COURT MARTIAL

Citation: *R. v. Martin*, 2022 CM 5025

Date: 20221110
Docket: 202164

Standing Court Martial

Canadian Forces Base Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

His Majesty the King

- and -

Petty Officer, 1st Class J. T. Martin, Offender

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

REASONS FOR SENTENCE

(Orally)

I. Introduction

[1] The offender, Petty Officer, 1st Class (PO 1) Martin, was charged with three offences pertaining to events that took place while on-board His Majesty's Canadian Ship (HMCS) *Harry DeWolf*. The first and second charges, laid pursuant to section 129 of the *National Defence Act* (*NDA*), allege conduct to the prejudice of good order and discipline in relation to harassment on the basis of race that would have taken place between 1 January 2020 and 31 March 2021 toward two crewmates Sailor, 2nd Class (S2) Brady (first charge), and S2 (now Sailor, 1st Class) Parsons (second charge). The third charge, ill-treated a person who by reason of rank was subordinate to him, contrary to section 95 of the *NDA*, alleges that between 1 and 31 March 2021, the accused struck the leg of S2 Brady with his knee.

[2] After a contested trial, the Court found PO 1 Martin guilty of the first and third charges on 9 November 2022. He was found not guilty of the second charge. The issue now is to determine a fair and fit sentence to impose on this offender.

II. What is the appropriate punishment for PO 1 Martin?

Circumstances of the offences

[3] In order to make this decision, I must, amongst other things, consider the circumstances of the commission of the offences, which can be summarized as follows. PO 1 Martin, an experienced boatswain (bos'n), was posted as the buffer of HMCS *Harry DeWolf* sometime between June and November 2019. As such, he was in charge of the Deck department, which is composed of between 15 and 17 bos'ns. PO 2 West was the assistant buffer who reported to the accused. The next level of reporting for the department was to an officer, a Lieutenant(N) Brown. S2 Brady was posted to HMCS *Harry DeWolf* as a crew member of the Deck department in January 2019 when he was a sailor, 3rd Class, and left the ship in March 2021. Because of the nature of the first and second charges, it is important to note for context that S2 Brady, PO 2 West and S2 (now S1) Parsons, who was the complainant in the second charge, were the only Black crew members on-board HMCS *Harry DeWolf* at the material time.

[4] The impugned conduct forming the basis of the alleged harassment of the first charge was in relation to name-calling S2 Brady "Lips" on an almost daily basis, and referring to him on two separate occasions as Black celebrities, and on another occasion making a vulgar reference to the anatomy of an animal. The impugned conduct forming the basis of the alleged harassment of the second charge was in relation to telling S2 Parsons on one occasion that if he dropped the net, the accused would drop him. There was a second comment made where the accused would have referred to S2 Parsons as "hot chocolate" in front of other subordinates. The third offence relates to an incident that occurred in the cafeteria on-board HMCS *Harry DeWolf*, where the offender hit S2 Brady several times with his knee while waiting to be served by the tray rails when social distancing measures were in force on-board ship as a result of the COVID-19 pandemic.

Summary of the finding

[5] At the trial, PO 1 Martin testified and generally corroborated the testimony of the prosecution witnesses, including admitting making all but one of the comments that form the basis of the impugned conduct of the first charge. I found that the reasons he gave for his conduct, even if I were to believe him, did not provide a legal justification that would negate any of the essential elements to prove that harassment occurred. Considering his testimony as a whole, and considering the rest of the evidence, I found that the prosecution has met its burden to prove beyond a reasonable doubt the guilt of the offender for that charge. As for the second charge, a verdict of not guilty was rendered because the alleged conduct did not meet all the criteria for the conduct to constitute harassment. Finally, PO 1 Martin's general denegation of the commission of

the third offence was not believed because the circumstances he provided in support of his denial were deemed illogical, and his evidence did not leave a reasonable doubt. The Court found that the prosecution's witnesses were credible. Therefore, the offender was found guilty of the third charge, in that he did ill-treat S2 Brady by striking his thigh with his knee.

Victim Impact Statement

[6] During the sentencing hearing, the prosecution confirmed that S2 Brady was offered the possibility to fill out a Victim Impact Statement (VIS), but he declined to do so.

