jaw of a colleague in the course of a brief, drunken assault at the Royal Military College, and the case of *R. v. Ex-Private K.A.W. Fox*, 2004 CM 35, who had been sentenced to forty-five days' imprisonment, suspended, for stabbing another private with a bayonet. Two civilian cases were also mentioned. Mrs. Hollett, a repeat offender, was sentenced to ninety days' imprisonment for hitting her boyfriend's sister on the head with a mirror during a drunken fight. Mention was also made of the case of *R. v. Yang*, 2019 QCCQ 3403, where the judge sentencing Mr. Yang held that sixty days was an appropriate punishment for the two offences of assault charged, on an elderly woman and her daughter during an argument about an apartment. What is interesting about the Yang case is that the trial judge decided to impose a one-day period of imprisonment given that the offender had spent time in pre-trial custody in excess of the period of imprisonment that would have been warranted. The sentencing judge mentioned that it was important, given the gravity of the offence, that a punishment of imprisonment appear on the record.

[60] That decision supports the argument by the prosecution to the effect that a punishment of imprisonment is the only one that can send the appropriate message given the gravity of the offences in the circumstances of this case.

[61] I do find that imprisonment is within the range of sentences for a case such as this one, albeit generally of a shorter duration than the sixty days that the prosecution is asking for.

[62] The prosecution is also asking that the punishment of imprisonment be coupled with dismissal from His Majesty's service, citing several cases where this punishment was imposed. Indeed, dismissal was imposed on occasion, but this was often on offenders already released from the CAF at the time of sentencing and in many cases was the result of joint submissions of counsel, where the issue for the trial judge is limited to an assessment of whether the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest, the test promulgated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43. Yet, cases resulting from joint submissions are part of the range of sentences for the application of the parity principle as explained at paragraphs 45 to 53 of the reasons for sentence in *R. v. Luis*, 2022 CM 4016. Dismissal is within the range of possible sentences here, although it has usually been imposed in cases where the level of violence or departure from the norm of conduct and/or consequences were more significant than what we have here, specifically the cases of *R. v. Cogswell*, 2021 CM 2021, *R. v. Rutherford*, 2018 CM 2022 and *R v Leaman*, 2013 CM 4004.

[63] The defence has brought a number of cases to my attention in attempting to demonstrate that its submission for a reprimand or severe reprimand, coupled with a fine is an appropriate range of sentences imposed in the past for similar offences. Specifically, the cases of *R. v Corporal MacMullin*, 2004 CM46, where the military judge imposed a severe reprimand and a fine in the amount of $1,800 for a corporal who assaulted a superior officer during a brawl. In *R. v. Anderson*, 2014 CM 4013, the

Court imposed a severe reprimand and a fine in the amount of $3,000 to a master corporal who had pulled a knife at his student in the course of a drunken discussion at an end of course celebration in a local bar. In *R. v. Rumbolt*, 2019 CM 2028, the military judge accepted a joint submission for a reprimand and a fine in the amount of $5,000 in relation to an assault by a member of the CAF on his ex-spouse, also member of the CAF, when they were vacationing together in Cuba.

[64] Although these precedents are of limited use given the discrepancies in circumstances of the offence and of the offender, they show a range of sentences including reprimands and severe reprimands coupled with fines to punish offences of violence in the past. These cases tend to show that the submission of the defence is within the range of sentences imposed in the past.

[65] In any event, even if the sentences proposed were outside the range, it would not constitute an absolute limit on my discretion as sentencing judge given that, as explained earlier, proportionality is the cardinal principle that must guide judges in imposing a fit sentence. There will always be situations that call for a sentence outside a particular range. Even if ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded.

The principle of restraint

Introduction

[66] The principle of restraint obliges me to sentence the offender with the least severe sentence required to maintain discipline, efficiency, and morale. In this case, I must consider all available punishments, paying particular attention to the circumstances of Pte Nongqayi.

[67] That is where I need to discuss the submission of the prosecution as it pertains to the proposition to impose a sentence of imprisonment and dismissal. I will start with dismissal because it carries more practical impact on the offender in the circumstances of this case than imprisonment, despite being lower in the scale of punishments at section 139 of the *NDA*.

