COURT MARTIAL

Citation: *R. v. Farrah*, 2022 CM 4009

Date: 20220413
Docket: 202212

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.P. Farrah, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

Introduction

[1] Corporal Farrah, having accepted and recorded your plea of guilty in respect of the one charge on the charge sheet, the Court now finds you guilty of that charge for stealing lumber, contrary to section 114 of the *National Defence Act* (*NDA*).

A joint submission is being proposed

[2] I now need to impose the sentence. This is a case where a joint submission is made to the Court. Both prosecution and defence counsel recommended that I impose a sentence constituted of a reprimand and a fine of $1,800.

[3] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. As any other trial judge, I may depart from a joint submission only if the proposed sentence would bring the administration of justice

into disrepute or is otherwise contrary to the public interest. This is the test promulgated by the Supreme Court of Canada (SCC) in *R. v. Anthony-Cook*, 2016 SCC 43.

[4] Indeed, the threshold to depart from the joint submission being made is high as joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress and expense of a trial and allowing efforts to be channelled into other matters. Furthermore, offenders who are remorseful may take advantage of a guilty plea to begin making amends. The most important benefit of joint submissions is the certainty they bring to all participants in the administration of justice.

[5] Yet, even if certainty of outcome is important for the parties, it is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as a military judge. As recognized by the Supreme Court of Canada, courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following either a trial or a guilty plea. It is the only opportunity for the Court to deal with the disciplinary requirements brought about by the conduct of the offender, on a military establishment, in public and in the virtual or physical presence of members of the offender's unit.

[6] The imposition of a sentence at court martial proceedings, therefore, performs an important disciplinary function, making this process different from the sentencing usually performed in civilian criminal justice courts. Even when a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered, but also adequately laid out in the sentencing decision to an extent that may not always be necessary in other courts.

[7] The fundamental principle of sentencing found at section 203.2 of the *NDA* provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the degree of responsibility of the offender.

Matters considered

[8] In this case, the prosecutor read a Statement of Circumstances which was formally admitted as accurate by Corporal Farrah. It was entered in evidence as an exhibit, along with other documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51.

[9] In addition to this evidence, counsel made submissions to support their position on sentence on the basis of the facts and considerations relevant to this case, in order to assist the Court to adequately apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed.

[10] The Statement of Circumstances, the submissions of counsel and the information on the documents entered as exhibits reveal the following circumstances relevant to the offence and the offender.

The offence

[11] The Statement of Circumstances reveals the following information as it pertains to the offence:

(a) at the time of the offence, Corporal Farrah, Corporal Moser and Corporal Walker were members of 2 Service Battalion; a unit located Canadian Forces Base (CFB) Petawawa, Ontario. At 0800 hours on 18 April 2021, the three soldiers started a twenty-four-hour-general-duty shift, working for the 4th Canadian Division Support Group (4 CDSG) at the Garrison's Isolation Facility, located at building G-106 in CFB Petawawa;

(b) at around 2200 hours on 18 April 2021, the three soldiers took possession of a Department of National Defence (DND) eight-passenger van and drove it to the parking lot of building J-108 where lumber of various nominal sizes was stored, having been purchased by the 4 CDSG on behalf of Her Majesty in Right of Canada to complete renovation and construction projects on the base;

(c) the three soldiers started loading lumber into the back of the van between 2200 and 2230 hours. At around 2230 hours on 18 April 2021, the three soldiers were observed loading lumber by a Canadian Armed Forces (CAF) member observing from inside her bedroom located on the third floor of building J-108. When she walked down with a colleague for a cigarette break in the parking lot, she saw Corporal Farrah, Corporal Moser and Corporal Walker stop loading the lumber into the van, instead whispering amongst each other, giving the impression that they were waiting for her to leave before continuing to load the lumber;

(d) after her cigarette break and having witnessed the three soldiers restarting loading lumber into the van from her bedroom window, she

contacted a supervisor, member of her course staff who resided in the same building, to explain what she had seen. That supervisor, Petty Officer, 2nd Class Masciotra, ran downstairs and upon exiting the building, saw Corporal Farrah holding a plank in his hands, another male running towards the front of a DND van while a third male was already seated in the front of the van. They drove away but Petty Officer, 2nd Class Masciotra was able to read the plate number and relay the information;

(e) Petty Officer, 2nd Class Masciotra then approached Corporal Farrah who had stayed behind. Corporal Farrah pleaded with Petty Officer, 2nd Class Masciotra to "let it go", not call the police, not to tell anyone, and he stated that they had "screwed up";

(f) at around 2312 hours on 18 April 2021, Petty Officer, 2nd Class Masciotra contacted the 2 Military Police Regiment Detachment (2MP Regt Det) Petawawa to report the stealing of the lumber. During that time, Corporal Farrah walked away. Military police (MP) officers on mobile patrol were immediately dispatched and located the DND van on a road heading towards the Frederick Gate, on the premises of CFB Petawawa;

