COURT MARTIAL

Citation: *R. v. Sutherland,* 2023 CM 5001

Date: 20230228
Docket: 202130

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

His Majesty the King

- and -

Master Corporal W.C. Sutherland, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as "V.R.", shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

I. Introduction

[1] Master Corporal (MCpl) Sutherland was found guilty by a Standing Court Martial on 3 June 2022, of committing an offence punishable under section 130 of the *National Defence Act* (*NDA*), particularized as "In that he, on or about 22 April 2020, aboard HMCS Fredericton, did sexually assault V.R." The Court must now determine and impose a fair and fit sentence, which requires that the punishment be proportional to the circumstances surrounding the commission of the offence and takes into consideration the offender's situation. At the sentencing hearing, counsel proposed a

joint submission, recommending that I impose a punishment of detention for a period of six weeks. Further, the defence is seeking a personal remedy to exempt MCpl Sutherland in the application of the *Sexual Offender Information Registration Act* (*SOIRA*) regime, submitting that subsections 227.01(1) and 227.02(2.1) of the NDA, which render the SOIRA regime applicable to military offenders, violate his section 7 *Charter* rights, and that the provisions are not saved by section 1. The Court must therefore first determine if the joint submission is contrary to the public interest, and second, whether the offender should be excluded from the imposition of a *SOIRA* order.

Background

[2] As part of my consideration of the joint submission, I must consider the circumstances surrounding the commission of the offence, which can be summarized as follows. From 18 January to 28 July 2020, Her Majesty's Canadian Ship (HMCS) *Fredericton* deployed in support of Operation REASSURANCE in Central and Eastern Europe. Approximately 234 crewmembers were serving aboard, including a detachment of aircrew composed of six officers, two non-commissioned officers (NCOs) and eleven non-commissioned members (NCMs), which included the offender. The aircrew had moved aboard ship in December 2019, in preparation for the deployment. As required by orders and custom of the service, members of the aircrew wear their distinctive flight suits when serving aboard ship. The victim was also part of the deployed ship's company, working on a rotation schedule in the galley of the junior rank mess. Their employment aboard meant having daily, but brief interactions with each junior rank crewmember during mealtime.

[3] On 21 April 2020, HMCS *Fredericton* was docked in Souda Bay, Greece for about ten days to resupply and offer the crew some rest. Because of sanitary restrictions imposed in relation to the COVID-19 pandemic, the ship's company was confined on-board during this port visit, and outsiders were not allowed to come aboard. After hands fall in that day, the ship was called secure sometime between 1600 and 1700 hours and some crewmates decided to socialize in their assigned mess after supper and have some drinks. The offender arrived at the mess in civilian attire around 1800 hours where he drank and socialized with four other aircrew members until the bar closed around midnight. They were taking turns buying rounds. Later in the evening, the offender was the only one who continued drinking, going up to the bar to buy more drinks for himself. He testified drinking a total of five to six tall beers throughout the evening. As the bar was closing and only a few patrons were left at the mess, the victim, unable to sleep, went to the mess and sat at the bar counter. It was not disputed that a male approached them and touched their thigh and crotch area without their consent. The defence conceded that the touching was sexual in nature. The incident lasted approximately five minutes before Sailor 1st Class (S1) Kester, an acquaintance of the victim, intervened to stop the interaction. The allegations were reported to the chain of command the next day.

[4] A few days later, on 29 April 2020, a helicopter deployed on the ship crashed, causing the death of six crewmembers. Aircrew personnel deployed on the ship at the

time were repatriated to Canada shortly thereafter. This tragedy had some impact on these trial proceedings in a way that will be explained later in this decision.

Finding of guilt

[5] In its decision finding MCpl Sutherland guilty, the Court did not find his general denial credible for many reasons. First, his testimony during his examination in chief was very brief, and his evidence substantially provided during the cross-examination, corroborated the prosecution's evidence, which placed the offender at the mess at the material time when the bar had closed and there were just a few people left. It also confirmed that MCpl Sutherland went to the bar counter on at least two occasions late in the evening to purchase alcoholic beverages. Further, the offender downplayed his alcohol consumption that night to demonstrate that he was not intoxicated, that he was in control and had a solid and reliable recollection of the events. Yet, he admitted taking turn buying rounds with four other aircrew personnel, then later getting up to go to the bar to continue consuming alcohol when the other members of his group had decided to stop their alcohol consumption. Because there were five members, and that he admitted going to the bar more than once, he would have had, conservatively, at least seven tall beers in a period of about six hours. He was also unable to answer questions related to facts that should have been easy to remember. I found that MCpl Sutherland's general denial of the allegations was not credible nor reliable.