Circumstances of the offender

[7] Turning to the circumstances of the offender, the evidence shows that PO 1 Martin enrolled in the Canadian Armed Forces (CAF) on 29 April 2004. He is thirty-seven years old, and has no dependents. PO 1 Martin is a member who has an unblemished career and rose quickly through the ranks, reaching a senior non-commissioned officer rank at a relatively young age. He was promoted substantively to his current rank in March 2018. He served mostly on the East Coast, and spent 1 029 days at sea, deploying to the North Atlantic/Bahrain in 2008, the Caribbean in 2009 and 2012, and in the Central Mediterranean in 2016-2017. He has received the NATO Medal for Operation ACTIVE ENDEAVOUR, the South-West Asia Service Medal (Afghanistan), the Operational Service Medal – EXPEDITION, the Special Service Medal - NATO, the Queen Elizabeth II's Diamond Jubilee Medal, and the Canadian Forces Decoration. He has no conduct sheet. As a result of the allegations forming the basis of the charges however, in December 2021 he was served a notice of intent to recommend release. The release process will continue its course dependant on the outcome of these trial proceedings.

Attitude of offender toward rehabilitation

[8] PO 1 Martin testified at the sentencing hearing and apologized first to S2 Brady, S1 Parsons and to PO 2 West. He also apologised to the Deck department. He told the Court that following the allegations, he reflected on his conduct. He attended the following courses the last year, delivered either by the CAF/Department of National Defence, or by the Canada School of Public Service: The Path to Dignity and Respect; Overcoming Your Own Unconscious Bias; Understanding Unconscious Bias; Harassment and Violence Prevention for Employees; and Harassment and Violence Prevention for Managers and Committees/Representatives. He also sought the support and advice from mentors. He assured the Court that his behaviour will never repeat itself.

[9] PO 1 Martin has not deployed nor sailed following the allegations and has therefore lost the opportunity to earn approximately $600 per month of sea allowance.

He has not served in a supervisory role since then. His current service is in relation to developing safety procedure policy.

[10] Lieutenant-Commander (LCdr) Green also testified for the defence. LCdr Green has been the offender's divisional officer for eight months now. He provided details of PO 1 Martin's current role and duties with the development of policies, sharing his much-needed expertise, performing well and without issue. LCdr Green testified that PO 1 Martin provides guidance and peer support to a complainant of sexual misconduct.

Position of the parties

[11] Following the presentation of the evidence, the prosecution recommended the imposition of a reduction in rank because the offences are serious; harassment of junior members is detrimental to the morale and cohesion of the troops and can lead to a breach of trust, particularly when the conduct is from senior members who are responsible for the welfare and well-being of subordinates. The impugned conduct was subversive and constituted a failure of leadership. Indeed, S2 Brady felt bullied, and the offender's conduct spoiled his experience in the CAF, making him question whether there is a place for a Black man in the CAF. Thus, considering CAF inclusiveness policies, entailing that any member, regardless of their race, should feel part of the CAF, the prosecution contended that this Court must denounce the conduct. As for the third charge, the prosecution contended that an offence of abuse of subordinates is more serious than an offence of assault under the *Criminal Code* because of the breach of trust that results from the commission of such offences in the CAF. Therefore, the punishment should serve to both denounce the conduct and to deter others from following the same path. Because holding a rank in the military, particularly the rank of PO 1, is a privilege, a reduction in rank carries a significant deterrent effect and in the circumstances of this case properly addresses the principles of sentencing. In order to come to this recommendation, the prosecution was informed that the conduct was persistent, that the name-calling was based on race, that it had an effect on efficiency and morale, that it was directed at a junior member of the Royal Canadian Navy (RCN), and that it constituted an abuse of trust. The prosecution also considered that the offender has no prior record, that he had exemplary service, that he presented a sincere apology, and that he took steps to rehabilitate himself.

[12] The defence recommended a severe reprimand. He explained that the offender regrets his actions and he is remorseful. In response to the prosecution's comparing an offence of abuse of subordinates with an assault charge, the defence contended that the objective gravity of an offence contrary to section 95 is lesser than an assault under the *Criminal Code* because the latter carries a more severe maximum punishment. The defence contended further that his recommendation meets the objective of denunciation. He also explained that there were several mitigating factors that support a punishment less severe than a reduction in rank, such as the delays in bringing this case to trial, that PO 1 Martin is no longer part of a ship's company, that he effectively lost the opportunity to earn sea allowance and to lead more junior sailors. His days serving the CAF are numbered. A release from the CAF means that he would lose his employment

and effectively also lose an opportunity to earn back the trust lost from the CAF. PO 1 Martin started his rehabilitation process. He is years away from retirement. The recommended sentence of the prosecution would have the effect of the offender having a criminal record; therefore it is too severe and should not be imposed.

