



COURT MARTIAL

Citation: *R. v. MacDonald*, 2010 CM 1018

Date: 20101026

Docket: 201024

Standing Court Martial

British Columbia Dragoon Armouries
Kelowna, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Sergeant D.G. MacDonald, Offender

Before: Colonel M. Dutil, C.M.J.

Subject to subsection 486.4 of the *Criminal Code* and section 179 of the *National Defence Act*, the court has directed that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.

REASONS FOR SENTENCE

(Orally)

[1] Sergeant MacDonald has entered a plea of guilty to the second charge, for behaving in a disgraceful manner contrary to section 93 of the *National Defence Act*. The court accepted and recorded the plea of guilty and directed that the proceedings with regard to the first charge be stayed. The prosecution withdrew the third charge laid under section 97 of the *National Defence Act* prior to plea.

[2] Previous courts martial that had to deal with section 93 offences defined, as I've already mentioned it this morning, disgraceful conduct in the following manner: That the accused behaved in a certain way that a reasonable person, viewing the matter objectively, would conclude that this behaviour was so outside community norms that

the behaviour was shockingly unacceptable. As stated by Chief Justice Strayer, as he then was Chief Justice of the Court Martial Appeal Court, in *R. v. Marsaw*, 1997, CMAC-395:

... [The] specific service offence under section 93 of the *National Defence Act* ... promotes the unique requirements of good order, high morale, and discipline so essential in the military context....

[3] It is now incumbent upon me to determine what shall be an appropriate, fair and just sentence that will maintain military discipline. Counsel for the prosecution and defence have made a joint submission on sentence. They recommend that you be sentenced to a severe reprimand and a fine in the amount of \$4,500 payable at the rate of \$300 per month. Although this court is not bound by this joint submission, it is generally accepted that a joint submission should be departed from only where to accept it would be contrary to public interest or would bring the administration of military justice into disrepute.

[4] The fundamental purpose of sentencing at courts martial is to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following objectives: the protection of the public and it includes the interest of the Canadian Forces; the denunciation of the unlawful conduct; the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences; and the reformation and rehabilitation of the offender.

[5] The sentence must also take into consideration the following principles. The sentence must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility; the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A court would also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances. In other words, punishments in the form of incarceration should be used as a last resort. Finally, the sentence should be increased or decreased to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[6] In determining sentence, I have considered the totality of the circumstances surrounding the commission of the offence as revealed by the statement of circumstances that you have accepted as conclusive evidence and the overwhelming documentary evidence, provided to the court with regard to the offender's military service and character's evidence. The facts surrounding this case were extensively contained in the statement of circumstances; that for the purpose of the record, I will repeat entirely and it reads as follows:

“Statement of circumstances

1. The events occurred at CFB Shilo on 30 June 2009. Sgt MacDonald is a regular force RMS clerk and the complainant is a 26 years old reserve force RMS clerk at the rank of MCpl. Sgt MacDonald and the complainant were both preparing for a deployment to Afghanistan as part of Task Force 3-09. They started to work together in Mid-March 2009 when Sgt MacDonald was assigned as the Provincial Reconstruction Team (PRT) Orderly Room (OR) chief clerk and the complainant was his second in command (2 i/c). The complainant and Sgt MacDonald worked well together, the complainant considered him like a mentor, learning from his extensive experience as an RMS Clerk. He taught her how to be a better leader and she had a lot of respect for Sgt MacDonald.

2. At the end of the day, on 29 June 2009, the complainant and a male colleague of the same rank each bought a six-pack of beer. They decided to go to Sgt MacDonald's room on the base to discuss and drink. The complainant was wearing a pair of shorts, a t-shirt and a light jacket. Over the evening, the complainant drank four or five beers, and gave some to Sgt MacDonald. During that time, they talked about work, about what happened during the day and about field exercises stories.

3. At around midnight, as they did not have any more beers to drink, Sgt MacDonald said they needed some more. They went to the complainant's building module, still on the base, where there were more alcoholic beverages. They all sat at a picnic table outside, engaged in conversation and drank the alcoholic beverages. The complainant and the MCpl started talking about boxing since she had just started boxing training. As they were both talking about boxing, they were also making boxing movements and sparring with the MCpl's boxing equipment. Afterwards, the complainant and Sgt MacDonald started talking about work again.

4. At around 0130hrs on 30 June 2009, the MCpl, bored with the work related conversation led by Sgt MacDonald and the complainant, left and went back to his room. Sgt MacDonald and the complainant continued their work related discussion for a while. When the complainant became very tired, and felt the effect of alcohol, she went inside alone to the common room of her module and decided to sleep on the sofa. Her room was located on a superior level and it was usually too warm to sleep comfortably. After falling asleep on her back and sleeping for an unknown period of time, the complainant was lightly awoken by her legs being moved, placed on someone's lap and rubbed, her breasts and thorax being touched from the outside of her jacket. She felt the jacket was being unzipped and hands rubbing and going down and up along her upper body and on her stomach. The person kept rubbing her legs and her body and touching her over her shorts in her

vagina area. All the meanwhile, still not fully awake and confused, the complainant kept pushing the hands away.