[6] Additionally, I found that his evidence did not leave me with a reasonable doubt regarding his guilt. The Court found that although two of the witnesses were highly intoxicated at the mess at the material time, the prosecution's witnesses were credible, and portions of their testimony regarding material facts were deemed reliable. The victim was also the only witness at the mess who did not drink alcoholic beverages that night. The victim did not know the offender's name at the time of the incident, but he was familiar to them; they recognized MCpl Sutherland as a member of the aircrew whom they had interacted with over a period of several months in the Junior Rank's Mess in the scope of their duties. Further, the victim was in close proximity to the offender during about five minutes as the incident unfolded and was able to identify MCpl Sutherland on a Facebook photo that same night, then as part of a process akin to a photo-line up identification a few days later. The process, conducted by the coxswain, was deemed to be conducted properly and in an unbiased manner. There were some discrepancies between the victim's testimony and the testimonies of the other two attendees, but they were minor and related to collateral issues. There were no internal inconsistencies in the victim's testimony, they maintained their version throughout and their credibility remained unshaken. I consequently rejected the defence's allegation that the essential element of identity was not proven. Being convinced beyond a reasonable doubt that MCpl Sutherland committed a sexual assault on the victim when the offender was at the bar counter beside them and he put his hand on their thigh up to their crotch area, I found MCpl Sutherland guilty.

II. Whether the joint submission meets the public interest test

Position of the parties

[7] In support of his recommendation that I impose a punishment of six-week's detention, the prosecution contended that general deterrence and denunciation should be the objectives that would achieve discipline in the circumstances of this case. He explained that trust is fundamental to the functioning of an armed force, in particular when troops share tight quarters, and have thus little to no privacy. He also explained that he considered that the offender's rehabilitation should not be compromised because MCpl Sutherland presents as a good prospect to be retained in the Canadian Armed Forces (CAF). The prosecution considered as aggravating, the military experience of the offender, that during the commission of the offence, the offender touched the crotch area of the victim, which was invasive, and that the touching happened repeatedly. He also found aggravating the impact on the victim as well as the fact that the sexual assault occurred on a deployment, which caused an additional administrative burden on the leadership. In mitigation, the prosecutor considered that this was a first offence for MCpl Sutherland, a conduct that seemed to be out of character for this member. Further, the offender was placed on counselling and probation and may be exposed to additional administrative review.

[8] The prosecution contended that his recommendation is well within the range of punishment for similar offences, considering cases such as *R. v. Cadieux*, 2019 CM 2019, where a punishment of sixty days' detention and a severe reprimand was imposed; *R. v. Luis*, 2022 CM 4016, where the military judge (MJ) imposed thirty days' imprisonment, a dismissal from Her Majesty's Service and a fine in the amount of $1,200; *R v Déry*, 2013 CM 3025, where a thirty days' imprisonment was imposed; *R v Yurczyszyn*, 2014 CM 2005, where the offender was sentenced to a reduction in rank from major to captain; and finally *R. v. Bankasingh*, 2021 CM 5009, who received sixty days' detention, of which was a joint submission.

[9] Defence counsel explained that the joint submission came after extensive discussions between counsel and followed a comprehensive review of court martial cases. Relying on the cases of *R. v. Bruce*, 2020 CM 5011, where, following a guilty plea, the joint submission of a reprimand combined with a fine in the amount of $3,000 was accepted and imposed for an offence contrary to section 129 for repeated touching; and *R. v. Marshall*, 2022 CM 2008, where a sixty days' imprisonment was imposed, the jointly recommended sentence is well within the range. The defence further submitted that, in addition of being a first-time offender, the conduct was out of character as MCpl Sutherland is generally respectful toward others. He is now following counselling and therapy and has significant support from his spouse. The defence also told the Court that a *Gladue* report was not required in the circumstances.

