COURT MARTIAL

Citation: *R. v. Sorbie*, 2015 CM 3010

Date: 20150623
Docket: 201506

Standing Court Martial

4th Canadian Division Support Base
Petawawa, Ontario

Between:

Her Majesty the Queen

- and -

Master Corporal P.K. Sorbie, Offender

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

REASONS FOR SENTENCE

(Orally)

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

[2] 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.

[3] In this case, the prosecution suggested to the court to impose on the offender a sentence of imprisonment for a period of 90 days. Defence counsel recommended that this court sentence the offender to a fine in the amount of $1,092. As an alternative, he mentioned that if the court would consider imprisonment as an appropriate punishment for the offender, a period of 7 days would be sufficient in the circumstances. In addition,

he put forward for consideration by the court the idea of suspending the carrying into effect of such punishment.

[4] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline, and, from a more general perspective, the maintenance of a just, peaceful and safe society. However, the law does not allow a military judge 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 judge 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.

[5] As it has always been the practice of military judges presiding at a court martial, and as mentioned by the Court Martial Appeal Court in *R.* v. *Tupper*, 2009 CMAC 5 at paragraph 30:

> When crafting a sentence, a trial judge must consider the fundamental purposes and goals of sentencing as found in sections 718 and following of the *Criminal Code*.

[6] Keeping in mind those *Criminal Code* provisions on sentencing, when imposing sanctions, I 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.

[7] When imposing a sentence, I 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 was established by the

Court Martial Appeal Court and the Supreme Court of Canada decisions; and,

e. Lastly, any sentence to be imposed by the court should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] The Supreme Court of Canada has elevated the principle of proportionality in sentencing as a fundamental principle (see *R. v. Ipeelee*, 2012 SCC 13 at paragraph 37 *and R. v. Nur*, 2015 SCC 15 at paragraph 42-43), making the determination of a sentence by a judge, including a military judge, a highly individualized process.

[9] As Judge LeBel expressed in *Ipeelee* at paragraph 37:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . .
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[10] Then, the principle of proportionality shall reconcile those different goals and make the sentence imposed on the offender proportionate to the gravity of the offence and to the responsibility and previous character of the offender, as expressed at subparagraph 112.48(2)(b) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O).

[11] As is often the situation, where an offence involves a serious breach of trust, as it is in this specific incident before the court, 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 re-offending, but also to deter others in similar situations from engaging in the same prohibited conduct. As stated by Judge Létourneau at paragraph 22 of the Court Martial Appeal Court decision in *R. v. St. Jean*, CMAC-429:

> 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.

[12] Master Corporal Sorbie joined the Regular Force with the Canadian Forces in April 2003 as a combat engineer. He was promoted to the rank of corporal in May 2007 and got the appointment of master corporal in June 2011. He was released from the

Canadian Forces in January 2015. He spent most of his career with the 2 Combat Engineer Regiment (2 CER) on Canadian Forces Base (CFB) Petawawa.

[13] From August 2005 to February 2006, he was deployed with the Task Force Kabul MB HQ Engineer Squadron in Afghanistan. Sometime after his return from Afghanistan, he suffered the loss of his father, Chief Warrant Officer Sorbie, who was the Regimental Sergeant Major of the 3rd Battalion, Royal Canadian Regiment, located on CFB Petawawa.

[14] Master Corporal Sorbie indicated to the court that he started to consume some opiates, such as cocaine, further to the death of his father, and drank alcohol. In 2012, he got injured and he had some medical limitations. In July 2012, he was then employed in the unit canteen as the second in command to Sergeant Matte and later to Sergeant Suttie. The 2 CER canteen staff was also responsible for selling kit for the 2 CER kit shop. Master Corporal Sorbie signed for the float from non-public funds. Master Corporal Sorbie had a key that gave him access to the canteen and kit shop locks.

[15] Sergeant Suttie and other members from the canteen staff became suspicious that there was money missing from the 2 CER canteen cash register. It was noticed that Master Corporal Sorbie was taking on a more active role in managing the daily closings, which involved money deposits and logging in sales. It was also noticed that when he was doing purchases for the canteen, he would take an extended amount of time to carry out the task. He was the sole user of the canteen credit card used to make purchases in stores.

[16] On the basis of those observations, Sergeant Suttie instructed two junior non-commissioned members working at the canteen to count the money twice daily. On Friday 19 July 2013 before leaving, the two counted that there was $277.50 in the till. An amount of $77.50 was removed for deposit and $200 remained in the till as the float.

[17] While he was on summer leave, Master Corporal Sorbie was seen failing to sign in and entering the unit on Sunday, 21 July 2013. He went to the canteen and took $147 from the till.