The proposed punishment of dismissal

[68] The submission to impose a dismissal appears to be based in large part on the assessment of unit authorities that based on the past and current conduct of Pte Nongqayi, they have lost confidence in her ability to meet the standard of conduct of CAF members and are therefore recommending that she be released from the CAF under item 2(a) of the Table to QR&O article 15.01 for unsatisfactory conduct.

[69] I do respect the opinion of unit authorities who have been interacting with Pte Nongqayi for much longer than this Court has. Nevertheless, their recommendation is

an administrative action aimed at informing the ultimate decision maker, namely DMCA at NDHQ. An administrative decision may ultimately be made to release Pte Nongqayi under a number of other items under article 15.01 such as 3, on medical grounds, 4(b), at the end of her period of service next January, 5(d), not advantageously employable or 5(f) unsuitable for further service. That decision is unknown at this time. The item of release may also be modified over time. The fact that a member of the CAF is subject to compulsory release recommendation from a unit informs but is in no way determinative of the entirely separate question of whether a court martial should impose a punishment of dismissal. A punishment is an entirely different thing than the administrative reason for release.

[70] As mentioned previously in a number of courts martial, the punishment of dismissal is very serious. It signals that the conduct of the offender represents a significant departure from the norm of conduct applicable to the point of incompatibility with further service as a member of the CAF. The punishment also carries an important indirect consequence as it results in doubling the ineligibility period to apply for a record suspension from five to ten years, under paragraph 4(1)(a) of the *Criminal Records Act* as mentioned by defence counsel. Interestingly, the imprisonment for sixty days, also proposed by the prosecution does not prevent an offender from applying for a record suspension after five years, as the ten-year suspension applies only for sentences over six months.

[71] I find that the circumstances of the offences here are not so severe as to warrant that punishment of dismissal. The offence of July 2022 did not cause any injuries to Pte Ikezu, thankfully. Following it, the unit did load Pte Nonqayi on a career course, which indicates to me that they had not lost confidence in her at that point. Of course, the threat made in March 2023 is serious and preoccupying. However, the level of violence threatened and the context, including the fact that Pte Welch was able to exchange normally with Pte Nongqayi afterwards before going to sleep, make me conclude that the offence is more within the realm of inconsiderate threats rather than an infliction of violence. With respect, I am unable to conclude, on the basis of the evidence before me, that a dismissal is the minimum sentence required to maintain discipline, efficiency and morale in the circumstances.

[72] I conclude therefore that in light of the evidence, the principle of restraint can be applied in the circumstances of this case to exclude the possibility of imposing the punishment of dismissal suggested by the prosecution.

The proposed punishment of imprisonment for sixty days

[73] The main feature of the prosecution's submission is the request for a punishment of imprisonment for a period of sixty days, albeit suspended. It is important to comprehend the context in which this submission was made to the Court. The main driver behind the prosecution's suggestion is the need for imprisonment to be imposed to send a message to achieve the objectives of denunciation and deterrence, particularly general deterrence. Yet, everyone agrees that Pte Nongqayi should not have to spend

time in custody going forward given that she has already spent ninety-one days in pre-trial custody, something that is very rare in the context of the military justice system. The prosecution's submission for sixty days of imprisonment is in the upper range of what could be imposed given the circumstances of the offences and of the offender in this case, on the basis of the precedents mentioned above. The prosecution asks that the period of imprisonment be suspended solely based on the fact that a longer period of pre-trial custody has already been served. This is to avoid that Pte Nongqayi serves another sixty days of imprisonment. Indeed, a total of 151 days of custody would appear excessive in relation to the offences and the offender in this case, at least on the basis of military precedents.