Sentencing principles of the military justice system

[10] When determining a sentence, the Court must be guided by the sentencing principles contained in the *NDA*. As provided at section 203.1 of the *NDA*: "The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale

of the Canadian Forces." The fundamental purpose shall be achieved by imposing just sanctions that have one or more of the objectives listed at subsection 203.1(2), such as deterrence, denunciation, to promote a habit of obedience to lawful commands and orders, to maintain public trust in the CAF as a disciplined armed force, or to assist in rehabilitating offenders. The objectives of the sentence are dictated by the particularity of the case and of the offender.

[11] Section 203.2 of the *NDA* provides for the fundamental principle of sentencing that, "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

[12] It is part of counsel's mandate in representing their respective clients to recommend to the Court a sentence that they deem fit and fair. Counsel have a comprehensive and complete knowledge of the circumstances surrounding the commission of the offence, while defence counsel is also aware of the offender's personal situation. When considering an appropriate sentence to recommend, counsel will often engage in resolution discussions. "Properly conducted, [these resolution discussions] permit the system to function smoothly and efficiently" (*R. v. Anthony-Cook*, 2016 SCC 43). The Supreme Court of Canada (SCC) has recognized that joint submissions provide many <u>benefits</u> to the accused, the participants, the unit, and the criminal justice system. They assist in limiting the resources normally required to support a contested trial because generally, a guilty plea forms part of the agreed-upon joint submission. It also saves the victim the emotional cost of having to testify in open court about the incident they were subjected to at the hand of the accused. The military justice system also benefits from joint submissions in a similar fashion.

[13] Although the benefits identified by the SCC are not necessarily obvious when a joint submission is presented following a contested trial where a guilty finding ensued, the SCC has established that the public interest test also applies in these circumstances, when it stated that "[F]or joint submissions to be possible, the parties must have a high degree of confidence that they will be accepted. Too much doubt and the parties may choose instead to accept the risks of a trial or a contested sentencing hearing" (*Anthony-Cook* at paragraph 41). More recently in *Baptiste c. R.* 2021 QCCA 1064, the Quebec Court of Appeal went further on the subject:

> [71] The importance of preserving the high degree of confidence necessary to prevent an unnecessary contested sentencing hearings and the important role of the Crown as the protector of the public interest, as the Supreme Court underlined in *Anthony-Cook* and recently in *Ontario (Attorney General) v. Clark*, cannot be ignored and do not simply vanish after a trial.
>
> [72] Even though the benefits of an uncontested sentencing hearing after trial are different in magnitude from a guilty plea before trial, they too save "precious time, resources, and expenses, which can be channeled into other matters".
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> […]
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> [74] Timely and efficient sentencing hearings are expected under s. 11(b) of the *Charter*. So is cooperation between counsel, including through joint submission after

> trial. This "is no small benefit" because it allows "our justice system to function more efficiently".
> [Footnotes omitted.]

[14] It falls on the prosecution to ensure that critical aspects of the case, such as the joint recommendation being reached after a contested trial where the victim of the sexual assault was not spared the emotional cost of testifying in court, are taken into consideration. Further, considering the additional information and submissions conveyed to me by the prosecution, both the victim, who was consulted, and the offender, were given some assurance as to the probable outcome regarding the sentence to be imposed. This most likely has served to mitigate the stress associated with the uncertainty of the outcome for both the offender and the victim. It also saved time and resources that would be required for both parties to present evidence in order to put their best foot forward in support of their respective recommendation on sentence.

[15] Having accepted that the public interest test applies to a joint submission presented following a guilty verdict, I must now examine the joint submission and determine if it is contrary to the public interest or whether it would cause an informed and reasonable person or public to lose confidence in the institution of the courts. In other words, a joint submission should not be rejected lightly. Although the threshold for intervention of the judge is high, trial judges are still required to examine the jointly proposed sentence. Joint recommendations are not sacrosanct. However, this Court is required to accept it even though it may have arrived at a different sentence in the absence of a joint recommendation. This means that I have limited sentencing discretion in this case.

[16] When considering a joint submission, trial judges can rightfully assume that counsel were mindful of the statutory sentencing principles when agreeing on the joint submission. It is also assumed, as already stated, that counsel took into consideration all relevant facts when mutually agreeing upon an appropriate sentence. Counsel submissions usually provide confirmation that they did in fact consider key aspects of the case, including the existence of aggravating factors, and of the offender's personal situation. Additionally, when adduced as evidence as part of the sentencing hearing, an Agreed Statement of Facts provides information that may present additional factors that were also considered during the negotiations, which would further support the joint submission.

