COURT MARTIAL

Citation: *R. v. Blackman*, 2015 CM 3009

Date: 20150514
Docket: 201342

General Court Martial

Lieutenant-Colonel George Taylor Denison III Armoury
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 2nd Class R.K. Blackman, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Petty Officer 2nd Class Blackman was found guilty on 4 December 2014 by this General Court Martial of all seven charges appearing on the charge sheet, which are one charge of fraud contrary to subsection 380(1) of the *Criminal Code*, three charges for forgery contrary to section 367 of the *Criminal Code* and three charges for uttering a forged document contrary to subsection 368(1) of the *Criminal Code*.

[2] On that same date, Military Judge Gibson, who was presiding at this General Court Martial, adjourned the proceedings for the sentencing phase to 6 January 2015, considering the unavailability of the defence counsel to proceed immediately with it.

[3] On 6 January 2015, because of the absence of the offender, the military judge presiding at this case, Judge Gibson, made the decision with the agreement of both counsel in chambers that the case would be postponed to 2 March 2015.

[4] Meanwhile, Judge Gibson was appointed on 5 February 2015 as a Justice to the Ontario Superior Court of Justice. On 9 February 2015, I was appointed by the Chief Military Judge as the replacement judge for the purpose of section 196 of the *National Defence Act* to continue the proceedings of the General Court Martial of Petty Officer 2nd Class Blackman.

[5] It is with the agreement of both counsels, further to two different conference calls, that it was agreed to continue the proceedings of this case on 30 March 2015. Then, I proceeded with the hearing on that day and the day after. On 1 April 2015, while the offender was adducing evidence on his case, defence counsel indicated to me that there was one witness that could not attend, being out of the country. On his request, I adjourned the proceedings to 13 May 2015 where he closed his case and where counsel addressed the court on sentence.

[6] Considering that this court martial pronounced its finding prior to the presiding military judge becoming unable to continue, then it comes under my responsibility as the replacement judge to determine the sentence.

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

[8] In this case, the prosecution suggested to the court to impose on the offender a sentence of imprisonment for a period of four to six months. He would also like the court to impose a combination of this punishment with a reduction in rank to the rank of leading seaman. Defence counsel recommended that this court sentence the offender to a reduction in rank to the rank of ordinary seaman and a fine to the amount of $10,000 to 15,000$.

[9] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline. 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.

[10] When imposing a punishment, the court shall consider 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.

[11] The military judge 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 responsibility and previous character of the offender;

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

(d) An offender should not 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 it was established by Court Martial Appeal Court of Canada and the 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.

[12] Given the very nature of the offences for which the offender was found guilty by this General Court Martial, I am of the opinion that sentencing in this case should focus on the objectives of denunciation and general deterrence. It is important to remember that the principle of general deterrence means that the sentence should deter not only the offender from reoffending, but also to deter others in similar situations from engaging in the same prohibited conduct.

[13] Petty Officer 2nd Class Blackman initially enrolled with the Canadian Forces in 1992 with the Reserve Force as an RMS clerk. Throughout his career with the Reserve Force, he was employed in various Class A and B positions. In September 2009, he was assigned Class C as the chief clerk with the 2 Military Police Unit Detachment in Petawawa for a deployment in Afghanistan. His pre-deployment training took place in Petawawa from that time until March 2010. He was deployed in Afghanistan with that unit from April to August 2010.

[14] During his pre-deployment training with the Military Police unit and his deployment in Afghanistan, the offender was away from home, considering that he was residing in Ottawa. At that time, he had custody of his youngest teenaged daughter. Between October 2009 and April 2010, he submitted six Family Care Assistance claims for a total amount $l2,460 for which the court martial found him guilty of fraud. Essentially, he claimed for having paid somebody for childcare for his daughter while he was away for training, while, in reality, he did not pay for any such thing.

[15] In addition, he forged and submitted a Family Care Assistance Declaration in support of those monthly claims for the months of November and December 2009, and for the month of January 2010, for which he was found guilty by this court martial for forgery and uttering a forged document. Essentially, the statement made by the caregiver in each document was forged.

[16] I considered the following aggravating factors:

(a) There is the objective seriousness of the offence of fraud. The maximum punishment for such an offence is 14 years' imprisonment or less punishment. Concerning the offence of forgery and uttering a forged document, the maximum punishment is 10 years' imprisonment or less punishment.

(b) Also, the subjective seriousness of the offence has been considered and it covers four aspects:

(1) The nature and the scope of the fraud. It was not a sophisticated fraud. Essentially, a Family Care Assistance Declaration was forged and submitted with a claim. It was very simple in nature. The magnitude of the fraud was relatively serious, considering that the total amount of it is over $10,000.