Applicable law

[13] In considering a fair and fit sentence to impose, the *NDA* sets out rules that sentencing judges must follow when determining an appropriate sentence. It establishes that the fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces. This fundamental purpose is achieved by imposing just punishments that satisfy one or more of the objectives found in the act, such as to promote a habit of obedience to lawful commands and orders and to deter others from adopting the same conduct. In turn, the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Proportionality is achieved by considering any relevant aggravating and mitigating factors as they relate to the circumstances of the commission of the offences and of the offender, as the case may be.

Gravity of the offences

[14] In determining a fair and appropriate sentence, the Court has considered the objective gravity of the two offences. The maximum punishments that can be imposed, as provided for the provision creating each offence in the *NDA*, is indicative of its objective gravity. An offence under section 129 is punishable by dismissal with disgrace from His Majesty's service or less punishment, while an offence under section 95 is punishable by imprisonment for less than two years or to less punishment.

[15] As for the subjective gravity, the first charge referred to harassment based on race. Harassment is an insidious conduct that creates an atmosphere of oppression on those subjected to it. In the military, it leads to a breach of trust, corroding discipline and esprit de corps and impacting operational efficiency, particularly when the harassment is caused by the conduct of a senior non-commissioned officer over a much more junior subordinate. At the time of the commission of the first offence, PO 1 Martin was entrusted with supervisory responsibilities of a department of fifteen to seventeen members. As a leader, his role included ensuring the well-being of all of his subordinates; his conduct of harassing a more junior member reveals a serious failure in his leadership.

[16] The offence of abuse of subordinates is a serious offence. In *Euper*, at paragraph 22, Sukstorf, MJ describes the purpose of a section 95 offence as:

> to denounce conduct that rises to the level of what is otherwise an abuse of authority even where it involves low-level behaviour. Holding a senior rank as an officer or a member in the Canadian Armed Forces is a privilege and with that privilege comes both responsibility and accountability. Hence, any conduct that undermines the trust, confidence and morale of others must be addressed.

Aggravating factors

[17] I now turn to the consideration of aggravating factors. Unfortunately, the information regarding the impact of the conduct on the complainant was sparse because S2 Brady choose not to provide a VIS. That was his choice as the law does not impose an obligation to provide a VIS. That said, both the record and the evidence accepted at trial revealed that the conduct for both offences was aimed at one of the most junior subordinates under the supervision of the offender. Indeed, S2 Brady was posted to HMCS *Harry DeWolf* as an Sailor, 3rd Class. He had little experience in the CAF; this was his first posting. His testimony that I have accepted revealed that he perceived his posting on-board ship as a humiliating experience involving intimidation and belittlement caused by one of his superiors, a senior non-commissioned member. In short, the offender's conduct tarnished S2 Brady's experience in the military.

[18] Furthermore, the offender's rank and experience in the CAF constitute aggravating factors, along with the important post he occupied at the time on-board ship as the buffer, leading a large department of shipmates. Also aggravating is that the conduct for the first offence was repetitive, with one comment being made almost daily. The comments were heard by others; some were said in front of the offender's subordinates, two of whom were the only other Black crewmembers on-board ship, while the vulgar comment was made to S2 Brady in front of a civilian worker.

Mitigating factors

[19] There are, however, compelling mitigating factors that were considered in the determination of the sentence. First and most importantly, I agree with both parties that PO 1 Martin's apology seemed sincere. He thoughtfully directed his apology to both complainants, and to his assistant buffer, acknowledging that his conduct most likely affected others of the same racial group. He also apologized to his chain of command. He was candid and very emotional, publicly exposing his vulnerabilities in relation to the improper conduct. His conduct while on the witness stand, and his words, are those of a genuinely remorseful offender. I believe him when he committed to never repeating the conduct forming the basis of the charges. It is apparent that he did reflect on his actions, taking decisive steps to rehabilitate himself in learning the root cause of his conduct in order to prevent a recurrence. In sum, he took serious steps to better himself. His experience from these events and the introspection he benefited from are more likely to allow him to become a better leader.

[20] He is also relatively young; he has many years to offer in the naval service. He has no conduct sheet. Prior to these court martial proceedings, he had an unblemished career and the evidence provided by his current superior showed that he continues to perform while awaiting his trial, going above and beyond in supporting a complainant of sexual misconduct. Undoubtedly, the navy is his life; he joined at a very young age and demonstrated that he is dedicated to the service, quickly climbing the military hierarchy.

Other consequences

[21] The Court also considered that the disciplinary actions that flowed from the allegation being reported resulted in both administrative and financial consequences. PO 1 Martin lost opportunities to earn sea allowance, to deploy, to serve on-board ship, and to continue leading subordinates. He was effectively precluded from serving in his current rank and trade in the Navy, fulfilling a non-leadership role. Additionally, he received a notice of intent to recommend release and the chain of command is waiting for these trial proceedings to be terminated before taking further steps with this administrative process.