[74] Two factors must be understood to properly evaluate the prosecution's submission. The first is that there is no such thing as a suspended sentence of imprisonment in the military justice system. There is a sentence of imprisonment, which can then be suspended. This requires a two-step process: first, guided by the applicable sentencing principles, the sentencing judge must conclude that a punishment of imprisonment is required and determine its duration. Second, the sentencing judge must determine whether the sentence should be suspended under the authority of section 215 of the *NDA*. To make that determination regarding suspension, courts martial have applied since 2010 what has been described by the Court Martial Appeal Court as the *Boire* test (see paragraph 45 of *R. v. Cogswell*, 2022 CMAC 7), stating that a suspension may be obtained, at the request of the offender, if the following requirements are met:

> (a) the offender demonstrates, on the balance of probabilities, that his or her particular circumstances justify a suspension of the punishment of imprisonment or detention; and
>
> (b) if the offender has met this burden, the Court considers that the suspension of the punishment of imprisonment or detention would not undermine the public trust in the military justice system, in the circumstances of the offences and the offender including, but not limited to, the particular circumstances justifying a suspension.

[75] The prosecution asks the Court to apply this test and suspend the sixty-day period of imprisonment, citing the case of *R. v. Conway*, 2017 CM 4006 as a precedent, where a joint submission that included imprisonment for a period of one day, to be suspended, was accepted. The Court in that case took into consideration thirty-nine days spent in pre-trial custody and then suspended the execution of the punishment of one-day imprisonment in consideration of the fact that Sergeant (Sgt) Conway had demonstrated that his particular circumstances justified the suspension based on his medical condition, the thirty-nine days spent in pre-trial custody and the opinion of a medical professional to the effect that further custody would expose him to a deterioration of his mental health.

[76] The second element the prosecution considered in arriving at its submission for suspending the period of imprisonment is the legal fact that in the military justice

system, there is no authority to express a sentence as a given period of detention or imprisonment which, considering a credit for time served, is then reduced to a lesser period. In fact, it can be argued that the *NDA* specifically prohibits such a practice.

[77] Indeed, the notion of credit discussed at subsections 719(3) to (3.3) of the *Criminal Code* is absent from the *NDA*. The decisions of the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64 and, more recently in *R. v. Basque*, 2023 SCC 18 reveal the existence of a common law discretion to grant credit for time served. However, such discretion would run afoul of subsections 204(1) and (2) of the *NDA* which read as follows:

> **Commencement of term**
>
> **204 (1)** Subject to subsections (3) and 148(1) [Intermittent Sentence] and sections 215 to 217 [Suspension], the term of a punishment of imprisonment or detention shall commence on the day on which the court martial pronounces sentence on the offender.
>
> **Time counted**
>
> **(2)** The only time that shall be reckoned toward the completion of a term of a punishment of imprisonment or detention shall be the time that the offender spends in civil custody or service custody while under the sentence in which that punishment is included.

[78] By stating that the term of a punishment of imprisonment commences on the day on which the Court pronounces sentence and specifying that the only time that counts is the time spent in custody while under the sentence, Parliament has enacted legislation that displaces the common law rule allowing credit, as foreseen in the discussion by Kasirer, J. of the Supreme Court of Canada in paragraph 4 in *Basque*, specifying that in doing so, Parliament must, "respect the relevant constitutional constraints". This seems to be the case with subsections 204(1) and (2) of the *NDA* given that Parliament is acting within its National defence prerogative and given that the *NDA* and QR&O have established a scheme by which the military judge must be informed of days spent in pre-trial custody in the course of the sentencing hearing. Evidently, that period is presumably considered in arriving at an appropriate sentence (i.e., the appropriate punishment or combination of punishments). This scheme, as explained at paragraph 9 of *Basque*, "addresses the considerations of fairness and justice touched on in *Wust*, including what Paciocco J.A. usefully described in an academic paper as 'the aversion to double punishment' . . .".

[79] In my opinion, this explains why courts martial have recognized that it is not possible to sentence an offender to "time served" without violating subsection 204(1) of the *NDA* and the principle to the effect that a sentence must be prospective, a principle also protected by subsection 719(1) of the *Criminal Code*, potentially enacted to prevent the judicial practice of backdating sentences, as explained at paragraph 6 of *Basque*. This is the conclusion my colleague Deschênes M.J. came to in her reasons in the case of *R. v. Penner*, 2020 CM 5016 at paragraphs 27 to 35, referring with approbation to the words of Carter C.M.J. in *R. v. ex-Chief Petty Officer 2nd Class G.A. Tobin*, 2005 CM 1 at paragraph 17.