Aggravating factors

[17] In examining the joint submission, in addition to the nature and objective gravity of the offence, I have considered the circumstances surrounding the commission of the offence as well as the offender's situation which are factors that the Court shall take into consideration when determining whether the proposed punishment meets the public interest test. Therefore, the following aggravating factors specific to this case were taken into consideration:

(a) the impact on the victim. V.S. showed a lot of courage in coming forward to report the conduct and to provide a testimony describing the sexual assault. In their VIS, they explained that they could no longer be around others without being constantly vigilant. They now experience trust issues with both their family and what they refer to as their military family. They even considered cancelling their wedding because it also impacted their relationship with their significant other. They wrote that they are now plagued with anxieties and stress, feeling empty and having panic attacks. They described having issues being touched. They had suicidal ideation. They started therapy and were prescribed an antidepressant. They also developed a habit of purchasing cigarettes, nearing $100 a month for this additional expense. It is apparent that the sexual assault had a lasting effect on them;

(b) the sexual assault occurred during a deployment. Although the offence was not committed in a theatre of hostilities, which would constitute a statutory aggravating factor, and while there is no evidence that the commission of the offence resulted in substantial harm to the conduct of a military operation, an offence committed on a deployment would cause a disruption to operational effectiveness in many ways. First, sexual misconduct incidents occurring in the context when crewmates live, eat, serve, sleep in close quarters would have a dramatic impact on trust, on morale and unit cohesion. Second, the reallocation of personnel resulting from measure taken to isolate the victim from the perpetrator would also cause resources issues. The same goes for the administrative and disciplinary measures that are required to be taken against an accused to address the misconduct, which require time and resources. On this note, the Agreed Statement of Facts submitted by the prosecution does confirm that these issues are natural consequences that flow from the commission of sexual offences on a deployment. That said, the document is generic and was not presented as a military impact statement. It does not address the specific impact the sexual assault committed by MCpl Sutherland had on the deployment of HMCS *Fredericton*. I have therefore not considered this document as conclusive to prove that the conduct caused specific harm, but only to support the conclusion that a sexual assault occurring during a deployment would naturally cause a disruption to operational effectiveness;

(c) the conduct continued despite the intervention of a peer. S1 Kester did interject when he saw that MCpl Sutherland had placed his hand on the victim’s thighs and that they seemed distressed. MCpl Sutherland stopped when S1 Kester arrived, but he resumed the touching shortly thereafter; and

(d) the Court has accepted the prosecution’s contention that MCpl Sutherland’s experience in the CAF is an aggravating factor, but to a

limited extent because he had served only nine years and was junior in rank when the infraction was committed.

Mitigating factors

[18] The Court also accepted counsel's submissions regarding mitigating circumstances and took into consideration that MCpl Sutherland has no prior criminal convictions.

The offender's situation

[19] Turning to the offender's career and personal situation, the documentary evidence listed at article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and provided by the prosecution reveal that the offender is forty-three years old. He enrolled in the CAF on 22 August 2011. He is deemed single and has no dependents. MCpl Sutherland has no conduct sheet. He was appointed to MCpl on 1 December 2021. As aircrew, he served for various periods onboard HMCS *Fredericton* and HMCS *St. John's* between July 2017 and July 2020. MCpl Sutherland was awarded the Special Service Medal – North Atlantic Treaty Organization.

