COURT MARTIAL

Citation: *R v Edmunds*, 2013 CM 4016

Date: 20130814
Docket: 201272

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Ex-Master Corporal N.S. Edmunds, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

[1] Ex-Master Corporal Edmunds, having accepted and recorded your plea of guilty to charge number 1, the court now finds you guilty of this charge. That charge was laid under section 130 of the *National Defence Act* and you are guilty of having committed a fraud over $5,000 contrary to subsection 380(1) of the *Criminal Code*. The court must now determine a just and appropriate sentence in this case.

[2] The statement of circumstances, to which you formally admitted the facts as conclusive evidence of your guilt and the testimony of Captain Willox provide this court with the circumstances surrounding the commission of this offence. At the time of the offence you were posted to 2 Field Ambulance and were working at the brigade pharmacy. Your duties included receiving goods ordered for the pharmacy and certifying them has having been received.

[3] In the spring of 2011 you requested information pertaining to prices and the need to obtain a quote from different suppliers if there was no Standing Offer Agreement in place with the distributor of combat gauzes. On 4 April 2011 you drafted and submitted a combat gauze sales invoice for $4,001.00 payable to Tactical First Response. On 6 April 2011 you again drafted and submitted a combat gauze sales invoice for $4,514.63 payable to Tactical First Response. You were and remain the sole owner and employee of Tactical First Response.

[4] Captain Willox was the Brigade Pharmacy Officer at 2 Field Ambulance. He was required to certify purchases pursuant to section 34 of the *Financial Administration Act*. He was posted out of 2 Field Ambulance in April 2011. Respectively on 4 and 6 April 2011 you stamped and signed both sales invoices certifying that the goods had been received in your capacity as Pharmacy Non-Commissioned Officer. You stamped and signed the name of Captain B. Willox on each invoices for their required "Certification Pursuant to Section 34 of the *Financial Administration Act*." You then sent both sales invoices to the cashier for payment.

[5] The sales invoices totalling $8,515 were paid by Her Majesty in Right of Canada to a TD Canada Trust account registered under Tactical First Response. You were the sole person having access to the TD Canada Trust account registered under Tactical First Response. You withdrew the monies from the TD Canada Trust account registered under Tactical First Response. Tactical First Response never ordered any combat gauze from the only authorized distributor in Canada nor from the manufacturer in the United States.

[6] Having reviewed the key facts of this case, I will now focus on determining the appropriate sentence. As indicated by the Court Martial Appeal Court sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge.

[7] The Court Martial Appeal Court clearly stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. The fundamental purpose of sentencing is to contribute to "respect for the law and the protection of society and this includes the Canadian Forces" by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

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

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[8] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation or a combination of those factors.

[9] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. A sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing. Proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[10] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentencing along the scale of appropriate sentences for similar offences.

[11] The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is one of the fundamental prerequisites to operational efficiency in any armed force.

[12] The prosecution suggests that the following principles of sentencing apply in this case: deterrence and denunciation. The prosecution submits that the minimum sentence in this matter is imprisonment for a period of 30 days. Defence counsel asserts that a fine would represent a just sentence in this case. He also indicates that a sentence of 14 days of intermittent imprisonment would then be an appropriate sentence should the court disagree with his initial suggestion. He finally submits that a suspended sentence of imprisonment could be an appropriate sentence.

[13] The *Criminal Code* provides guidance to sentencing judges at section 380.1 when sentencing for an offence referred to section 380. I have reviewed section 380.1 and find that it does not apply in our case.