(g) the MP officers completed a traffic stop of the DND vehicle. Corporal Moser was identified as the passenger while Corporal Walker was identified as the driver with their respective NDI 20 identification cards. MP officers saw planks and posts of lumber in the back of the van, with the longest planks protruding between the two front seats. A total of forty-four planks of 2 inches by 10 inches by 10 feet lumber and sixteen posts of 6 inches by 6 inches by 10 feet lumber were found in the back of the DND vehicle;

(h) at around 2332 hours on 18 April 2021, the MP officers placed Corporal Moser and Corporal Walker under arrest and both were transported to the 2MP Regt Det Petawawa. Just over thirty minutes later, after having been cautioned and exercised his right to retain and instruct counsel, Corporal Walker confessed to stealing the lumber that was found in the back of the DND van. He stated that he knew there was a third person involved in the stealing. Although he initially was not willing to give a name, he was granted a request to call that individual and tell him about the arrest;

(i) after having been informed of the situation by Corporal Walker, Corporal Farrah attended the 2MP Regt Det Petawawa on his own accord. After having been cautioned and exercised his right to retain and instruct counsel, Corporal Farrah confessed to stealing the lumber that was found in the back of the DND van. He was then released from custody; and

(j) Corporal Farrah knew that the forty-four planks of 2 inches by 10 inches by 10 feet lumber and sixteen posts of 6 inches by 6 inches by 10 feet lumber were the property of Her Majesty in Right of Canada and he knew that he had no right to them. The approximate value of the stolen lumber is $956 before taxes.

The offender

[12] Corporal Farrah is thirty-three years old. He has chosen to take his release from the CAF on 15 February 2022 for reasons unrelated to the offence. He has been serving almost thirteen years as a material technician in the army, mainly in CFB Petawawa. He has now returned to his home town of Windsor, Ontario, where he is taking care of an elderly parent.

[13] Corporal Farrah's conduct sheet includes two prior convictions for minor disciplinary offences, in 2010 and 2019, which have no relationship with the offence for which he is pleading guilty today. In terms of criminal conduct, Corporal Farrah should be considered as a first-time offender.

Gravity of the offence

[14] The Court has considered the objective gravity of the offence in this case. The offence of stealing contrary to section 114 of the *NDA*, attracts a maximum punishment of seven years of imprisonment. It is therefore an objectively serious offence going to the core of the need to maintain a disciplined armed force.

[15] As it pertains to the subjective seriousness of the military offence of stealing, it has been recognized frequently as an offence addressing improper behaviour that can have significant impact on discipline, not only when committed against property of a colleague but also when dealing with public property as here. Indeed, stealing from an employer is a serious offence, as recognized by the Court Martial Appeal Court (CMAC) recently in the case of *R. v. Darrigan*, 2020 CMAC 1, and in the often quoted case of *R. v. St-Jean*, 6 CMAR 159, where, in the context of a fraud case, Létourneau

J.A. had this to say about the impact of abusing the confidence of the institution, at paragraph 22:

> 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.

Aggravating factors

[16] I do believe that the circumstances of the offence and the offender in this case reveal two aggravating factors. First is the breach of trust involved. This aggravating factor will be present anytime someone steels from an employer, as recognized by the CMAC in *Darrigan*, the most recent military appeal case dealing with stealing, at paragraph 49. Second is the fact that Corporal Farrah, along with his colleagues Corporals Moser and Walker, were on duty working with the 4 CDSG when they stole the lumber purchased and stored by their unit of employment. Surely, the expectation relating to the conduct of duty personnel is that they will not commit offences while assigned to duty, nor will they take advantage of what I presumed to be facilitated access to a DND van in an attempt to move property outside CFB Petawawa. The conduct the offender engaged in is clearly outside of what is acceptable in the course of a twenty-four-hour-general-duty shift.

[17] I do acknowledge the other circumstances mentioned by the prosecutor but choose to qualify them as part of the offence itself as opposed to aggravating circumstances which are, strictly speaking, circumstances which increase an otherwise appropriate sentence, as provided for at paragraph 203.3(a) of the *NDA*. For instance, the fact that some planning was required to obtain a DND van suitable to carry the lumber to be stolen is not sufficiently elaborate to be aggravating. However, it is a relevant circumstance of the offence which reveals that the offence is not a result of impulsive behaviour, which could have been a mitigating factor.