(2) The degree of premeditation is very high. Basically, you claimed the allowance on a monthly basis over a period of six months. You clearly knew what you were doing in the circumstances and did not hesitate to do it again because of the pre-deployment context, being unusual circumstances justifying your actions.

(3) Everything concerning those claims relied on you, which would include your integrity and honesty. In a system relying mainly on those principles, you clearly failed to respect them while expectations of your peers, your supervisors and your organization were very high. You broke that relation of trust.

(4) You derived a personal benefit from those transactions. Despite the absence of evidence, it is clear that you received the money in

> your account and that you had a possibility to take advantage of it.

[17] I also considered the following mitigating factors:

(a) Your fragile mental health. Despite there being no evidence connecting the mental health problems you are experiencing with the commission of the offences or the consequences that resulted from that situation, I am still sensitive to the fact that your professional and personal life was disrupted by this matter and has impacted on your mental health. You are making efforts to live with those consequences and have turned to people for help, which appears to be some kind of achievement for somebody who usually does things by himself and on his own. I encourage you to continue to act in that way because it seems to bring you some comfort and results.

(b) There are also some administrative consequences in relation to your performance at work since you transferred into the Regular Force in 2011, which is the expression of a lack of trust by your chain of command through the withdrawal of your security clearance and the fact that you went through an administrative career review process that is now pending because of this court martial. Your mental health deteriorated because of that situation while undergoing this court martial. Even if it is not related to the offences before this court, it is still your situation and I must considered it as a mitigating factor in the circumstances.

(c) Finally, it must not be forgotten that upon your conviction, you will get a criminal record. It will have an impact on your professional and personal life and it cannot be overlooked.

[18] As I mentioned in *R. v. Maillet*, 2013 CM 3034, given the size of the Canadian Forces as an organization, it relies in large part on the integrity and honesty of its members to ensure sound management of the funds entrusted to it from the public purse when it comes to managing the individual allowances of its members. When a fraud within the meaning of the *Criminal Code* is committed, it is important to note, as many other Canadian courts have, including courts martial, that this is a serious crime that calls for a particularly severe approach because of the very nature of this crime and its impact. Members who have volunteered to serve our society, such as Forces members, cannot attempt in any way to obtain a strictly personal benefit to which they are clearly not entitled. In so doing, they betray the trust placed in them by all Canadians and those who lead them. This is what Justice Létourneau addressed in a more general manner in *R. v. St. Jean*, CMAC 429 at paragraph 22.

[19] As said by the Chief Military Judge, Judge Dutil, in his decision of *R. v. Roche*, 2008 CM 1001, at paragraph 15:

> Despite the decisions of the Court Martial Appeal Court in *St-Jean*, *Lévesque*, *Deg* and *Vanier*, it must be said that since the 2004 amendments to the *Criminal Code* related to the maximum sentence applicable to the offence of fraud where the subject-matter of the offence exceeds $5000 under paragraph 380(1)(a) of the *Criminal Code*, Canada's appellate courts have generally imposed prison sentences when the fraud is significant or when it is committed against an employer, whether it took place over a longer or shorter periods.
>
> The courts may impose a custodial sentence on any grounds they consider appropriate to achieve the paramount objectives of general deterrence and denunciation in this type of case, even if the offender has no judicial record, has registered a guilty plea and expressed remorse, has repaid the victims fully or in part, has little chance of re-offending and is known and respected in the community.

[20] It has been suggested that the court impose on the offender a sentence of reduction in rank to the rank of ordinary seaman.

[21] In the Court Martial Appeal Court decision of *R. v. Fitzpatrick*, 1995 CMAC 381, Judge Goodfellow described at paragraph 31 the nature of such a sentence:

> The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, plus social and professional standing loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence.

[22] Justice Bennett also expressed clearly the meaning of such a sentence, when she said in the Court Martial Appeal Court decision of *Reid v. R.; Sinclair v. R.*, 2010 CMAC 4, at paragraph 39:

> . . . . A reduction in rank is an important tool in the sentencing kit of the military judge. It signifies more effectively than any fine or reprimand that can be imposed the military's loss of trust in the offending member. That loss of trust is expressed in this case through demotion to a position in which the offenders have lost their supervisory capacity.

[23] So reduction in rank is a purely military sentence that reflects the loss of trust in the offending member to act in a leadership position at his current rank. As indicated at section 140.2 of the *National Defence Act*, it can also be imposed as an accompanying punishment to the one of imprisonment.

[24] Here, in this case, I do not find any application for the punishment of reduction in rank in the circumstances of this case. Essentially, there is no evidence that because of his rank, function, position, authority, his knowledge, skills related to his trade or experience, the offender used those things in order to facilitate the commission of the offences. As expressed by the prosecutor, the facts did not disclose a complex scheme for committing the offences and did not require any special knowledge from the offender. He was not in a position of trust regarding the submission or processing of the claims. Honesty is at stake, not in regard of his rank, position or occupation, but simply as an employee toward his employer.

