



COURT MARTIAL

Citation: R. v. Cobby, 2024 CM 3013

Date: 20240725
Docket: 202348

Standing Court Martial

5th Canadian Division Support Base Gagetown
Oromocto, New Brunswick, Canada

Between:

His Majesty the King

- and -

Captain B.J. Cobby, Offender

Before: Lieutenant-Colonel L.-V. d’Auteuil, D.C.M.J.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Captain (Capt) Cobby was found guilty of one offence for having fought with a person subject to the Code of Service Discipline (CSD), on or about 17 December 2022, at or near Côte-des-Neiges Armoury, contrary to section 86 of the *National Defence Act* (NDA).

[2] This decision is about the sentence to be imposed by this court martial, further to this finding of guilt.

Circumstances of the commission of the offence

[3] On 17 December 2022, the Royal Canadian Hussars (RCH) held the soldiers’ dinner, also called the troop dinner, at Côte-des-Neiges Armoury in Montreal. The troop dinner is a long Canadian military tradition which takes place at the end of the year, sometime before Christmas, where all junior members of the unit, which includes those who wear the rank of private, corporal and the appointment of master corporal, dine while the service is provided by the senior non-commissioned members (NCOs), from the rank of sergeant to chief warrant officer, and all officers of the unit.

[4] By doing so, the senior NCOs and the officers of the unit show their appreciation to their soldiers for their hard work in the past year.

[5] Dinner was just one of the RCH activities planned for the day, which took place with the participation of all members of the unit. The morning started at 8 a.m. with a sports activity, followed by a parade at 10 a.m. during which various mentions, honours and medals were awarded.

[6] Once the parade ended, senior NCOs and officers set up everything necessary for the troop dinner to take place. Then, junior members of the unit were invited to be seated at 12:30 p.m. Senior NCOs and officers then served the dinner.

[7] The dinner ended at 2:30 p.m. Senior NCOs and officers cleaned up everything while junior members went to the junior ranks' mess.

[8] Once done with the cleaning, senior NCOs and officers went to their own mess, a combined mess in which each group benefit from their own space.

[9] A mess is the home, a club, and the centre of a military member's social life. Messes are organized by rank to allow each peer group to socialize without feeling inhibited by the presence of superiors or subordinates. Each member shall pay mess dues to be a member.

[10] Any other person who is not a member of a specific mess and would like to access it may do so if invited. Then, such person is considered a guest.

[11] As stated by Major (Maj) Pilon during his testimony, according to the traditions in force at the RCH, only the commanding officer and the regimental sergeant-major of the RCH were not considered as guests and could access any mess, including the junior ranks' mess, without any invitation.

[12] The evidence adduced before the Court revealed that a general invitation was made by the members of the junior ranks' mess to the members of the senior NCOs and officers' mess to join them in their mess. However, there is no evidence as to who specifically made the invitation on behalf of the junior ranks' mess, when and how it was made, which may explain that among the witnesses who testified before the Court, some were aware of the invitation, and some were not.

[13] For those who are not a member of the junior ranks' mess, to access it, there is a need, as a tradition, to ring the bell at the door and wait until a member of the junior ranks' mess provides the authorization to access it.

[14] Capt Cobby is a member of the RCH who attended and participated in the troop dinner on 17 December 2022. He served dinner to the junior members of the unit and helped to clean up after. After, he went to the officers' mess where he had a couple of drinks.

[15] At around 6 p.m., he went down to the junior ranks' mess in accordance with the invitation made. There was somebody in that mess that was asking him for some time by a text message to come down, which he finally did.

[16] Some senior NCOs and officers were in the mess when he entered. He was there for a couple of hours when he decided to go to the washroom located outside the junior ranks' mess.

[17] When he entered the washroom, he saw Master Corporal (MCpl) Pichette. As said by Capt Cobby in his unofficial confession, this is where it started.

[18] MCpl Pichette had several complaints against Capt Cobby: allegations of harassment against two female soldiers, an unexpected intervention with an instructor while he was a candidate on an armoured trade course, and an unexpected testimony several years ago at his summary trial that resulted in MCpl Pichette's conviction and reduction to the rank of private.

[19] The discussions on these specific topics began between the two in the washroom, continued during their movement back to the junior ranks' mess and stopped when MCpl Pichette formally prohibited Capt Cobby from entering. Both claimed that it was the other person who started the discussion. However, there is no need for the Court to decide which person started the conversation, as such finding is not determinative of anything to decide on this matter.