[18] On the next Monday morning, the money in the till was counted as per Sergeant Suttie's instructions and it was discovered that there was only $53 remaining in the till.

[19] On one other instance, another member of the canteen staff noticed that $70 was missing from the till and asked Master Corporal Sorbie about it. The latter admitted having taken the money.

[20] Master Corporal Sorbie, as the second in command of the canteen, had signed an acknowledgement form advising that "shortages, damage to or the loss, deficiency, theft, destruction, deterioration or improper expenditure of any non-public property, and/or non-public funds (cash or cash equivalents) will be recovered."

[21] After an investigation, Master Corporal Sorbie was removed from his responsibilities as the second in command of the canteen on 26 August 2013. Soon thereafter, it was discovered that the canteen fund was missing approximately $11,000.

[22] In a cautioned interview, Master Corporal Sorbie admitted that while employed as the canteen second in command, he took items from the canteen without paying, including a tomahawk. He utilized the acquittance roll as an automated teller machine. He confessed to having stolen amounts between $5 and $60 daily from 1 July 2012 to 26 August 2013. He also declared being a daily drug user since 2006 and had been spending approximately $20 to $200 a day on OxyContin, Percocet, Fentanyl patches, Morphine, Cocaine and other types of opiates. He mentioned during his testimony before the court that he became physically dependant on those drugs during the year 2012 to 2013.

[23] He has suffered severe depression and has had trouble sleeping since 2006. He said that drugs made him feel better but, in the end, he felt more depressed.

[24] Once removed from the canteen, he sought help. He got himself on methadone maintenance therapy with the Ontario Addiction Treatment Centre, twice a week, in October 2013. He was followed by his medical officer once a month and those things kept him stable. He got an appointment with a psychiatrist in October 2014. However, once released, he stopped having access to this support. While in the Forces, he requested access to a residential programme but never got it.

[25] He is on a methadone programme at Sunrise Methadone Clinic for the last two weeks and he is seeking help from Veterans Affairs in order to get access to a residential programme. Essentially, his goal is to get rid of his dependence to drugs, to reinsert himself in society and become a valid asset. His motivation to do so comes, among other things, from his son, aged seven.

[26] He receives a $900 monthly disability pension from Veterans Affairs and does not have any other revenue. He is currently living with his mother. He pays $200 per month for child support and provides $700 to his mother for expenses. He has a lot of credit card debt but he has no outstanding debt with drug dealers. He has no job.

[27] He said that he felt terrible and bad about what he did, and at some point he tried to take his own life. He stated that, from the time he confessed to the time he was released, he apologized the most he could to his peers for what he did.

[28] A unit disciplinary investigation took place on this matter on the day Master Corporal Sorbie was taken out of the canteen. A few days after, the matter was passed to the military police to carry on with the investigation. The investigation was concluded in mid-November 2013. For eight months, nothing had happened to the file and no evidence was adduced to provide the court with an explanation for the lack of any action concerning this file during that delay.

[29] The actual Commanding Officer of 2 CER took over his duty in June 2014. A month after he took his position, which is in July 2014, charges were laid against the

offender regarding the present case. The matter was sent to the referral authority in August 2014 and to the Director of Military Prosecutions in October 2014. A prosecutor was assigned in November 2014 and charges were preferred on 12 February 2015.

[30] The Commanding Officer of 2 CER mentioned that the fact that this file did not proceed in a timely manner caused concern among members of the unit about the capacity of the military justice system to deal with disciplinary matters, such as the one involving the offender.

[31] At the beginning of the month of December 2014, the offender was found guilty by the actual Commanding Officer of 2 CER of two charges of AWOL and he was sentenced to 2 days confined to barracks and a $1,000 fine. In addition, the Commanding Officer banished the offender from the unit and the base in order to pass a message to the unit's members that crime, such as the one before the court, does not pay. The offender was released on 12 January 2015 under the item 5(f), unsuitable for further service.

[32] The offence of stealing when entrusted by reason of employment is something directly related to Canadian Forces members' ethical obligations such as honesty, integrity and loyalty. For a non-commissioned member, as for an officer, being trustworthy at all times is more than essential for the accomplishment of any task or mission in an armed force, whatever the function or role you have to perform.