[20] The defence produced a voluminous exhibit book containing several letters of support. The prosecution did not object to the evidence being marked as exhibits. The first letter, dated 6 February 2023, is from the offender's mother, a retired warrant officer who served for thirty-six years in the CAF. She provided an overview of the offender's childhood and youth while she was posted to various bases, how she was separated from him and his brother and the remorse that came with it. She detailed certain events that forged who MCpl Sutherland has become today. She wrote that his father, who also served in the CAF for twenty years, was of Aboriginal heritage and had a difficult and dysfunctional upbringing. She also mentioned that MCpl Sutherland's father drank to excess, and she believed consuming alcohol was encouraged in the military. The upbringing and excessive drinking of MCpl Sutherland's father, as well as an uncle's drinking habit when the latter was living with the offender's family when the offender was a child, had detrimental effects on him. She also wrote that MCpl Sutherland started consuming alcohol as a teenager, hanging out with the wrong crowd. He was however employed at Radio Shack and within the first year, he was promoted to assistant manager then appointed acting manager during the last year. She described he had an excellent work ethic and that he demonstrated great dedication, integrity and loyalty. She wrote that as an adult, he is a generous person with a big heart, and he is a loving son. In 2018, he fundraised for a humanitarian cause which involved building schools in Nicaragua. She finally mentioned that he has no issue abstaining from alcohol consumption.

[21] Another letter dated 11 January 2023 from MCpl Maxime Rousseau, a close friend and former co-worker, states that the offender is a generous soul who always treated others with the respect they deserve. An email from Master Warrant Officer (MWO) Hatfield electronically signed and dated 11 January 2023, was also part of the

exhibit book. MWO Hatfield is a superior who wrote amongst other things that the offender is an excellent and dedicated worker. MCpl Sutherland's spouse, Ashley Thibault, wrote a letter in his support, and similarly states that he is a generous and honest person, a man of a few words. A letter from Warrant Officer (WO) Griffin, fleet deputy quality manager at 12 Air Maintenance Squadron dated 12 January 2023, indicates that MCpl Sutherland was always polite and professional, and that consequently, he believed the contentious conduct was out of character.

[22] Dr Matthew Morgan, psychiatrist, wrote a letter dated 13 October 2022. He explained the offender was assessed on 12 March 2021, and diagnosed with post-traumatic stress disorder (PTSD) as a result of the helicopter crash. He was also diagnosed with mild to moderate alcohol use disorder. When he was assessed, the offender was experiencing intrusive memories (nightmares and flashbacks), avoidance of place where he would see the helicopter, negative emotions, and an increase in alcohol use in response to worsening mental health. Dr Morgan further explained that in October 2022, the offender had some improvement in his mood and a reduction of alcohol use. However, in the weeks leading up to these proceedings on sentence, there was an exacerbation of symptoms such as insomnia and distress. MCpl Sutherland consults Dr Morgan every one to two months on a regular basis. Dr Morgan wrote that the offender sees a therapist on a weekly basis and attends addictions sessions as needed. He was prescribed medication to treat his depressive and anxious symptoms and to treat insomnia. In regard to therapy, he has difficulty addressing his trauma symptoms due to low motivation and energy and also due to his distress in relation to these proceedings.

[23] Finally, the defence provided a two-page letter from Dr Krista Luedemann, dated 8 November 2022. Dr Luedemann wrote that MCpl Sutherland was referred to their service in November 2020 for an assessment of possible trauma in relation to the helicopter crash. She has been involved in his care as a psychologist since July 2022, and as of November 2022, he had completed thirteen individual therapy sessions. Additionally, MCpl Sutherland had completed thirty-six sessions since July 2021, before his file was transferred to her. She wrote that he is an active participant in the therapy sessions and attends scheduled appointments.

Other indirect consequences

[24] Having reviewed the offender's personal situation, I must also consider any indirect consequences of these proceedings. I agree that MCpl Sutherland being placed on counselling and probation, with an administrative review that may follow, are consequences that I need to take into consideration when examining the joint submission.

Parity

[25] Turning now to the parity principle, the Court examined precedents for similar offences to determine whether the joint submission is similar to sentences imposed on

similar offenders. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishment that would be appropriate in this case.

[26] The Court was informed of court martial cases similar to this case, in particular *Luis* and of the other precedents provided by counsel. After a review of these precedents, including *Bruce* and *R. v. Levesque*, 2023 CM 2001, the Court concludes that sentences imposed for this type of low gravity sexual assault do not always comprise a custodial sentence; the appropriate range for this type of offence is generally composed of a severe reprimand and a hefty fine. That said, in this case, there are aggravating factors that would bring an appropriate punishment toward the higher end of the range because the incident occurred during a deployment, and because the impact the sexual assault had on the victim was severe. In any event, while at the higher end on the range of punishment, the joint submission corresponds to punishments imposed in the past for similar offences. That is sufficient to allow the Court to conclude that the proposed sentence is not unfit. Consequently, the recommendation on sentence meets the parity principle.