[20] MCpl Pichette explained that he stopped at the entrance of the junior ranks' mess and told Capt Cobby that he was not welcome. Capt Cobby confirmed that MCpl Pichette put himself in his way and intentionally blocked him from entering the mess.

[21] Capt Cobby then told MCpl Pichette, while raising the tone of his voice, to get out of his way, but MCpl Pichette did not. He repeated himself by telling MCpl Pichette that it was an order and told him to get the hell out. He said that he may have swore at one point during this exchange.

[22] Capt Cobby confirmed that the exchange became heated. A female bombardier (Bdr) identified at Bdr Bokor went to get help and she asked Master Bombardier (MBdr) Lalchan and Warrant Officer (WO) Bourbonnais-Brown, who were both inside the junior ranks' mess working at the bar, to come and intervene before things got worse between MCpl Pichette and Capt Cobby.

[23] MBdr Lalchan is the vice-president of operations of the junior ranks' mess committee and a member of the 2nd Field Artillery Regiment, which is co-located in the same building with the RCH. The junior ranks' mess is used and managed by soldiers from both units.

[24] It is the practice to have somebody from one unit open and operate the junior ranks' mess when soldiers belonging to the other unit have their troop dinner, which explains why MBdr Lalchan was there on that night.

[25] WO Bourbonnais-Brown is a member of the RCH and received his promotion to his rank on parade on that very day. He went to the junior ranks' mess, first to ring the bell for buying a round for the members present, as it is the tradition when you are promoted, and second to help those who were on duty at the bar in this mess.

[26] Both MBdr Lalchan and WO Bourbonnais-Brown noticed the exchange taking place in the mess vestibule between MCpl Pichette and Capt Cobby, but they did not intervene until requested to do so by Bdr Bokor.

[27] MBdr Lalchan testified that when he approached the vestibule, he saw Capt Cobby trying to enter the mess by physically pushing MCpl Pichette. The Court notes that MCpl Pichette testified, as Capt Cobby did, that both persons never touch each other while they were talking.

[28] MBdr Lalchan confirmed that WO Bourbonnais-Brown arrived and tried to speak to Capt Cobby, that he helped to separate Capt Cobby from MCpl Pichette by pushing Capt Cobby back. Once the latter realized that he was asked to calm down and he did, MBdr Lalchan left Capt Cobby with WO Bourbonnais-Brown.

[29] WO Bourbonnais-Brown confirmed that he went to the vestibule. It looked like MCpl Pichette and Capt Cobby were about to fight, because they were yelling and pointing fingers at each other. He heard Capt Cobby saying to MCpl Pichette that he was a captain and that it was an order.

[30] When he arrived, he placed himself between MCpl Pichette and Capt Cobby, and he put each of his hands on each one's shoulder, and he gently pushed them away from each other.

[31] Capt Cobby put both hands in the air, said to WO Bourbonnais-Brown not to touch him, and brushed his hand off. WO Bourbonnais-Brown confirmed that in doing this, Capt Cobby accidentally touched his hand being on the officer's shoulder. At about the same time, WO Bourbonnais-Brown felt himself being hit on the right side of his face by Capt Cobby's other hand with a closed fist.

[32] Capt Cobby confirmed that he told WO Bourbonnais-Brown not to touch him and he may have brushed off his hand, like a deflection, while saying to him not to touch him. He said that he noticed that something triggered WO Bourbonnais-Brown, a gesture or a word, and the latter started to push him out of the mess.

[33] As shown on the smartphone video taken by MCpl Pichette (Exhibit 4), MBdr Lalchan and WO Bourbonnais-Brown pushed Capt Cobby back some distance, taking him out of the vestibule. Meanwhile, Capt Cobby told them that he was a captain and started calling them all kinds of names.

[34] MBdr Lalchan pushed Capt Cobby with both his arms, while WO Bourbonnais-Brown had his left arm underneath MBdr Lalchan left armpit, and his left hand pressed against the lower neck and part of Capt Cobby's throat. Capt Cobby held WO Bourbonnais-Brown's tie with his left hand as he was pushed back.

[35] Capt Cobby was forced back, and he freed himself by pushing them away with both hands, while still saying that he was a captain.

[36] Capt Cobby was escorted into a hallway by both MBdr Lalchan and WO Bourbonnais-Brown, followed by Bdr Bokor and MCpl Pichette. Capt Cobby calmed down and left with WO Bourbonnais-Brown in a different corridor. At that point, the video ended.

[37] MBdr Lalchan, Bdr Bokor and MCpl Pichette made their way back to the junior ranks' mess.