[33] In determining the sentence, I considered the following aggravating factors:

a. I consider as aggravating the objective seriousness of the offence. The offences you were charged with were laid in accordance with section 114 of the *National Defence Act*, which is punishable by imprisonment for a term not exceeding 14 years or to less punishment.

b. Secondly, the subjective seriousness of the offence, which consists of two aspects:

i. The breach of trust. You committed these offences on a defence establishment in your unit's canteen set out in order to be used for furthering and bolstering morale and *esprit de corps* among your peers and within your unit. Your lack of integrity, courage, honesty and loyalty was totally contrary to the obligations and principles of ethics you were taught as a soldier in the Canadian Forces and resulted in a permanent deprivation of these funds for this non-public fund organization. With the rank, experience and position you had at the time in the Canadian Forces, you knew that by your actions, you were abusing the trust of your peers and your supervisors in the chain of command. You would not be surprised that they felt betrayed by your actions. The way you acted was disappointing for those who were part of your work environment and they had greater expectations from somebody like you, as it is

for the public in general from their soldiers. Essentially, you did not hesitate to think of yourself before others.

ii. It is clear from the circumstances that you deliberately planned what you did and that you did not care about doing it again and again on a daily basis for about a year. Such premeditated, repetitive and long action must be considered as a serious aggravating factor in the circumstances of this case.

[34] I also considered the following mitigating factors:

a. Through the facts presented to this court, I must consider your guilty plea on both charges as disclosing the fact that you are taking full responsibility for what you did;

b. The total value of the theft is at the low end of the scale of punishment, being around $1,000. Even if it was discovered that $11,000 was missing from the canteen fund after you were removed from your position, the latter amount cannot be considered by this court as having any meaning in the circumstances of this case. You pleaded guilty to a specific amount, dispensing the prosecution of proving it. There are no other circumstances in the context of this case that would link you as being responsible, from a disciplinary perspective, with the total amount missing. The prosecution clearly expressed how it came, as a result, to the total amount to which you pleaded guilty, and the court has no other choice than to accept it as it is.

c. Despite the length of time over which the theft took place, I must say that it did not require a high degree of planning and sophistication. Reality is that you ended up in that function because of your physical limitations. You were not trained for that position and it was not a common task to be performed by somebody in your trade. Putting somebody like you in that position with the personal problems you had at the time was not a wise thing to do in the circumstances. Without being an excuse for what you did, by providing you such authority while being in the personal situation you were, without clear and close supervision, it may have appeared to you as being an easy way to get access to what you needed without anybody noticing what you were doing. As a matter of fact, the actual Commanding Officer of 2 CER made sure that the position you occupied gets more oversight on a regular basis. He authorized the installation of a costly point of sale system in order to ease inventory, facilitate transactions, gain efficiency and reduce chances that what you did will happen again or otherwise can be detected very quickly.

d. In order to denounce what you did and deter others from doing the same thing, two things were done:

i. First, you were banished from the unit and the base because of the totality of your actions, including the charges before this court, because your Commanding Officer wanted to make clear that crime does not pay. You were told that you betrayed your chain of command and your peers, and that if you would be found in the unit lines or on the base, you could be arrested. Basically, your Commanding Officer relieved you from performance of any military duty, sending you home. Interestingly enough, this measure shall be taken in accordance with the conditions specified at article 101.09 of the QR&O when charges are laid, and it seems that none of them were respected. That being said, it appears to the court that you were sanctioned in order to denounce your behaviour and send a message to others that what you did cannot be tolerated, despite being presumed innocent of the charges before this court.

ii. Second, you were released from the Canadian Forces as a result of your overall conduct, including the one reflected in the charges before this court. I recognize clearly that this administrative measure does not constitute a disciplinary sanction in itself; however, it had some specific deterrence on you and might have limited general deterrence on others. It also reflects some kind of denunciation in relation to your conduct. You were released under item 5(f), which means "unsuitable for further service". It is important to know that this specific item "[a]pplies to the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces" as stated at table 1 of QR&O article 15.01.

e. The delay to deal with this matter. The court does not want to blame anybody in this case, but the closest the disciplinary matter is dealt with, the more relevant and efficient will be the punishment on the morale and the cohesion of the unit members, as expressed by your former Commanding Officer before this court. As one of the factors considered here, the time elapsed since the incident occurred, which is about two years, makes it less relevant, to some degree, to give consideration to a stronger or higher punishment. As stated by the Commanding Officer of 2 CER, the delay to deal with this matter had a considerable and negative influence on the unit.

f. The fact that you clearly recognized that you messed up your career in the Canadian Forces and your life so far because of your depression and your drug dependence. You clearly indicated to me that you want to find ways other than taking drugs and alcohol for dealing with your personal

> problems. You are not using it as an excuse for what you did, but as something that you should have better dealt with to avoid being before this court today. You made some little but important steps in order to get on the path of recovery and you are well aware that you still have a long way to go to achieve your ultimate goal: reinsert yourself as a productive member of society.
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> g. Your personal financial situation. You are unemployed, getting a medical monthly pension of $900 split between your child care obligation and the expenses you pay to your mother in order to live with her.