[14] I will now set out the aggravating circumstances and the mitigating circumstances that I have considered in determining the appropriate sentence in this case. I consider the following to be aggravating:

(a) this offence involved some premeditation on your part. You made inquiries on the acquisition of combat gauze. You prepared and submitted two

invoices for the combat gauze on two separate days. You forged the signature of Captain Willox when you certified the combat gauze had been received. While premeditated, this offence is not the most sophisticated. The 4 April invoice does not include any tax while the 6 April invoice includes an amount of $513.63 for the primary tax. This anomaly would surely have been detected by the competent authorities;

(b) the prosecutor addressed the role of your business in this scheme. I have not been provided with any evidence concerning this business other than what is found in the statement of circumstances which indicates you were and remain the sole owner and employee of Tactical First Response. The evidence does not indicate whether this business is legitimate or not. As such, I cannot conclude you created that business for the purpose of committing the fraud;

(c) paragraph 718.2(a)(iii) of the *Criminal Code* provides that evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be an aggravating circumstance. You took advantage of your position as the Pharmacy Non-Commissioned Officer to plan and execute the fraud;

(d) Captain Willox testified you were his second in command and that you were responsible for the daily operation of the pharmacy. You took advantage of a particular vulnerable period of time for your unit to commit your crime. Captain Willox was tasked as the OC of Medical Company because of 2 Field Ambulance's deployment to Afghanistan. He could not devote much time to the pharmacy and he had to trust and rely on you to ensure the smooth running of the pharmacy. He was also being posted out of that position in April of 2011;

(e) you did breach that trust put into you by Captain Willlox and 2 Field Ambulance. Captain Willox testified that this breach of trust has had an adverse effect on him in that he cannot trust people as he used to. Lieutenant-Colonel Crook, the present Commanding Officer of 2 Field Ambulance, has testified that such actions erode the trust that must be present in a unit to enable the unit to work efficiently. Leaders at all levels must be able to trust their subordinates to follow orders;

(f) I give much weight to this aggravating factor. You abused the trust of your immediate superior and your position of authority at the pharmacy at a very specific time; when you thought there might be even less oversight on the part of your chain of command;

(g) much was said about the combat gauze; its important role in saving lives on the battlefield in Afghanistan, the difficulties in obtaining it from the sole distributor in Canada and the strict controls over its distribution by

the medical authorities in Ottawa. The prosecutor wants the court to conclude there was no delivery of the combat gauze and to conclude this could have led to serious consequences; namely, the endangering of lives of Canadian soldiers. Yet, the court was not presented with any direct evidence that the 200 units of combat gauze were not delivered by Tactical First Response other than none was ordered from the distributor or the manufacturer. No evidence was presented concerning the exact inventory of combat gauze at the time of the offence and of the impact this fraud might have had on the pharmacy or the units relying on the pharmacy;

(h) defence counsel asserts the evidence points to the fact that the gauze was delivered since a review of these invoices was conducted because authorities thought it was an attempt at contract splitting since the amounts were slightly less than $5,000. He argues the fraud was committed by the false certification and the forged signature;

(i) paragraph (*b*) of article 112.52 of the *Queen's Regulations and Orders* provides that the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or ay previous conviction by the accused. The combat gauze does seem to be a life saving item that must be controlled properly to ensure the safety of our soldiers. A sentencing judge must be presented with evidence to support arguments that would aggravate a sentence; statements on possible consequences that attempt to illicit emotional responses have no place in a sentencing hearing. I find the prosecutor has not provided any evidence that proves that aggravating fact beyond a reasonable doubt;

(j) you are not a first time offender. Exhibit 7, a CPIC printout, indicates that you were convicted of two charges of breaking and entering and theft in Calgary in 1997 and were sentenced to four months of a conditional sentence and six months of probation. You were also convicted of possession of property obtained by crime in Victoria in 2007 and were sentenced to a suspended sentence and probation for six months. Exhibit 6, your conduct sheet, indicates that you were sentenced to a $3,000 fine by the Ontario Court of Justice, in Pembroke, for an offence of possession of property obtained by crime on 30 August 2011. You were 21 at the time of the first offence and not yet a member of the Canadian Forces. You were 31 at the time of the second offence and you were 36 at the time of the third offence. These entries do show a pattern of dishonesty and theft. It appears you have not learned from your previous trials and sentences. This is an important aggravating factor;