[80] I conclude that the prosecution has formulated its recommendation for sixty days' imprisonment, to be suspended, as a means to send a message of denunciation and general deterrence without unjustifiably negatively affecting Pte Nongqayi. The main problem with the submission is that it is based on an inversion of the reasoning steps: I am asked to consider that sixty days is an appropriate duration in light of the fact that it will be suspended while the proper reasoning process is to consider whether imprisonment is required and for how long, then determine whether the conditions for suspension are met. An additional difficulty is the fact that subsection 215(2) of the *NDA* provides since 2018 that the court martial suspending the execution of a punishment shall impose conditions on the offender, the breach of which may lead to the suspension of imprisonment being revoked and the offender committed to imprisonment after being allowed an opportunity to make representations.

[81] If I was to agree with the prosecution, it would mean that Pte Nongqayi would have been ordered to serve 151 days of custody in total, that is the ninety-one days in pre-trial custody and the additional sixty days in a sentence of imprisonment. Also, even if she would leave the Court without being in custody if I grant the request to suspend, she would have a Damocles sword hanging over her head as any breach of conditions for a period of two months would risk sending her in custody again. In my view, this would be excessive, a breach of the principle of restraint and may even set Pte Nongqayi up for failure.

[82] Nothing I have said in this overview of the framework for the sentencing of offenders who have spent time in pre-trial custody would preclude a consideration to the effect that a sentence involving the punishment of imprisonment is required in the circumstances of this case, despite the lengthy period of pre-trial custody. I find that the appropriate duration should be for one day, a symbolic but important statement, as explained by the sentencing judge in the case of *Yang*. The same considerations were applied in the case of Sgt Conway. The period of imprisonment could then be suspended as required without imposing a significant additional burden on the offender.

Choosing a fit sentence

[83] Having rejected the submission of the prosecution for sixty days of imprisonment and the punishment of dismissal, I must now turn to the determination of an appropriate sentence.

[84] In choosing a fit sentence, I believe it is appropriate to start by considering whether the suggestion of the defence to impose a reprimand or a severe reprimand, combined with a fine in the amount of $2,500 would be sufficient to maintain discipline. Taking into consideration the principle of restraint, I must nevertheless ask myself whether the objectives of denunciation and deterrence, both general and specific, that I have identified as important in this case can still be met if I was to give priority to the objective of rehabilitation as requested by the defence. In arriving at that conclusion,

I must consider the circumstances of the offence and of Pte Nongqayi, including the aggravating and the mitigating factors identified previously.

[85] Having considered these factors and the objectives that the sentence must meet, I have to conclude that a severe reprimand or reprimand and a fine would not be sufficient to send the required signal of denunciation that the gravity of the offences in this case calls for.

[86] Indeed, the conduct of Pte Nongqayi is serious, as highlighted previously. Despite the absence of physical injuries, it has had an effect on personnel at CFSCE and beyond, on CFB Kingston. This conduct needs to be sanctioned with punishments that have a strong enough symbolic impact, which is not the case with a reprimand or a severe reprimand, especially given the rank and status of the offender. As mentioned in *Luis*, severe reprimands and reprimands have little effect beyond constituting a blemish on a service record. This can be significant for a member of the CAF who has had a long and successful career. However, when a service record consists of modest accomplishments such as in the case of an offender at the rank of private who has not reached the level of training required to function in a military occupation, the imposition of such punishments serves little purpose and may even be counterproductive: it hardly achieves the objectives of sentencing and risks damaging the repute in the administration of military justice.

[87] I do realize that reprimands and severe reprimands have been imposed in the past, along with fines, to sanction similar offences. As explained earlier, they are part of the range of sanctions available. Yet, I realize that the focus of the CAF as it pertains to the safety and security of its members have changed in recent years, notably as it pertains to psychological well-being. The importance of ensuring the well-being of members has grown, as it has in the civilian workplace. Things that were tolerated before no longer are. It is important that punishments, even when symbolic as in this case, send the appropriate message, especially in cases of violence where the actions of the offender have the potential to cause serious physical or mental injuries. Here, Pte Welch states in her victim impact statement that she had to rely on the mental health programs provided by the CAF following the offence. A reprimand or severe reprimand for an offender in the rank of private in the circumstances of this case would not be sufficient to send the appropriate signal of denunciation that is required and that I have identified as important.