[35] It was suggested by the prosecution to impose on the offender a sentence of imprisonment for a period of 90 days. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or any combination of sanctions is not appropriate for the offence and the offender. The court is of the opinion that those principles are relevant in a military justice context and they were confirmed in the decision of the Court Martial Appeal Court in *R. v. Baptista*, 2006 CMAC 1.

[36] Canadian criminal courts have categorized theft by persons being in a position of trust as a special category for sentencing purposes. Usually, the denunciation and the deterrence of this type of infraction generally require incarceration.

[37] In a military context, courts martial have taken a slightly different approach. A review of a number of cases over the last six years (see courts martial decisions in *Price*, *Blackman*, *Loughrey*, *Haché*, *Roche*, *Hynes*, *Noseworthy*, *Gray*, *Clark*, *Tardif*, *Cyr*, *Coulombe* and *Paas*) involving situations of theft or fraud from an employer and abuse of trust indicates that punishment may vary from a purely military sentence, such as a reduction rank, combined or not with a severe reprimand and/or a fine, to a more typical criminal sentence, such as imprisonment. The closer the offence is linked to the military community, the more appropriate a purely military sentence becomes.

[38] Clearly, the chain of command and peers of Master Corporal Sorbie felt that their trust was betrayed. They were disappointed and angry with him for what he did for over a year; however, the question is not what sentence would make them satisfied that justice has been served from their own perspective, but, as said by Military Judge Perron in *R. v. Price*, 2009 CM 4009 at paragraph 31:

> The key question in this case is the following: what is the just and appropriate sentence that is proportionate to the gravity of the offence and the blameworthiness of the offender and that will satisfy the principles of general deterrence and denunciation of the illegal conduct?

[39] Considering the nature of the offences, the applicable sentencing principles, mainly denunciation and general deterrence, and also the aggravating and mitigating factors that I have mentioned earlier, I come to the conclusion that incarceration in this case would not constitute the minimum necessary punishment for those offences. It does

not 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 do not consider it as the minimum punishment that must be imposed in the circumstances of this case. I do not see any reason, in the specific circumstances of this case, that would justify depriving the offender of his liberty.

[40] As stated by Judge Perron in *Price* at paragraph 30:

> Courts martial must craft the appropriate sentence using punishments found in the scale of punishments. These sentences must promote discipline. The scale of punishment contains certain punishments that are not found in the *Criminal Code of Canada*, such as dismissal with disgrace from Her Majesty's service, dismissal from Her Majesty's service, reduction in rank, forfeiture of seniority, severe reprimand, reprimand and minor punishments. These punishments reflect the importance we attach to honourable service in Her Majesty's Canadian Forces and the importance we attach to a person's rank. They are reflections of our values as members of the profession of arms.

[41] I am of the opinion that denunciation and general deterrence would be principles better reflected and served in the circumstances of this case by a purely military sentence such as reduction in rank, combined with some other punishments.

[42] As expressed by the Court Martial Appeal Court in its decision of *R. v. Fitzpatrick*, 5 C.M.A.R. 336; and *Reid v. R., Sinclair v. R.*, 2010 CMAC 4, 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.

[43] Master Corporal Sorbie, you are still fighting with your own demons since the death of your father, which brought you to betray the trust of your chain of command and your peers in order to satisfy your own personal needs to the detriment of your military community. You were told in different ways, prior to this trial, that you lost the trust of many people because of your actions in taking drugs and alcohol.

[44] You made some steps to stop this way down to Hell, but the military world had already lost confidence in you. Despite that, you still fight for getting free from your dependence in trying to get assistance in your battle.

[45] I conclude that a fit sentence that would reflect, in the circumstances of this case, this loss of trust would be a purely military one involving a reduction in rank to private combined with a severe reprimand and a fine.

FOR THESE REASONS, THE COURT:

[46] **FINDS** you guilty of the first and second charge on the charge sheet for stealing when entrusted by reason of your employment with the custody, control or distribution of the things stolen.

[47] **SENTENCES** you to a reduction in rank to the rank of private, to a severe reprimand and to a fine to the amount of $1,000. The fine is to be paid in monthly

instalments of $100 each, commencing on 1 July 2015 and continuing for the following nine months.

Counsel:

The Director of Military Prosecutions as represented by Major A. Samson.

Major D. Hodson, Defence Counsel Services, Counsel for Master Corporal P.K. Sorbie.