Objectives

[27] In light of the offence for which the offender was found guilty and in light of his personal circumstances, I accept that the fundamental purposes of sentencing shall be achieved by imposing a sanction that has for objectives in this case to deter others from adopting the same conduct and to denounce unlawful conduct, while not being so harsh as to compromise his rehabilitation. I agree with the prosecution that the offender presents a potential for rehabilitation. In fact, when he presented this joint submission, he confirmed being aware that NOTE (A) to article 104.09 of the QR&O provides that "[O]nce the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career". This note also states "Specialized treatment and counselling programmes to deal with drug and alcohol dependencies and similar health problems will also be made available to those service detainees who require them". This means that the offender can continue his treatment and therapy sessions during his detention. In sum, while the proposed sentence meets the objectives of general deterrence and deterrence, MCpl Sutherland's rehabilitation would not be compromised.

Ancillary orders

[28] Turning to ancillary orders that may be imposed, since MCpl Sutherland was convicted of a primary designated offence pursuant to section 487.04 of the *Criminal Code*, the Court also makes an order authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis from him pursuant to section 196.14 of the *NDA*.

[29] Finally, based on the position taken by the prosecution, I have also considered whether this is an appropriate case for a prohibition order, as stipulated under section 147.1 of the *NDA*. In this case, such an order is neither desirable nor necessary in the

circumstances of this trial because the commission of the offence did not involve violence with a weapon and the sexual assault was relatively minor. I will not make an order to that effect.

III. Whether this offender should be granted the remedy sought to exempt him from the imposition of a *SOIRA* order

Position of the parties

[30] I must now consider the application submitted by the offender with regard to the imposition of an order pursuant to the SOIRA. Relying on the SCC decision *R. v. Ndhlovu*, 2022 SCC 38, the offender filed a Notice of *Charter* application seeking a declaration that subsections 227.01(1) & 227.02(2.1) of the *NDA* are contrary to his right to liberty as protected by section 7 of the *Charter* and that the provisions are not saved by section 1 of the *Charter*. He is seeking a personal remedy to not have a *SOIRA* order imposed on him on the basis that he is highly unlikely to reoffend, similar to the circumstances of Mr Ndhlovu. The prosecution is not contesting the application.

The law

[31] Subsection 227.01(1) of the *NDA* provides that when a court martial imposes a sentence on a person for an offence referred to in paragraph (a) or (c) of the definition of "designated offence" within section 227, it shall make an order requiring the person to comply with the *SOIRA* for the applicable period specified in section 227.02. The purpose of that order is to make available information of convicted sexual offenders in order to help police investigate other offences. The statute does not provide discretion to the Court to decide to impose or not the order; an order shall be imposed in all cases.

[32] In *Ndhlovu*, the SCC declared unconstitutional the *Criminal Code* provisions that are similar to those of the *NDA SOIRA* regime. The SCC has also ruled that the effect of its decision is suspended for one year, therefore the mandatory imposition of the order is still in force. Of note, in the criminal justice system, the prosecution can proceed summarily where the offence involves a relatively minor sexual assault. In our system, all service offences are treated as indictable offences, which means that the required *SOIRA* order for offences of sexual assault are automatically imposed for a period of twenty years regardless of the subjective gravity of the offence.

[33] That said, the SCC's decision in *Ndhlovu* provides that trial judges have discretion to determine, on a case-by-case basis, on application from the offender, whether the offender's registration in the *SOIRA* violates their section 7 *Charter* rights. The burden is on the offender to demonstrate that based on the facts of his case, the imposition of the *SOIRA* order is grossly disproportionate or bears no connection to the *SOIRA's* purpose of assisting police in the prevention and investigation of sex offences. The SCC has provided guidance to sentencing judges in this regard. If "registering offenders who are not an increased risk of reoffending bears no connection" to that

purpose, then the sentencing judge can grant the remedy sought and exempt the offender from the application of the *SOIRA* regime.

