

Citation: *R. v. Corporal S.L. Rose*, 2008 CM 1022

Docket: 200848

**STANDING COURT MARTIAL
CANADA
ALBERTA
DEBNEY ARMOURY, EDMONTON**

Date: 24 November 2008

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**CORPORAL S.L. ROSE
(Offender)**

SENTENCE

(Rendered Orally)

[1] Corporal Rose, the court, having accepted and recorded your admission of guilt in respect of the first charge punishable under section 114 of the *National Defence Act (NDA)*, mainly the offence of stealing, the court now finds you guilty of this charge.

[2] Counsel for the prosecution and defence have come up with a joint submission on sentence. They recommend that the court sentence you to imprisonment for a period of seven days accompanied by a fine in the amount of \$1,000. They also recommend that the court suspend the carrying into effect of the imprisonment. Although this court is not bound by the joint recommendation, it is generally accepted that a joint submission should be departed from only where to accept it would be contrary to public interest and would bring the administration of justice into disrepute.

[3] At the end of counsel's submissions on sentencing, the court asked counsel for further submissions on the propriety of suspending the imprisonment based on the evidence before the court at the time. The court had already recognized that the part of the recommendation dealing with incarceration in the form of imprisonment for a period of seven days was within the range of possible sentences in this type of case. As a result, the court accepted to reopen the case and recall Corporal Rose's treating psychiatrist, Dr Elwell. Dr Elwell has testified that incarceration, even in its shorter expression, would have significant negative impact on the offender because of her fragile state in dealing with severe depression and borderline personality disorder.

According to him, a custodial sentence would not only create potential adverse effects in the form of severe anxiety and panic attacks, but it would also definitely cause a significant step back in her treatment for her personality disorder and her addictions.

[4] However, the court must determine if this sentence is also the minimum necessary intervention that is adequate in the particular circumstances. In reviewing the joint submission on sentence, the court has considered the totality of the circumstances surrounding the commission of the offence that were presented during the sentencing procedure, as well as the extensive documentary evidence filed with the court. The court considered also the testimonies of Mr Denis Strilchuck, the Deputy Base Addiction Counselor, Dr Leo Elwell, the offender's treating psychiatrist, as well as Corporal Rose's testimony. Finally, the court listened to counsel's submissions, and the court reviewed any direct and indirect consequences that the finding and the sentence will have on Corporal Rose.

[5] Based on the Statement of Circumstances filed by the prosecution at Exhibit 7, and the Agreed Statement of Facts at Exhibit 13, this case reveals the following:

Between 1 March 2007 and 31 July 2007 Corporal Rose was the canteen representative of the 742 Signals Squadron canteen fund referred to as Club 742. She was responsible for the daily operations of the fund, including stocking the canteen, collecting chits and cash, and payment of incoming bills.

On 17 August 2007 she was asked by the 742 Signals Squadron social committee president if she was aware that certain bills had not been paid. She asked to talk to him in private and confessed that she had been stealing from the fund to support her gambling addiction. She deprived the fund, property of her coworkers, of an amount of approximately \$2,338. She immediately confessed to police authorities and informed of her intent to admit her guilt at the earliest opportunity. Her testimony indicates clearly that she is remorseful, ashamed, and she apologized sincerely to the court, but mostly to her coworkers for breaching their trust. She also promised that she will reimburse the social fund once she is discharged from bankruptcy. She admits full responsibility.

Mr Strilchuck testified that she suffers from a severe gambling addiction, but Dr Elwell testified that her pathological condition was more complex and severe. Her gambling addiction existed at least for the last six years, however, Dr Elwell testified that she has suffered for at least ten years from mid to severe mental health problems. She also suffers from alcohol abuse. Finally, she suffers from borderline personality disorder.

Although she had attended at a gambling dependancy treatment program of 21 days in September 2007, this treatment did not address her other mental health issues.

In September 2008 she declared bankruptcy and relapsed with both gambling and alcohol abuse at a local casino. Several days later she received a notice of intent to recommend release for misuse of alcohol in relation to her last incident.

On 25 September she was admitted to a hospital after a suicide attempt in the nature of a medication overdose, which was described by Dr Elwell as a cry for help. Today she is moderately medicated for her mental health condition and followed up by medical staff and counsellors.

[6] In *R. v. Généreux*,¹ the Supreme Court of Canada held that "to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." The Supreme Court said that "in the particular context of military discipline, breaches of discipline must be dealt with speedily and frequently punished more severely than would be the case if a civilian had engaged in such conduct." But even those words, when elevated at the level of principles, cannot amount to imply or to grant to military tribunals the authority to impose a sentence that would be composed of a punishment or punishments that would go beyond what is required in the circumstances of a case. In other words, any sentence imposed by the court, whether civilian or military, must always represent the minimum action required.

[7] It is recognized that imposing an appropriate sentence on an accused for the wrongful acts that he or she has committed, and in relation to offences for which he is guilty, must be in-line with certain objectives having regard to the principles applicable to sentencing. It's also recognized that those principles will vary from case to case, and the weight assigned to them must be adapted to the circumstances of the case and to the individual offender.