[38] According to WO Bourbonnais-Brown, while being left alone with Capt Cobby, the latter tried to make his way back to the junior ranks' mess. He put himself in Capt Cobby's way. Capt Cobby punched him in the face for a second time. He decided to put Capt Cobby in a headlock for about a minute to calm him down. He got hit in the face again by Capt Cobby while he maintained this hold. He finally released Capt Cobby who became and stayed calm.

[39] According to Capt Cobby, he was trying to get WO Bourbonnais-Brown off him when he was put in a headlock. He managed to break out of the headlock, moved back and punched him in the face with a left-hand jab. Then, WO Bourbonnais-Brown stopped moving and they started talking. He said that as long as WO Bourbonnais-Brown was not trying to put his hands on him, things were good.

[40] Capt Cobby and WO Bourbonnais-Brown met with Maj Pilon in the officers' mess. Capt Cobby reported the incident with MCpl Pichette. He was told by Maj Pilon that he could make a complaint if he wished to. Maj Pilon reported by text message to his commanding officer that an incident occurred involving MCpl Pichette and Capt Cobby.

[41] During this meeting, nothing was said regarding the punch, or punches given in the face by Capt Cobby to WO Bourbonnais-Brown. According to WO Bourbonnais-Brown, he mentioned to Maj Pilon that he recommended that Capt Cobby leave the building. Maj Pilon and Capt Cobby told the Court that nothing was said by WO Bourbonnais-Brown during the meeting.

[42] WO Bourbonnais-Brown went down the junior ranks' mess and conducted an informal investigation about the incident involving MCpl Pichette and Capt Cobby. He talked to some people involved and came to the conclusion that the behaviour of Capt Cobby toward some junior members was inappropriate and he made the decision to push the matter to a higher level in his chain of command.

[43] Some time after, Capt Cobby was at the entrance of the building which is also near the entrance to the junior ranks' mess when WO Bourbonnais-Brown saw him. He thought he wanted to re-enter the mess and told him to leave.

[44] WO Bourbonnais-Brown told the Court that when he met with Capt Cobby at the entrance, the latter would have told him that he would regret it, that he had powerful friends.

[45] According to Capt Cobby, he would have rather answered him that he did not take orders from him and asked for someone to get a senior officer.

[46] Sgt Choe testified that he was present when Capt Cobby and WO Bourbonnais-Brown had an exchange at the entrance of the building, because he was asked by WO Bourbonnais-Brown to attend with him on any potential interaction that would involve Capt Cobby.

[47] Sergeant (Sgt) Choe told the Court that during the conversation, Capt Cobby was agitated, that he raised the tone of his voice when he spoke with WO Bourbonnais-Brown, and that Capt Cobby was outraged that he had to leave the building.

[48] Sgt Choe said that WO Bourbonnais-Brown wanted Capt Cobby to leave the building, and that he felt the tension between the two.

[49] Capt Putureau finally came and asked what was going on. WO Bourbonnais-Brown told him that he thought Capt Cobby wanted to enter the junior ranks' mess and that he did not want him to. It was his intention to call the military police if he did not leave.

[50] Capt Putureanu asked WO Bourbonnais-Brown to leave, which he did, and he spoke to Capt Cobby who told him that he was waiting for someone who was in the junior ranks' mess to leave. The person he was waiting for came out of the junior ranks' mess and he left. WO Bourbonnais-Brown confirmed that after speaking with Capt Putureanu, Capt Cobby did indeed leave the building.

The evidence

[51] No witnesses were called. The prosecution introduced the Statement as to Particulars of Service of Accused, the Member's Personnel Record Résumé, an excerpt from the Master Pay Record Report for the period of January to June 2024, and a document confirming that Capt Cobby has no conduct sheet.

[52] The offender submitted to the Court four Personnel Evaluation Reports, one Personnel Development Report and one Performance Appraisal Report.

The law

[53] As the military judge presiding at this Standing Court Martial, it is now my duty to determine the sentence.

[54] In the particular context of an armed force, the military justice system constitutes 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, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions.

[55] The military judge must consider the purposes and principles of sentencing as found in sections 203.1 to 203.3 of the *NDA*.

[56] The fundamental purposes of sentencing in a court martial are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale, and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[57] 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.

[58] Keeping in mind this legal context, the fundamental purposes of sentencing in a court martial are to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

- (a) to promote a habit of obedience to lawful commands and orders;
- (b) to maintain public trust in the Canadian Forces as a disciplined armed force;
- (c) to denounce unlawful conduct [...];
- (d) to deter offenders and other persons from committing offences;
- (e) to assist in rehabilitating offenders;
- (f) to assist in reintegrating offenders into military service;
- (g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
- (h) to provide reparations for harm done to victims or to the community; and
- (i) to promote a sense of responsibility in offenders and an acknowledgment of the harm done to victims and to the community.