Mitigating factors

[18] That said, the Court acknowledges the following mitigating factors:

(a) first, Corporal Farrah's guilty plea today, which avoided the expense and energy of running a trial and demonstrates that he is taking full responsibility for his actions in this public trial in the presence of members of his former unit and of members of the broader military community;

(b) second, the fact that Corporal Farrah's conduct sheet does not include similar offences of a criminal nature, hence that he must be considered as a first-time offender;

(c) third, the conduct of Corporal Farrah following the offence, admitting his error to Petty Officer, 2nd Class Masciotra at the scene and reporting immediately to 2MP Regt Det Petawawa when contacted to make a declaration in which he confessed his involvement at the earliest possibility; and

(d) the past conduct and satisfactory service of Corporal Farrah prior to his release, showing that he has strong potential for rehabilitation and deserving, at his young age, of a sentence which will have minimal consequences for his future success as a citizen.

Objectives of sentencing to be emphasized in this case

[22] The circumstances of this case, revealing an element of breach of trust in the course of employment, require that the focus be placed on the objectives of denunciation and deterrence in sentencing the offender. Specifically, the sentence proposed must be sufficient not only to deter Corporal Farrah from reoffending, but must also denounce his conduct in the community and act as a deterrent to others who may be tempted to engage in the same type of unacceptable behaviour. In short, it must show that misbehaviour has consequences, especially in cases of theft or fraud in relation to public property.

[23] That being mentioned, I agree with defence counsel that rehabilitation is important and that the need for specific deterrence aimed at Corporal Farrah must not compromise the efforts he has made to rehabilitate himself, especially as he transitions to civilian world. That is the case even if the sentence will have consequences on him as he will be soon looking for civilian employment with a criminal record. It is true that the records should have the effect of meeting the objective of specific deterrence.

Assessing the joint submission

[24] The submissions from counsel made a few references to previous court martial cases, especially the cases of *R. v. Corporal Q.A. Stevenson*, 2005 CM 13, and *R. v. Corporal D.T. Keller*, 2005 CM 07, involving a common stealing enterprise by two members tried separately. While acknowledging that the unique circumstances of this case make it difficult to find a precedent exactly on point, it remains that parity is an important principle of sentencing which cannot be ignored, especially in cases of joint offenders, even when a joint submission is made to the Court. It is so simply because it is often in comparing with sentences imposed for similar crimes that the public gets a first impression about the reasonableness of a sentence jointly proposed by counsel.

[25] This is particularly true here given that there were three parties to the offence. I am informed by the prosecutor that Corporal Walker was tried by summary trial and sentenced to a reprimand and a fine of $2,000. As for Corporal Moser, he is to be tried by court martial in July.

[26] The case law discussed with counsel and the Court's experience demonstrate that the vast majority of sentences for stealing involved a reprimand or severe reprimand combined with a fine. It is the case for the sentencing decision I rendered last fall in *R. v. Anderson*, 2021 CM 4009. Suffice to say that in respect to the principle of parity, the joint submission of counsel is within a range of similar sentences for similar offences, including in comparison with the sentence imposed on Corporal Walker, a co-offender.

[27] In any event, the issue for me to assess as military judge is not whether I like the sentence being jointly proposed or whether I would have come up with something better. As stated earlier, I may depart from the joint submission of counsel only if I consider that the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

[28] In determining whether that is the case, I must ask myself whether the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system. In this case, I do believe that a reasonable person aware of the circumstances would expect the offender to receive a sentence which expresses disapprobation for the failure in discipline involved and have a direct impact on the offender. The sentence being proposed, combining the punishments of a reprimand with a fine, is aligned with these expectations.

[29] As recognized by the SCC, trial judges must refrain from tinkering with joint submissions if their benefit can be maximized. Prosecution and defence counsel are well placed to negotiate and arrive at joint submissions that reflect the interests of both

the public and the accused. They are highly knowledgeable about the circumstances of the offender and the offence, as they are with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command and victims. He or she is aware of the needs of the military and civilian communities, and is charged with representing the community's interest in seeing that justice be done. Defence counsel is required to act in the accused's best interests, including ensuring that the accused's plea is voluntary and informed. Both counsel are bound professionally and ethically not to mislead the Court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest, as they have demonstrated in this case.

[30] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the aggravating and mitigating factors mentioned previously, I cannot conclude that the sentence being jointly proposed would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. It must, therefore, be accepted.

[31] Corporal Farrah, I accept the submission of your counsel essentially to the effect that your conduct of April 2021 reveals a lack of maturity and judgement on your part. I also agree that you have taken responsibility for your actions and shown remorse. I hope you recognize that participating in stealing lumber was unacceptable, not only in the military but also in any civilian occupation. I hope that you have learned a lesson and that you are determined to do much better and move on without reoffending.

FOR THESE REASONS, THE COURT:

[31] **SENTENCES** Corporal Farrah to a reprimand and a fine of $1,800 payable no later than before close of business on Tuesday, 19 April 2022, to the appropriate authority on CFB Petawawa.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois

Mr P. Ketcheson, Crystal Barristers, 331 Somerset Street West, Ottawa, Ontario, Counsel for Corporal D.P. Farrah