[25] Then, reduction in rank in those circumstances does not appear as being the appropriate punishment in order to reflect the objectives of denunciation and general deterrence in the circumstances.

[26] Incarceration would then appear to me as the only appropriate form of punishment acceptable in the circumstances of this case in order to achieve the objectives of denunciation and general deterrence and I consider it as the minimum punishment that must be imposed in the circumstances of this case.

[27] Now, what would be the appropriate type of incarceration in the circumstances of this case? The military justice system has disciplinary tools such as detention, which seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. When the act as charged goes beyond the disciplinary framework and constitutes a strictly criminal activity, it is necessary to examine the offence, not only in light of the particular values and skills of members of the Canadian Forces but also from the perspective of the exercise of concurrent criminal jurisdiction.

[28] It seems clear to me that incarceration in the form of imprisonment is the only appropriate sanction in the circumstances and that there is no other sanction or combination of sanctions that is appropriate for the offences and the offender. Therefore, the court considers that a sentence of imprisonment is necessary to protect the public and maintain discipline.

[29] Then, what would be the duration of such a sentence? Considering the magnitude, the complexity and the length of the fraud and the actions of the offender in order to commit it, I would suggest that a period for less than the one suggested by the prosecutor, which is four to six months, would seem appropriate to me in the circumstances. Giving consideration to the applicable sentencing principles, including sentences imposed on similar offenders for similar offences committed in similar circumstances by military and civil tribunals, and the aggravating and mitigating factors mentioned above, I conclude that imprisonment for a period of 45 days would appear as the appropriate and necessary minimum punishment in this case.

[30] The defence counsel suggested to the Court that it suspend the sentence of imprisonment by means of its powers under section 215 of the *National Defence Act* because it is warranted on account of the exceptional circumstances of the offender allegedly demonstrated in this case.

[31] Section 215 of the *National Defence Act* reads as follows:

> Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.

[32] This section is in Division 8 of the Code of Service Discipline in the *National Defence Act*, which contains the provisions applicable to imprisonment and detention. The suspension of a punishment of imprisonment is a discretionary and exceptional power that may be exercised by a service tribunal, including a court martial. This power is different from the power provided by section 731 of the *Criminal Code*, which allows a civilian court of criminal jurisdiction to suspend the passing of sentence while subjecting an offender to a probation order, or the power provided by section 742.1 of the *Criminal Code* on imprisonment with conditional sentencing, which allows a civilian court of criminal jurisdiction to sentence an offender to serve a punishment of imprisonment in the community.

[33] The *National Defence Act* does not contain any particular criteria for the application of section 215. To this day, the court martial's interpretation of its application is quite clear and has been established by various military judges in other cases. As a military judge, I articulated my approach concerning this matter in a variety of courts martial since my decision in *R. v. Paradis*, 2010 CM 3025.

[34] Essentially, if the offender demonstrates, on a balance of probabilities, that his particular circumstances or the operational requirements of the Canadian Forces justify the necessity of suspending the sentence of imprisonment or detention, the court will make such an order. However, before doing so, the court must consider, once it has found that such an order is appropriate, whether or not the suspension of that sentence would undermine the public trust in the military justice system as part of the Canadian justice system in general. If the court finds that that it would not, the court will then make the order.

[35] Basically, Petty Officer 2nd Class Blackman is dealing effectively with a difficult situation he created himself in various ways. He is clearly trying to get a more positive approach to life and to all those small battles he has to go through, from a professional and personal perspective. Life for him is not easy but with the support of some professionals and with his own determination, he looks like he has all chances to succeed.

[36] Notwithstanding that, the fact that the offender would be best served by not serving incarceration time in order to provide him access to the best possible treatment cannot stand. He can have access to treatment and follow-up by qualified medical consultants during the time he serves his sentence of imprisonment. My understanding from the Canadian Forces Service Prison and Detention Barrack is that he will have such access and support. His current psychiatrist, psychologist and social worker will be able to provide information to those involved in the treatment of the offender during the time he will spend in jail.

[37] Then, it is my opinion that the offender has not demonstrated on a balance of probabilities that there exists for him particular circumstances that would justify the necessity of suspending the sentence of imprisonment by the court.

FOR THESE REASONS, THE COURT:

[38] **SENTENCES** you to imprisonment for a term of 45 days.

Counsel:

The Director of Military Prosecutions as represented by Major D. Martin and Lieutenant-Commander D.R. Reeves.

Major D. Hodson, Defence Counsel Services, Counsel for Petty Officer 2nd Class R.K. Blackman.