[34] Recently, other courts martial (*Luis* and *Levesque*) have recognized that the SCC decision in *Ndhlovu* is applicable *mutatis mutandis* to the *NDA* provisions and accordingly, the suspension in effect applies to section 227.01 of the *NDA*. In these two decisions, both MJs granted a personal remedy on the basis that both the circumstances of the offenders and of the offences, which were subjectively at the lower end of subjective gravity, called for this measure. In *Luis*, the MJ also found that he could decide on the *Charter* application without the benefit of a forensic report regarding the risk of re-offending because there was enough information before him to decide the issue.

Analysis

[35] I find that, based on the evidence presented at the sentencing hearing regarding the circumstances surrounding the commission of the offence as well as the offender's character and personal situation, I am satisfied that his case calls for granting him a personal remedy, excluding him from the application of the *SOIRA* regime. While a forensic report constitutes the gold standard to the determination of the risk of re-offending, I am mindful that such assessment is not an exact science. Indeed, forensic experts consider not only the personal character and traits of the individual using technical methodologies, they also, in part, base their finding on statistics.

[36] Additionally, I was informed by defence counsel that in Nova Scotia, there is a forensic behaviours program designed to provide this type of assessment on referral. Defence counsel further explained that typically, an offender is referred to the program following a conviction once a Court order is made to this effect at the request of counsel. A Crown's brief is then sent along with a copy of a pre-sentence report. The obtention of the forensic report takes several months following very comprehensive testing. In the circumstances, I am of the view that not only the obtention of a forensic report to assess risk of recidivism in Nova Scotia would cause additional delays to complete this matter, this option calls into question the issue of authority of a court martial to make an order referring MCpl Sutherland to a provincial forensic behaviours program.

[37] Nevertheless, without further delving into the authority of a court martial to issue an order for the preparation of a forensic report, I agree with the prosecution that defence provided me with extensive and sufficient material in regard to MCpl Sutherland's personal circumstances that allows me to make a determination on this application. The evidence allows me to conclude that his conduct toward V.R. on or about 21 April 2020, was out of character. He is now engaged in therapy with regard to PTSD, and the professional support he receives has helped him in dealing with his alcohol abuse. MCpl Sutherland has strong support from his spouse and extensive community support network. He has no previous criminal record and has no other similar reported incidents of this kind. Combined with the circumstances surrounding

the commission the offence, in particular the relatively minor nature of the sexual assault involved, I find that he is not at an increased risk of reoffending. Consequently, the requirement for the offender to register undermines any real possibility that this information on the *SOIRA* will ever prove useful to law enforcement authorities.

[38] Therefore, imposing *SOIRA* registration on MCpl Sutherland for a time period of twenty years as required in the *NDA*, would generate significant violation of his section 7 *Charter* rights as described in the *Ndhlovu* decision for such a long period and I find that he ought to be exempted from that requirement.

IV. Conclusion

[39] Having reviewed the documentary evidence introduced as exhibits and considered counsel's submissions, I find that they carefully assessed the offender's specific circumstances when they arrived at their joint submission. Since counsel identified and considered the most relevant aggravating and mitigating factors surrounding the commission of the offence, properly addressed the applicable principles and objectives of sentencing in this case, I accept counsel's position that the need for general deterrence and denunciation are met with the proposed sentence. In short, while the joint submission presented by counsel falls at the higher range of punishment for similar cases, the Court finds that the proposed punishment is not contrary to the public interest and would not bring the military justice system into disrepute. In fact, considering the severe impact on the victim and that the offence occurred during a deployment where measures taken following the complaint disrupted operations, I find that the proposed sentence of six weeks' detention is a fair and fit sentence. The offender is on the proper path to rehabilitate himself, but he will need to continue addressing his mental health issues, in particular the alcohol use disorder, an aspect that played a significant role in the commission of the offence.

FOR THESE REASONS, THE COURT:

[40] **SENTENCES** MCpl Sutherland to detention for a period of six weeks.

[41] **ORDERS**, pursuant to section 196.14 of the *NDA* that the number of samples of bodily substances that are reasonably required be taken from him for the purpose of forensic DNA analysis by personnel of the military police from Canadian Forces Base Halifax to be done immediately after the proceedings are terminated.

[42] The sentence was passed at 1738 hours on 28 February 2023.

Counsel:

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

Mr T. Singleton, Singleton and Associates Barristers & Solicitors, 1809 Barrington Street, Suite 1100, Halifax, NS, Counsel for Master Corporal W.C. Sutherland