5. The complainant then heard Sgt MacDonald ask if she wanted him to rub her legs and her “pussy”. At the same time, she felt his hand go under her shorts and underwear and felt his fingers on the exterior of her vagina. Now realizing what was happening, fully awake and shocked, the complainant quickly sat up so that his hand would come out of her shorts and asked what Sgt MacDonald had just said. He repeated his request and while saying this, Sgt MacDonald tried to move his hand, more forcefully this time, towards her vagina under her shorts. The complainant immediately strongly hit him on the head with her right fist, jumped up and ran away up the stairs to her room.

6. While the complainant was running away, Sgt MacDonald shouted to her that she was going to be Returned to her Unit (RTU), that she was going to lose her rank and that she was “over”. Once upstairs in her room, she locked the door. Now fully realizing what had happened, she started crying. The complainant tried to find her work cell phone and realized it was downstairs. She waited in her room for a bit and then she heard the module’s door closed. She opened the door, slowly went downstairs, trying to see if Sgt MacDonald was still there. Since he was not there, she grabbed the cell phone and ran back to her room where she called her Adjutant. The Adjutant told her to call the MP to report what had happened. She then called the MP immediately and waited for them to arrive to her room.

7. The complainant felt betrayed by her supervisor who she thought she could trust. Using her own words, she said to the investigator that before 30 June 2009, she trusted him with her life. As part of the job, she wanted to be the best 2 i/c and had a lot of respect for him. So much so that she did not see the events of 30 June 2009 coming. The complainant feared that she would be judged by her peers and by the chain of command and also feared losing her good reputation.

8. After the events of 30 June 2009, the complainant feared that she would not be deployed with the PRT in Afghanistan which added to the day’s stressful events. Ultimately, the chain of command made the decision to remove Sgt MacDonald from the training for the deployment and kept the complainant as part of the deployed team.”

That concludes the circumstances surrounding the offence.

I have also considered the submissions made by counsel. And also, I have taken the direct and indirect consequences that the finding and the sentence will have on Sergeant MacDonald.

[7] I agree with the prosecution here that the case should emphasize the need for general deterrence, specific deterrence, denunciation of the conduct, and I would add rehabilitation. Here, the court is dealing with a specific military offence, one for behaving in a disgraceful manner. And the overwhelming details provided in the statement of circumstances clearly, you know, make out that this conduct was disgraceful. The offence relates to one of the key attributes required of every member of the Canadian Forces; that is, the respect of the dignity of all persons. Any failure to respect this attribute by a military member toward a peer is a serious matter and may reflect on the trustworthy relationship and the reliability that must exist at all times among armed forces' members when performing any task or mission. However, this situation is magnified and aggravated when a supervisor behaves in a disgraceful manner toward one of his subordinates.

[8] The court must praise counsel, in the case at bar, for their professionalism. This is one of the finest and thoroughly presented joint submission on sentence in recent years. Not only counsel presented their position in a precise and most complete manner, their submissions were focused and extremely helpful to the court.

[9] The court fully endorses the representations made by counsel. Objectively a serious offence, the circumstances of the commission of the offence are aggravating, particularly where the victim was an immediate subordinate who held the offender in high esteem and considered him as a mentor. The breach of trust also took place where the victim was in a most vulnerable position as she was asleep and intoxicated. Finally, the particular circumstances of the offender must also aggravate the sentence. He was a very experienced senior non-commissioned member at the rank of sergeant as a chief clerk.

[10] However, the mitigating circumstances are also overwhelming. First, it is recognized that the plea of guilty saved the complainant of having to testify today of this traumatic experience in public. This plea was also announced at the earliest opportunity. Second, one of the key mitigating element in this case is the public apology that Sergeant MacDonald offered or made this morning. He apologized to the complainant, he apologized to his family, and he apologized to his entire chain of command. I must emphasize, that in my long experience as a military judge, I have rarely seen an offender making an apology that is so sincere, complete and heartfelt. Third, the documentary evidence is also overwhelming. Whether we examine the extensive list of letters of appreciation, the characters letters and the personal evaluation reports, they all clearly point out in one direction: Sergeant MacDonald is an outstanding CF member who had a very impressive career personally, but most importantly a person who was seen as an exceptional mentor, and a leader who cares for his subordinates' well-being. Counsel from both sides made it clear to the court from the outset: Sergeant MacDonald is a good citizen and a fine CF member who made a serious mistake. It should not come as a surprise that the circumstances of such a mistake or lack of judgment were exacerbated by the consumption of alcohol by everyone involved. This event is not only out of character, based on the evidence

before the court; it is an aberration from a truly good person who had no previous record before today. Finally, his stable and supportive family situation must also serve to mitigate the sentence as well as his financial situation. Therefore, the court has no reason not to rely on the good judgment of counsel present in court today based on their thorough analysis of this case.

[11] Consequently, Sergeant MacDonald, please stand up. The court finds you guilty of the second charge; confirms that the court directed that the proceedings with regard to the first charge be stayed; and the court sentences you to a severe reprimand and a fine in the amount of \$4500 payable at a rate of \$300 per month for a period of 15 months effective 15 November 2010.

Counsel:

Lieutenant-Colonel M. Trudel, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander P. Desbiens, Directorate of Defence Counsel Services
Counsel for Sergeant D.G. MacDonald