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

- (a) a sentence must be proportionate to the gravity of the offence;
- (b) a sentence must be proportionate to the degree of responsibility of the offender;
- (c) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
- (d) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (e) an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
- (f) all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;
- (g) a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the CAF; and
- (h) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

Position of the parties

The prosecution

[60] The prosecution suggested to the Court to impose on the offender the punishment of a severe reprimand and a fine in the amount of \$3,500.

[61] According to the prosecution, the imposition of such a sentence would reflect the objective of specific deterrence, denunciation, and rehabilitation. It considers that it is the least severe sentence required for achieving the fundamental purpose of sentencing, which is to maintain the discipline, efficiency, and morale of the CAF.

[62] It would also be proportionate to the gravity of the offence and the degree of responsibility of the offender, especially considering the relevant aggravating and mitigating factors identified by the prosecution.

Capt Cobby

[63] Capt Cobby suggested, through his counsel, that instead of convicting him, the Court directs that he be discharged absolutely, pursuant to section 203.08 of the *NDA*.

[64] He claimed that the offence for which the Court found him guilty is one for which an absolute discharge is available.

[65] He submitted that he proved that it was in his best interest that an absolute discharge be granted by the Court because he demonstrated that he is a person of good character, without a previous conviction, and it is not necessary to enter a conviction against him to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions on him.

[66] He finally expressed that the granting of an absolute discharge is not contrary to the public interest because he was charged, held to account, and was found guilty by a Standing Court Martial for a CSD offence, which not only denounces the conduct, but sends a strong message of general deterrence.

[67] Alternately, if the Court does not accept his suggestion, then he suggested that the Court sentences him to a fine in the amount of \$200.

Analysis

Seriousness of the offence

[68] Section 86 of the *NDA* is a type of offence that aims to encourage members of the CAF to demonstrate self-discipline in a context where emotional or physical violence is involved in order to refrain from and prevent any disruption of the discipline that must exist in a military environment within of a group of soldiers, sailors, airmen/airwomen or any mixture of some of these groups.

[69] Objectively speaking, the maximum punishment that a court martial can impose for such an offence is imprisonment for less than two years, which puts it at the low end of seriousness among all service offences in the CSD, considering that some others are referring to a maximum punishment of imprisonment for five, seven, ten, fourteen years or even to imprisonment for life.

[70] However, it is still a serious service offence because Parliament considered that a court martial still needs to be able to consider depriving of liberty an offender if he is found guilty of such an offence.

Objectives considered by the Court for sentencing

[71] Accordingly, the Court concluded that the punishment to be imposed by this court martial shall consider two objectives:

- (a) to maintain public trust in the CAF as a disciplined armed force; and
- (b) to denounce the unlawful conduct.

[72] A sentence must also be proportionate to the gravity of the offence and the degree of responsibility of the offender. As stated by the Supreme Court of Canada, the principle of proportionality in sentencing is a fundamental principle, making the determination of a sentence by a judge, including a military judge, a highly individualized process.

[73] I will now discuss the sentencing principles. The first one is to account for any relevant aggravating and mitigating factors that may increase or reduce the sentence to be imposed by the Court.

Aggravating factors

[74] I identified three aggravating factors in this matter: first, the place where the offender fought; second, the rank and experience of the offender; and third, the injury caused to the person the offender was fighting with.

[75] Capt Cobby fought in a defence establishment on the day the RCH troop dinner was held. Fighting in such an environment clearly does not reflect what is expected of a CAF member and resulted in some disturbances at some point.

[76] The Court also considered the rank and experience of Capt Cobby as an aggravating factor because at the time of the commission of the offence, he had thirty-one years as a member of the CAF; including seventeen years as a senior NCO, and three years as an officer. And for the majority of those years, he was employed on Class B. So, he has sufficient experience and knowledge to understand that such behaviour was inappropriate.

[77] Finally, I considered the injury suffered by WO Bourbonnais-Brown. Despite being minor injuries, they remained something to be considered as aggravating.

Mitigating factors

[78] Now, I identified some mitigating factors. First, there is his professional performance. It is clear, especially in the recent years, that Capt Cobby highly performs. His superiors were very pleased with all his professional accomplishments, realizations, and potential to be promoted to the next rank.