[88] I have to agree with the prosecution that a sentence which includes the punishment of imprisonment is required in this case. The conduct here was criminal and it requires sanction by a punishment usually applied to criminal acts. However, as hinted to earlier, it will be for one day given that the offender has already spent more time in custody than what the upper limit of the sentencing range would call for in relation to the circumstances of the offences and of the offender.

[89] The question of the suspension now becomes relevant. The prosecution agrees that no additional incarceration is required on the part of Pte Nongqayi given the ninety-

one days spent in pre-trial custody. The evidence also reveals that the mental health of Pte Nongqayi is fragile and detrimentally affected by bad news in her life. Having Pte Nongqayi report to a custodial facility, even for only one day, would run the risk of significantly affecting her mental health and jeopardize the progress she has made in the last month or so. It is not worth the risk. Consequently, I find that the conditions for the suspension of the sentence of imprisonment are met: the offender has demonstrated that her particular circumstances, pre-trial custody and mental health, justify a suspension of the punishment of imprisonment. The Court also considers that the suspension of the punishment of imprisonment would not undermine the public trust in the military justice system, in the circumstances of the offences and the offender.

[90] The latest amendments to the *NDA* now require at subsection 215(1.1) that a court martial making a decision that the execution of a punishment of imprisonment be suspended must include in its decision a statement that it has considered the safety and security of every victim of the offence. I can confirm that I have. Pte Nongqayi lives on base, which may place her in interaction with the two victims in this case, especially Pte Welch who has expressed some concerns for her safety following the incidents and her testimony at the trial. However, I am confident that with the months that have passed since the findings at trial, without any incidents and the measures taken by CFSCE as highlighted in the evidence, there are no threats to Pte Welch's or anyone else's safety and security from the offender.

[91] Subsection 215(2) of the *NDA* provides that the court martial suspending the execution of a punishment shall impose conditions on the offender. A condition will be provided and explained directly to Pte Nongqayi at the close of these reasons.

[92] This leaves the question of the fine in the amount of $2,500 suggested by the defence. As would be obvious from what I have said about the need for the punishment of imprisonment to be imposed, a fine alone would not, in my view be sufficient to achieve the objectives of denunciation and deterrence in this case, given the gravity of the offences, unless it would be substantial, an option not open in this case given the low rank and low income of the offender.

[93] Yet, a moderate fine is important in this case given that the other punishment envisaged, namely the imprisonment for one day, will have no practical effect after the suspension. A moderate fine will allow Pte Nongqayi to feel the consequences of her wrongdoing for the next few months as it will be paid in $500 instalments as requested. This is exactly the period during which she needs to come to grip with the wrong she has caused and engage herself meaningfully on the road to rehabilitation, with all the help she can get, especially given the uncertainty which lies ahead of her in relation to her future with the CAF. Considering that I have increased the severity of the accompanying punishment to the fine compared to what defence suggested, I will decrease the amount of the fine accordingly to an amount of $2,000, payable in instalments as will be ordered shortly.

DNA

[94] In accordance with section 196.14 of the *NDA*, considering that the offence of assault with a weapon, for which I have passed sentence, is a primary designated offence within the meaning of section 196.11 of the *NDA*, I order, as indicated on the attached prescribed form, that samples of bodily substances be taken from Pte Nongqayi for the purpose of forensic DNA analysis.

Weapons prohibition order

[95] Since Private Nongqayi was found guilty of offences of assault with a weapon, fighting and of uttering threats, I must conclude that violence against a person was used, threatened or attempted in the course of the offences. Pursuant to paragraph 147.1(1)(a) of the *NDA*, this Court must consider whether it is desirable, in the interests of the safety of the person or of any other person, to make a weapons prohibition order. The prosecution is asking me to make such an order for a duration of ten years, while the defence argues that it is not necessary. Based on the conclusion I have reached about the total lack of control exhibited by Pte Nongqayi in relation to the 2022 offence and the fact that she continues to struggle with alcohol addiction and depression despite her recent progress, I have concluded that it is desirable to impose a weapons prohibition order for the safety of the offender and other persons she may interact with. The period of the order will be for three years, which is the minimum I find is required in the circumstances.