(k) the amount of the fraud, $8,515, is a substantial amount of money. An agreed statement of facts found at Exhibit 10 informs me you were having significant debt and collection issues at the time of the offence and that creditors were calling your unit. I have not been provided with any

other information concerning those debts. I have not been informed whether you used any of the $8,515 to repay your debts. As such, this information provides me with little information to understand the context surrounding this offence. Even if you committed this fraud to pay your debts, I have no evidence that would show this fraud was committed for any other reason than personal gain;

(l) this fraud was committed against Her Majesty in Right of Canada. I never refer to a member of the Canadian Forces as an employee because we are not employees of the Government of Canada. We are members of the profession of arms who seve our country. Having said this, the present case is one akin to fraud involving an employee-employer relationship. Canadian law considers this type of fraud to be more serious than most other cases of fraud. I refer to paragraph 22 from the 2000 Court Martial Appeal Court decision of *Private St-Jean and Her Majesty the Queen*, CMAC-429 to illustrate this aggravating factor:

> After a review of the sentence imposed, the principles applicable and the jurisprudence of this Court, I cannot say that the sentencing President erred or acted unreasonably when he asserted the need to emphasize deterrence. In a large and complex public organization such as the Canadian Forces which possesses a very substantial budget, manages an enormous quantity of material and Crown assets and operates a multiplicity of diversified programs, the management must inevitably rely upon the assistance and integrity of its employees. No control system, however efficient it may be, can be a valid substitute for the integrity of the staff in which the management puts its faith and confidence. A breach of that faith by way of fraud is often very difficult to detect and costly to investigate. It undermines public respect for the institution and results in losses of public funds. Military offenders convicted of fraud, and other military personnel who might be tempted to imitate them, should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct. Deterrence in such cases does not necessarily entail imprisonment, but it does not *per se* rule out that possibility even for a first offender. There is no hard and fast rule in this Court that a fraud committed by a member of the Armed Forces against his employer requires a mandatory jail term or cannot automatically deserve imprisonment. Every case depends on its facts and circumstances.

This is an important aggravating factor; and.

(m) you have not made any restitution yet nor was I presented with any evidence that you wish to do so. Restitution in fraud cases is an important factor in sentencing. Restitution is a demonstration of remorse and a willingness on the part of the offender to repair the harm caused by his or her illegal action. The lack of restitution and intent on your part is noted by the court.

[15] As to the mitigating circumstances, I note the following:

(a) you have pled guilty. Therefore, a plea of guilty will usually be considered as a mitigating factor. This approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions and the harm done as a consequence of these actions;

(b) the agreed statement of facts also indicates that you were asked by the military police to give a statement in December 2011 and that you gave a statement acknowledging your involvement in this matter. The credit given to a guilty plea and cooperation with the police varies with the circumstances of each case. A plea of guilty is often associated with remorse. An absence of remorse is not an aggravating factor. Remorse reflects the offender's character and attitude towards his crimes and his prospects of rehabilitation. I find this mitigating factor is present but will give it less weight than I usually do because of the absence of any intention to repay the defrauded amounts;

(c) the offence occurred in April-May 2011. You gave a statement to the military police in December 2011. You were charged by your unit on 18 June 2012. You were released from the Canadian Forces on 9 October 2012. The charge sheet was signed on 9 November 2012 and the trial was convened on 17 January 2013 for 13 February 2013;

(d) you had initially indicated you would plead guilty to charge No. 1 but the trial did not proceed on 13 February because you had been provided with additional disclosure on 12 February. We then reconvened on 2 April to set a trial date. The trial date was set for 12 August in Petawawa. Defence counsel presented two pretrial applications on 17 June;

(e) one application requested an order declaring the accused was entitled to make a new choice of type of court martial and the other dealt with disclosure. The first application was the subject of a complete hearing on 17 June and defence counsel decided to wait before proceeding with the disclosure application since he had received a significant amount of disclosure at the time of the application. I provided counsel with a decision on the mode of trial application on 19 July. Defence counsel withdrew his application for disclosure at the beginning of the trial. He also presented an application challenging the constitutionality of section 130 of the *National Defence Act* but conceded that, based on previous decisions by courts martial on this subject, his application would also be dismissed;