[79] As I mentioned, Capt Cobby is highly respected, highly professional. He is a dedicated officer, having outstanding performances and recommended for immediate promotion.

[80] Also, he does not have any conduct sheet or criminal record.

[81] The Court considers that it is an out-of-character incident, meaning that it is not something Capt Cobby does, it is not his usual practice.

[82] And the fact that he had to face this court martial, which was announced and accessible to the public and which took place in the presence of some of his colleagues, has no doubt had a very significant deterrent effect on him and on them. The message is that the kind of conduct that Capt Cobby displayed will not be tolerated in any way and will be dealt with accordingly.

Sentencing precedents

[83] From the case law presented by both counsel, I note that for similar offenders committing a similar offence in similar circumstances, courts martial usually imposed minor punishments such as confinement to barracks, sometimes combined with a fine, or impose fines or reprimands, or a combination of reprimand, severe reprimand, or a combination of these punishments.

Absolute discharge

[84] Before deciding what is the least severe sentence required in the circumstances of this case to maintain discipline, efficiency, and morale of the CAF, I must address first if I can direct that Capt Cobby be discharged absolutely of the offence.

[85] Under section 203.8 of the *NDA*, for an offence to be eligible for consideration by the court martial of an absolute discharge, the offence must be one for which there is no minimum punishment prescribed by law or not punishable by imprisonment for fourteen years or for life.

[86] Considering that the offence of fighting with a person subject to the CSD, an offender may be liable to imprisonment for less than two years or to less punishment if convicted, the Court concludes that this offence is available for consideration by the Court to direct that Capt Cobby be discharged absolutely.

[87] Now, is it in the best interest of the offender that he be discharged absolutely by this court martial for the offence?

[88] In *R. v. Fallofield*, [1973] 13 C.C.C. (2d) 450, at pages 454-455, the British Columbia Court of Appeal said:

Generally, the first condition would presuppose that the accused is a person of good character, without any previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

[89] As I mentioned it previously, Capt Cobby is without any previous conviction. He has no criminal record. He is a first-time offender.

[90] Considering the evidence as a whole, I conclude that Capt Cobby presented to the Court evidence to show that he is a person of good character, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him.

[91] However, the Court concludes that there is no evidence that demonstrates that a conviction against him may have significant adverse repercussions. I would say that the impact on a potential promotion, or on his employment on Class B is pure speculation. There was no mention and no evidence whatsoever that such a thing may happen or not. So, I must conclude,

in these circumstances, that the burden has not been met, and that it is not in his best interest that Capt Cobby be discharged absolutely by this court martial.

What is the least severe sentence required in the circumstances of this case to maintain discipline, efficiency, and morale of the CAF?

[92] The two objectives that the Court considered to frame its decision is the denunciation of the unlawful conduct, and the maintenance of the public trust in the CAF as a disciplined armed force.

[93] I would say that these objectives are mainly achieved by having Capt Cobby charged and dealt with at a court martial. In the circumstances of this case, the Court is giving a lot of weight to the mitigating factors, such as the work performance, the fact that the offence is something that is out of character for Capt Cobby to make, and the Court is convinced that he will not reoffend, just by the fact that he faced this court martial.

[94] I also considered that one year and seven months have passed since the incident. Obviously, the Court shall consider sentences going from minor punishments to a fine, reprimand, or severe reprimand. The offender's defence counsel raised the fact that the entry on the conduct sheet would be removed after one year if the Court accepts his suggestion to impose a sentence of a fine in the amount of \$200. It must be said that if the Court was to accept the suggestion of the prosecution to impose a severe reprimand and a fine in the amount of \$3,500, then the entry on that conduct sheet would be removed after three years, which puts the Court in the situation to consider this aspect somewhat similar to that of probation in civil court.

[95] What I want to express is: whether there is a need, as raised by offender's defence counsel, to have the sentence stay on the conduct sheet for more than one year. And I would say that there is no indication that there is such a need in the circumstances.

[96] This leads this Court to conclude that the least severe sentence to be imposed is a fine in the amount of \$200.

[97] I am clearly convinced that Capt Cobby got the message, considering his rank and experience, and also the fact that he experienced this court martial. In the circumstances, as I mentioned earlier, sentencing is a very individualized process, and I do not see the need for the Court to impose anything higher than that.

FOR ALL THESE REASONS, THE COURT:

[98] **SENTENCES** Capt Cobby to a fine in the amount of \$200, payable immediately.

COUNSEL:

The Director of Military Prosecutions, as represented by Major B. Richard

Commander B. Walden, Defence Counsel Services, Counsel for Captain B.J. Cobby