Citation: *R v Benson*, 2014 CM 4003

Date: 20140604
Docket: 201397

Standing Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman T. Benson, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Leading Seaman Benson, having accepted and recorded a plea of guilty in respect of the first, second and fourth charge on the charge sheet, the court now finds you guilty of those charges. It is now my duty as the military judge presiding at this Standing Court Martial to determine the sentence.

[2] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is the promotion of good conduct by allowing the proper sanction of misconduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. In doing so, it also ensures that the public interest in promoting respect for the laws of Canada is served by the punishment of persons subject to the Code of Service Discipline.

[3] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the Armed Forces to deal matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale

amongst the Canadian Forces.

[4] That being said, punishments imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. It also goes directly to the duty imposed to the court to impose a sentence commensurate to the gravity of the offence and the previous character of the offender, as stated in the Queen's Regulations and Orders, paragraph 112.48(2)(b).

[5] As the Supreme Court of Canada recognized in *R v Généreux*, [1992] 3 SCC 259, at page 293:

> To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.

At the same page, the Supreme Court emphasized that in the particular context of military justice:

> Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.

[6] However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[7] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society where necessary; and

(e) to rehabilitate and reform offenders.

[9] When imposing sentence, a military court must also take into consideration the following principles:

(a) the sentence must be proportionate to the gravity of the offence;

(b) the sentence must be proportionate to the responsibility and previous character of the offender;

(c) the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) no offender should be deprived of liberty if applicable in the circumstances if less restrictive sanctions may be appropriate in the circumstances. In short, the court should impose a sentence of imprisonment or detention only as a last resort as was established by the Court Martial Appeal Court and Supreme Court of Canada decisions; and

(e) lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] I came to the conclusion that in the particular circumstances of this case, sentencing should place the focus on the objectives of denunciation, general deterrence, and rehabilitation.

[9] Here, the court is dealing with a 27-year-old offender who joined the Navy on the 1st of June, 2009. He was promoted to leading seaman on 28 June 2013 and he is a maritime engineer currently posted to HMCS CALGARY. Leading Seaman Benson pleaded guilty to three offences, two of which relate to each other.

[10] The specific circumstances of the first two offences are as follows. On 18 April 2013, Leading Seaman Benson, then an able seaman, was at sea aboard HMCS CALGARY working in the master seaman and below cafeteria as a cafeteria hand. Part of his duties required him to work in the scullery, where there was approximately one inch of water on the deck. Ordinary Seaman Trigg entered the cafeteria and noticed the water on the deck of the scullery. He remarked, somewhat jokingly, that Able Seaman Benson would have to work in there to resolve the situation. Ordinary Seaman Trigg then turned to leave, at which point Able Seaman Benson cuffed Ordinary Seaman Trigg in the back of the head, using the back of his hand. Ordinary Seaman Trigg considered this blow to have been intended in a joking manner, but delivered with sufficient force as to be unfriendly and unnecessary.

[11] On the next day, 19 April 2013, HMCS CALGARY came alongside at 0855 hours at the dockyard in Esquimalt. Petty Officer 2nd Class Read was Able Seaman Benson's supervisor, and at approximately 0915 hours, he conducted an interview with Able Seaman Benson with respect to the events of the previous day. He counselled Able Seaman Benson that his behaviour on 18 April 2013 was unacceptable and that the incident was being brought to the attention of the Coxswain. At this point, then-Able Seaman Benson became very defensive and closed with Petty Officer 2nd Class Read toe-to-toe. He exclaimed in a raised voice words to the effect of needing to be off the ship and nowhere near Ordinary Seaman Trigg or he would "fuck'n," at which point Petty Officer 2nd Class Read interjected and told Able Seaman Benson to regain his composure. To this, then-Able Seaman Benson replied, "this is high school."

[12] At the time Able Seaman Benson understood the interview with Petty Officer

2nd Class Read to be an informal interview, and one in which he could safely vent some of his anger over the situation. He had also been under a lot of stress in the preceding weeks due to issues within his family and health concerns with respect to his grandfather.

[13] The circumstances of the third offence are as follows. On 27 August 2013, HMCS CALGARY was scheduled to sail for a fast cruise. On normal duty days in August 2013, in HMCS CALGARY, leave expired at 0750 hours. On 27 August 2013, on account of the scheduled fast cruise, leave expired at 0730 hours. Leading Seaman Benson was aware of the scheduled fast cruise and the time of leave expiry. Leading Seaman Benson crossed the brow to arrive on-board HMCS CALGARY at 0742 hours, twelve minutes after leave had expired. Leading Seaman Benson had not intended to be late, but had forgotten about the leave expiry time due to having been focused on a course.

[14] The prosecutor and defence counsel made a joint submission on sentence to be imposed by this court. They recommended that the court impose a sentence composed of a reprimand and fine in the amount of $800 in order to meet justice requirements. Although this court is not bound by this joint recommendation, it is generally accepted that a sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to public interest, and on that point, the authority is *R v Taylor* 2008 CMAC 1 at paragraph 21.