(f) I do not agree with the prosecutor that these applications were frivolous. The mode of trial application raised valid legal issues. I cannot categorically state that the disclosure application had merit since I have not seen full disclosure provided to defence counsel on 17 June but I did observe it was voluminous; and

(g) defence counsel argued that the delay in bringing this matter to trial should be considered by the court as a mitigating factor. The pre-charge delay, Apr-May 2011 to 18 June 2012 is approximately 13 months. The post-charge delay, 18 June 2012 to trial date is either approximately 8 months when the date considered is 13 February or approximately 14 months when 12 August is considered. I find the post-trial delays are acceptable and I have not been provided with enough evidence to determine that the pre-trial delay is unacceptable. I have not been presented any evidence that would demonstrate the pre-trial delay and the post-trial delay are exceptional or that ex-Master Corporal Edmunds has suffered a prejudice from these delays. As such, I will not consider delay as a mitigating factor.

[16] Defence counsel suggests that a fine is the appropriate sentence in the present case and that this punishment would protect the public. I disagree with him. The previous convictions and sentences indicate that ex-Master Corporal Edmunds has not heeded the messages sent by those courts. He is past the point where a fine is a sentence that would have an impact on him.

[17] Defence counsel suggests an intermittent sentence of imprisonment for 14 days as found at the new section 148 of the *National Defence Act* would be appropriate in the circumstances of this case. The prosecutor argued against this possibility and referred to section 148 also. The prosecutor also referred to section 203 of the *National Defence Act* when discussing sentencing principles.

[18] As pointed out by the court during the sentencing hearing, section 135 of the *Strengthening Military Justice in the Defence of Canada Act*, S.C. 2013, c.24 reads as follows:

> (1) Subject to subsection (2), the provisions of this Act, other than subsections 2(2) to (4) and (6) and sections 3, 10, 11, 41 to 45, 106, 109 to 116, 118 to 125 and 132 to 134, come into force on a day or days to be fixed by order of the Governor in Council.

[19] Section 24 of the *Strengthening Military Justice in the Defence of Canada* Act replaces section 148 of the *National Defence Act* and section 62 adds the new section 203. Neither defence counsel nor the prosecutor has provided the court any evidence demonstrating that sections 24 and 62 have come into force by order of the Governor in Council. An intermittent sentence is not a sentencing option available to a sentencing judge at this time since the new section 148 has not yet come into force. Both counsel

referred to dispositions that are not in force at this time. This was a waste of the court's time.

[20] In determining the appropriate sentence the court has considered the circumstances surrounding the commission of this offence, the mitigating and aggravating circumstances presented by your counsel and by the prosecutor, the jurisprudence presented by counsel and the representations by the prosecution and by your defence counsel as well as the applicable principles of sentencing.

[21] I find I have been presented with little evidence in mitigation. This fraud against the Canadian Forces, akin to an employee-employer fraud, the fact that you abused the trust given to you by your unit and your position of authority, as well as your previous convictions are important aggravating factors. I would have considered a more severe sentence had I been presented with evidence that your actions had a negative impact on the availability of the combat gauze to our soldiers.

[22] The principles of denunciation, deterrence, as well as rehabilitation have been considered by the court. The court must impose a sentence that will provide a clear message to you and to others that this type of conduct is unacceptable and a sentence that will assist you in taking responsibility for your actions. This sentence must denounce the conduct of the offender, but this sentence will also permit you to attend the business course in Ottawa this fall.

FOR THESE REASONS, THE COURT:

[23] **SENTENCES**, ex-Master Corporal Edmunds, to a period of imprisonment of 30 days.

[24] I have not been presented any evidence that would warrant the suspension of this sentence.

Counsel:

Major Lacharite, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major D. Berntsen, Directorate of Defence Counsel Services
Counsel for ex-Master Corporal Edmunds