Parity

[22] Having considered both the circumstances of the commission of the offences and the situation of the offender, I have reviewed court martial cases provided by counsel in the context of the parity principle. The review of cases that are similar, pertaining to offenders in similar situation convicted of similar offences, guides sentencing judges in ensuring that the offender receives a punishment that is within the range of punishments established in similar circumstances.

[23] In closing submissions, prosecution referred to three cases, including *R. v. Duhart*, 2015 CM 4023 where a Sergeant was sentenced to a severe reprimand and a fine of $4,000 after a finding of guilt of four charges in relation to sexual harassment and ill-treatment of two subordinates who served under his direct supervision. Further in *Euper*, 2018 CM 2012, the offender pled guilty and the joint submission of a reduction in rank from sergeant to corporal and a fine in the amount of $1,500 was the punishment imposed. This case also involved a sexual misconduct that could be construed as a sexual assault. The offender, a Sergeant, was much older and no longer served in the CAF at the time of sentencing. Turning to cases supporting the defense's position, in *R. v. Scott*, 2018 CM 2034, Sergeant Scott was found guilty of three offences of conduct to the prejudice of good order and discipline for harassment, using insulting languages toward three subordinates and was sentenced to a severe reprimand. In the case of *R. v. Deveaux*, 2012 CM 2011, the joint submission of a severe reprimand and a fine in the amount of $5,000 was accepted following a guilty plea. I have also considered *R. v. Whitten*, 2012 CM 4004, a case where the offender was sentenced to a severe reprimand and a fine in the amount of $3,000 following a guilty plea.

[24] Having reviewed the cases provided by the prosecution, I agree with the defence that some of the prosecution's cases are to be distinguished either because they pertained to sexual misconduct resembling sexual assault, or because the situation of the offender differed significantly from that of PO 1 Martin's. That said, I find that the decisions provided indicate punishments imposed in similar circumstances that range from a reduction in rank in more serious circumstances, to a severe reprimand alone, or combined with a fine.

Principles of sentencing deserving greatest emphasis

[25] I do agree with counsel that the fundamental purpose of sentencing is achieved by imposing a punishment that has the objectives of denunciation and general deterrence. Thus, the punishment should be severe enough to denounce the conduct and deter others from adopting it. At the same time, it should not be so harsh as to interfere with PO 1 Martin's rehabilitation.

Determination of a fair and fit sentence

[26] Consequently, I do not agree that a reduction in rank as suggested by the prosecution is the least severe punishment that would achieve discipline in the circumstances. Partly because the proposed punishment is at the highest end of the range and was imposed for sexual misconduct, and partly because of the offender's show of remorse and steps taken toward rehabilitation, a reduction in rank does not align with the principle of proportionality. It is too severe considering the circumstances of the case and the situation of this offender. Additionally, it would, in effect, result in PO 1 Martin having a criminal record. While I in no way wish to downplay the seriousness of the conduct, and although this Court holds the offender entirely responsible for his actions, PO 1 Martin has already paid a hefty price professionally and financially. Consequently, I find that a severe reprimand, a punishment that is well within the range of punishment, would be the least severe punishment that would achieve discipline in the circumstances.

Conclusion

[27] These incidents and their consequences constituted a wake-up call the offender needed to correct his behavior. In addition to his apology and public acknowledgement of the harm done, as well as the serious steps he took to rehabilitate himself, the lesson-learned experience PO 1 Martin acquired from the consequences he faced as a result of his improper conduct demonstrate that he is a dedicated RCN member who is capable of introspection. I therefore see no reason that he should be released from the CAF. On the contrary, he has learned to be a better leader and can develop to be an exemplary one, leading his subordinates toward inclusiveness and respect of others regardless of their race and background. That said, his release or retention in the CAF is not my decision to make. I truly hope that he is offered an opportunity to continue serving his country by remaining a member of the RCN so he can earn back the trust of his chain of command, peers, and subordinates.

[28] Having considered his personal situation and the circumstances of the commission of the two offences of which he was found guilty, I find as a result that a severe reprimand would be the least severe punishment that would achieve discipline in the circumstances.

FOR THESE REASONS, THE COURT:

[29] **SENTENCES** PO 1 Martin to a severe reprimand.

Counsel:

The Director of Military Prosecutions as represented by Major C.R. Gallant

Major É. Carrier, Defence Counsel Services, Counsel for Petty Officer, 1st Class J.T. Martin