COURT MARTIAL

Citation: *R. v. Gagnon*, 2016 CM 3020

Date: 20161122
Docket: 201616

Standing Court Martial

2nd Canadian Division Support Base Valcartier
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer J.M.B. Gagnon, Offender

Before: Lieutenant-Colonel L-V. d'Auteuil, M.J.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR SENTENCE

(Orally)

[1] Warrant Officer Gagnon, the Court accepts and records your guilty plea on the first and only charge appearing in the charge sheet and therefore finds you guilty today on this charge.

[2] The military justice system is the ultimate means of enforcing discipline, which is a fundamental element of military activity in the Canadian Armed Forces (CAF). The purpose of this system is to prevent misconduct or in a more positive way to ensure that good conduct is promoted. It is through discipline that the CAF ensures that its members will carry out their missions successfully, confidently and reliably.

[3] The military justice system also ensures that public order is maintained and that persons subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] Here the prosecutor and the offender's counsel have made a joint submission on the sentence to be imposed. They recommended that the Court impose a fine in the amount of $400.

[5] Although the Court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should only depart from it when there are compelling reasons to do so. These reasons may include the fact that the sentence is contrary to the public interest as the Supreme Court of Canada recently stated the decision *R. v. Anthony-Cook*, 2016 SCC 43 at paragraph 32:

> [32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[6] The *Anthony-Cook* decision recently imposed a more rigorous test that implies that the judge no longer has to determine the fitness of the sentence. I was skimming Judge Pelletier's decision in *R. v. Laurin*, 2015 CM 4011, in which the judge determined that the sentence fit the circumstances and was not against the public interest. Now, what the Supreme Court's decision has indicated to judges, particularly in our case as military judges, is that judges no longer have to weigh this idea of the fitness of the sentence, being the fact that the sentence is appropriate. The judge simply has to ensure that it does not run counter to the public interest or bring the administration of justice into disrepute.

[7] Why is this a better approach? By having a more rigorous and simpler test, as counsel have mentioned, it is appropriate and necessary for the justice system. It must be understood that in negotiations, because in the end it is the parties who discuss the sentence that should be imposed by the Court, the level of certainty is increased for the accused. He waives his right to a trial, but he must have some degree of certainty that the agreement reached by the parties will be accepted. You cannot be a hundred per cent certain, but you still need to have some degree of certainty if you decide to waive your right to a trial and plead not guilty.

[8] On the other hand, the level of certainty will also increase for the prosecution, because it obviously minimizes the risk since it is some form of guarantee that there will be a conviction.

[9] Also, for the system in general, it is appropriate and necessary because it minimizes stress on the players, and also on other participants, particularly victims and witnesses who would be called to court. Now, these people do not have to introduce themselves, and they do not have to go to court. And finally, there are legal costs that are minimized. Spending two hours in court, as opposed to a week or two, obviously represents an enormous difference in costs, particularly in a system like ours where witnesses can be anywhere else but, on the base, and would have to be brought in. There are issues of travel costs, hotel costs, waiting, people's productivity; all of this is

to our advantage through settlement. So, it is a better approach if we increase the level of certainty. We save in many ways.

[10] When can the Court depart from the recommendation? Only "where the proposed sentence would be viewed by reasonable and informed persons as a breakthrough in the proper functioning of the justice system". Here I am quoting what was said in *Anthony-Cook* at paragraph 42. Interfering with "the proper functioning of the justice system" is essentially the parameter that the judge must consider when imposing a sentence where a joint suggestion has been made.

[11] So, as I have pointed out and I emphasize again, this approach is essentially based on the work of counsel who, as part of their negotiations, determine what the appropriate sentence would be in the circumstances. It is no longer up to the judge. The prosecution acts as a representative of the interests of the community and of the public interest, and defence counsel ensures that the prosecution acts in the best interests of their client. It is in this context that the joint suggestion is presented to the judge.

[12] This explains why, basically, I have only have to examine the question of public interest.

[13] Warrant Officer Gagnon, you saw my reaction when I looked at the documentation. Without knowing you, just the quantity of your operational involvement in the CAF and the career you have had, the document spoke for itself. As you can see, even the lawyers have a great deal of respect, and I assume that the people here have a great deal of respect for everything you have done. What I understand from the prosecutor is that the respect goes far beyond what you have accomplished, but also concerns the fact that your efforts have been a detriment to your health. I think that is also recognized and respected. You frequently put the CAF before yourself and perhaps your family, and you have suffered the consequences.

[14] Without looking at the fitness of the sentence, the statements from counsel lead me to understand that this is an isolated act, totally unusual given your past and present, and the circumstances that gave rise to the incident may be explained by your state of health, more than anything else.

[15] Nor can I comment on the fitness of bringing you before the Court today, but I understand very well that by doing so, there is a risk of trauma. But that is not the goal. The goal is in fact a question of discipline. I think you, among all of us, are perhaps in the best position to understand the need for discipline within the CAF, because you have probably experienced how important this can be in several operations. I think that, in the public interest, that disciplinary action should be taken, since there are people who have thought that it was necessary despite all the circumstances.

[16] I understand that in the discussions between the counsel, your achievements over the course of your career and also your current state were taken into account. It seems that they often cited the people who care for you, so they made the joint

suggestion before me today. They took into account all the circumstances. Obviously, it is not a decision that could be cited in the future as the standard. I do not think they wanted to adapt to the standard, but to reflect their perspective, which was appropriate in the circumstances.

[17] As for me, given the explanations I have received through the evidence and submissions of counsel, I have no choice but to accept counsel's recommendation with respect to this joint suggestion, because it is not against the public interest and, given the circumstances, it is far from bringing the administration of justice into disrepute. It seems to me to be in the public interest; a reasonably informed person apprised of all the circumstances would find this to be entirely correct for the system. There is no chance that the justice system will collapse because we accept such a recommendation. On the contrary, I think there are people who would greatly encourage me to accept it given everything you have done.

[18] It is with great respect, I think, that everyone makes their little suggestion, and I accept it. I understand that you will leave the CAF at a certain date. You can be proud of what you have done. The person presiding at the trial, in his wisdom, did not know to what extent your mental state could excuse your actions, not being a lawyer and not being a legally trained person. He simply wanted to be careful and put it in the hands of counsel and the judge to make sure that you had all the options and that you were treated fairly insofar as your physical and mental condition is a valid excuse.

[19] This is not an excuse, but on the other hand it is a factor, as I understand it, that is very, very, very mitigating. Because it is quite out of the ordinary in terms of what is known and in terms of your reputation for what you have done. So, these circumstances explain why you had to come back here today, but as I understand it, this is the last time you will be brought back in this way. And all I can wish you is good luck in your life, because you have so much left. At 54 years old I can tell you, there is still a long way to go. So, I wish you a long and peaceful retirement after all you have accomplished. And to have the opportunity for your loved ones to finally enjoy your presence.

[20] So, the Court accepts counsel's joint recommendation as to the sentence, being a fine in the amount of $400 since this sentence is not against the public interest, and it is not likely to bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[21] **FINDS** Warrant Officer Gagnon guilty of the first count, which is an offence under section 129 of the *National Defence Act* for an act to the prejudice of good order and discipline.

[22] **SENTENCES** Warrant Officer Gagnon to a fine in the amount of $400 payable in four equal instalments of $100 commencing on 30 January 2017 and continuing for the following three months.

Counsel:

The Director of Military Prosecutions, as represented by Major A.J. van der Linde

Major Gélinas-Proulx, Defence Counsel Services, counsel for Warrant Officer J.M.B. Gagnon