Conclusion and disposition

[96] I have concluded that a sentence composed of the punishments of imprisonment and a fine would be the minimum sufficient to meet the interest of discipline in this case. As recognized by the Supreme Court of Canada, the imposition of a sentence by a judge is not an entirely precise process. Guided by the principle of proportionality, I have done my very best to exercise judgment and arrive at crafting a sentence that constitutes the absolute minimum to meet the requirement of discipline in this case, while impeding as little as possible the rehabilitation of Pte Nongqayi. I am confident I have been able to strike the appropriate balance.

[97] Pte Nongqayi, your counsel invited me not to give up on you. I want you to know that I did not. Even if I did not impose the exact sentence he suggested, I crafted a sentence which allows you to stay in the CAF until your future is assessed by the appropriate authorities at higher headquarters in consultation with healthcare specialists as required and in consideration of the fairness due to you, so your wishes to stay in the CAF can be considered and an item of release appropriate to your situation can be imposed if necessary. Secondly, I impose a sentence that spares you from further incarceration, recognizing that you have already paid a heavy price for your offences. Thirdly, I have imposed a moderate fine, less than what was asked by your counsel, but sufficient so you can reflect about what has happened and how you can do better in the future. And finally, I am making a sentence that demands that you keep the peace and be of good behaviour for the next twenty-four hours, the duration of the one-day

sentence of imprisonment that I suspend, so that hopefully you do not relapse as you did on 27 July 2023 following the decision of the panel. I do not know why you would do that as I believe the outcome of the sentencing today should not be seen as negative. As mentioned at the opening of the sentencing hearing, there has to be a sentence following guilty findings and there is no ideal time for that. I decided to proceed this week rather than expose you to more uncertainty for months to come. I hope this will be beneficial to you.

[98] Indeed, the period of time that is coming up in your life is extremely important. Now that you are done with the justice system in this court and in the civilian court as a witness, you need to reflect about what happened and plan for the future, which may not involve service in the CAF. You will need to transition, and it is going to be challenging. From what I have seen of you in court, you are smart and quick on your feet. I truly believe you can do something good with your life.

[99] Remember your testimony earlier this week. Your counsel highlighted the fact that you have better friends now who do not drink to excess. You acknowledged they are better for you, but added, “but of course, at the end of the day it’s on me!” Exactly, it is on you.

FOR THESE REASONS, THE COURT:

[100] **SENTENCES** Pte Nongqayi to imprisonment for a period of one day and a fine in the amount of $2,000.

[101] **SUSPENDS** the carrying into effect of the punishment of imprisonment.

[102] **ORDERS** Pte Nongqayi to keep the peace and be of good behaviour for the next twenty-four hours, that is until the punishment of imprisonment is remitted under subsection 217(2) of the *National Defence Act*.

[103] **ORDERS** that the fine be payable in four instalments of $500, the first payable no later than 1 November 2023, subsequent payments being due no later than the 15th days of the months of November 2023, December 2023 and January 2024. Should Pte Nongqayi be released from the CAF before the fine has been paid in full, any remaining unpaid sum will be payable on the day of her release.

MAKES THE FOLLOWING ORDERS, NAMELY:

[104] In accordance with subsection 147.1(1) of the *NDA*, the Court has made an order on the prescribed form prohibiting the offender from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for three years, to end not before 20 October 2026.

[105] **DNA Order**. In accordance with subsection 196.14(1) of the *NDA*, the Court orders as indicated on the attached prescribed form, that the number of samples of bodily substances that are reasonably required be taken from Pte Nongqayi for the purpose of forensic DNA analysis by military police from CFB Kingston within the next seven days.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commanders J. Besner and J. Benhaim

Captain C. Da Cruz, Defence Counsel Services, Counsel for Private X. Nongqayi