[15] In arriving at what the court considers a fair and appropriate sentence, the court has considered the objective seriousness of the offences, which is provided by section 85 of the *National Defence Act*, punishable by dismissal with disgrace from Her Majesty's service and by sections 95 and 90 of the *National Defence Act*, both punishable by imprisonment for less than two years.

[16] The court also considered mitigating and aggravating factors. Aggravating is the subjective seriousness of the offences. Indeed, the offences you have pleaded guilty to touch on important aspects of military life: respect for your shipmates and your superiors and respect for orders demanding your presence for duty on-board ship at a specific time. The use of physical contact in an unfriendly manner, as you have done, cannot be encouraged or tolerated on-board ship. Also, a petty officer addressing misbehaviour by an able seaman is entitled to the upmost respect. As stated by your counsel, in the Canadian Forces no one is exempt from the obligation to show respect to superiors, especially during a conversation aimed at addressing issues of conduct, as was the case here.

[17] It has been suggested that the presence of a conviction for assault in the offender's conduct sheet shows a pattern of misbehaviour in relation to charges one and two that should be considered aggravating. It is important to mention, however, that the conviction for assault was awarded on the 31st of July 2013; that is, after the offences at charges one and two were committed on 18 and 19 April 2013. As explained by the Court Martial Appeal Court in the case of *R v Castillo* 2003 CMAC 6, this conviction

cannot be considered a previous conviction for sentencing purposes as it did not occur prior to the current offences under consideration. Yet the infraction remains relevant as a previous conviction in relation to charge four and also a valid demonstration of misbehaviour post-offence.

[18] There are, however, significant mitigating factors that the court has considered. First and foremost, your guilty plea, which the court considers as a genuine sign of remorse that you are taking full responsibility for what you did and wish to remain a valid asset to the Navy and the Canadian Forces. This admission of responsibility occurred in the very public forum of this court martial. The fact that in terms of subjective gravity, although serious, the offences you committed, given their circumstances as mentioned by both counsel, are at the low end of the spectrum. I accept the submissions of your counsel who, based on the facts in the statement of circumstances, submits that your act of striking Ordinary Seaman Triggs with the back of your hand was certainly improper but not an abuse of rank or power in the circumstances. Also, the contempt you showed to Petty Officer 2nd Class Reed was, as admitted by the prosecution, at the low end of the scale. As it pertains to the offence of absence without leave, the 12 minutes you were adrift were the result of a lack of attention, which remains nevertheless consequential, given the importance of being at one's duty when required.

[19] Another mitigating circumstance is your record of service in the Canadian Forces. It appears from the evidence produced before this court that the incidents which occurred in April, July and August 2013 have not repeated themselves. I do accept the representations that were made by counsel to the effect that you attended stress and anger management training offered on base following the events, although evidence of your attendance as well as details about the programme would have been more useful to the court in terms of evaluating the weight to be given to such training sessions. I also considered the fact that you have been an apparently productive member of your ship's company since the events.

[20] I have considered the two cases presented to me and discussed by counsel during their submissions. They constitute useful precedents, with the caveat, of course, that it is always difficult to find cases exactly on point, especially when we have multiple charges before the court that are not necessarily resulting from a single incident. That said, considering the nature of the offences, the circumstances in which they were committed, the applicable sentencing principles, including sentences imposed on other offenders for similar offences in similar circumstances, and considering the aggravating and the mitigating factors mentioned previously, these cases reassure me that the punishments of a reprimand and a fine in the amount of $800 jointly proposed by counsel are within the range of an appropriate sentence in this case. The joint submission made by counsel is not contrary to the public interest and will not bring the administration of justice into disrepute. The court will, therefore, accept it.

[21] No submissions were made to this court concerning a prohibition order under section 147.1 of the *National Defence Act*, which leads me to conclude that the prosecution considered that the offender here was not being convicted of an offence, "in the commission of which violence against a person was used, threatened or attempted".

Without ruling on whether this is the case, the court has considered the issue and concluded that given the circumstance of the offence under section 95 of the *National Defence Act* for striking a subordinate, it would not be desirable to make a prohibition order. Furthermore, there has been no application made by the prosecution for forensic DNA analysis under Division 6.1 of the *National Defence Act*.

[22] Leading Seaman Benson, the charges you pleaded guilty to reveal behaviour that is not acceptable in the Navy or the Canadian Forces. Since then, however, you seem to have recognized some weaknesses in dealing with stress and anger and that evidently you have been able to perform at a level which has allowed you to retain the privilege of continuing to be a member of the ship's company of HMCS CALGARY. I trust you will act to maintain the confidence given to you and remain a proactive member of your Navy and the Canadian Forces.

FOR THESE REASONS, THE COURT:

[23] **FINDS** you guilty of the first charge under section 85 of the *National Defence Act* for behaving with contempt to a superior officer; of the second charge under section 95 of the *National Defence Act* for striking a person who by reason of rank was subordinate to you; and of the third charge under section 90 of *National Defence Act* for absence without leave.

[24] **SENTENCES** you to a reprimand and a fine in amount of **$**800, payable in two consecutive monthly instalments of $400 before mid-August 2014.

Counsel:

Major J.G. Simpson, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major E. Thomas, Directorate of Defence Counsel Services
Counsel for Leading Seaman Benson