[8] In order to contribute to one of the essential objectives of military discipline, these objectives and principles may be stated as follows: First, the protection of the public, which includes the Canadian Forces; second, the punishment and denunciation of the offender; third, the deterrent effect on the offender and anyone else from committing the same offence; fourth, the rehabilitation and reform of the offender; fifth, the proportionality and seriousness of the offence and the degree of responsibility of the offender; further, the imposition of a custodial sentence, but only where the court is satisfied that it is necessary and the punishment of last resort; and, finally, the court will

¹ [1992] 1 S.C.R. 259.

take into account the aggravating and mitigating circumstances relating to the offender's situation.

[9] In this case, the court is satisfied that this type of offence certainly merits that the principles of denunciation and general deterrence be put forward, and this is such when the offence is committed by a person who betrays their coworkers and the trust that they invested in him or her. And, in this particular case, when the funds had been raised for social activities in order to build morale, cohesiveness, and, I would add, *esprit de corps*. However, as serious as this may be, this case does not involve fraud or theft against the employer like in *Poirier, Roche, or Anderson*.² However, again, stealing from your comrades is one of the most serious offences in a military context. If you cannot trust your brothers- and sisters-in-arms, who can you trust?

[10] In this case the following factors aggravate the sentence:

First, the nature of the offence and maximum sentence provided by parliament. The offence of stealing under the *NDA* is subject to a maximum sentence of imprisonment for a period of 14 years where the person was entrusted with the property stolen. Objectively, it is a very serious offence.

Second, the nature and the scope of the stealing. Over a period of five months the offender took over \$2300 from the social fund that she had voluntarily accepted to control on of behalf and for the benefit of her colleagues.

Third, the degree of authority and trust characterizing the relationship between the offender and the victims. Here the abuse of the trust is a particularly aggravating factor when the court considers that you stole from your colleagues.

And, fourth, the personal gain realized by the offender. You used the funds to feed your gambling addiction. Having an addiction, be it a gambling addiction or any other addiction, is not a license to go and steal from your comrades.

[11] The court considers that the following factors mitigate the sentence:

² *R. v. Poirier*, 2007 CM 1023; *R. c. Roche*, 2008 CM 1001; *R. v. Anderson*, 2008 CM 1005.

The offender's conduct after the commission of the offence. The court acknowledges your admission of guilt before the court and the remorse that you have expressed including your public apology for the harm caused to the victims of your theft. The court believes that this is a genuine expression of remorse.

Second, your criminal and disciplinary record, or lack thereof. Although you have a conduct sheet for an alcohol misuse incident, it doesn't serve here to aggravate the sentence, but it explains and provides context for your recent relapses in September 2008. Otherwise you would have no prior criminal or disciplinary record.

And finally, your personal and economic situation. Because of your chronic gambling you recently declared bankruptcy for which you have not been yet discharged. But this is only a small aspect of your situation. You have, according to your physician, severe mental health issues and, according to him, you still have a long way to go before recovery. As for your current mental health, it is very fragile; however, you are making small progress and this will be a long process. It's also very likely, based on the evidence before the court, that you will be released from the Canadian Forces for your alcohol abuse and other behaviours.

[12] Suffering from a serious gambling addiction or problem cannot mitigate the sentence itself, although it does diminish Corporal Rose's degree of responsibility as it was stated by her counsel. Corporal Rose has undertaken to repay the full amount of the theft. Complete restitution prior to trial would have had more weight, but it is a positive step nonetheless. In *Roche*,³ the court noted that in the *Criminal Code* "restitution is part of the sentencing process and may influence the quantum of the period of incarceration. Any civil court with criminal jurisdiction may order that the offender make restitution under section 738 of the *Criminal Code*. This provision is part of the sentencing regime under the *Criminal Code*." Again, "it is another major shortcoming of the court martial's powers that it cannot issue such an order in dealing with similar offences."

[13] In *Roche*, the court stated at paragraph 21:

[TRANSLATION] The Court paid particular attention to defence counsel's recommendation to consider punishment that does not involve incarceration in the form of imprisonment, which is generally a punishment of last resort. However, recent legislation and case law do not support such an approach in cases of fraud committed against an employer by an employee abusing a position of trust

³ *Roche*, Ibid

directly related to the management or supervision of the money or material fraudulently taken. A custodial sentence is required to promote denunciation and deterrence.

This approach is helpful in cases where the theft or fraud is committed against comrades or social or benevolent funds that are administered by the offender in breach of trust.

[14] Considering the evidence before the court, however, and the guiding principles of general deterrence and denunciation, I cannot agree with the approach proposed by counsel in their joint submission on sentence. I think such a sentence would not serve the interest of justice. This case has more resemblance to that of *Corporal Gamache*⁴ who was a volunteer at his mess and responsible for the inventory and merchandise at the regimental mess. Although, Gamache was a Reservist and inexperienced in the Canadian Forces, the behaviour was of the same nature, stealing from your comrades and breaching their trust.

[15] Corporal Rose, in these circumstances I do not believe that the punishment of last resort is warranted in the circumstances in order to ensure general deterrence and denunciation when not interfering with your rehabilitation, therefore, the issue of suspension does not require examination.

[14] The court considers that the maintenance of discipline and the public interest can be achieved with another combination of punishments that will attract very serious consequences, especially if you are released from the Canadian Forces. Therefore, the court sentences you to the reduction in rank to the rank of private with an accompanying fine of \$750. The fine will have to be paid over the next six months at a rate of \$125 a month. And, of course, should you be released from the Canadian Forces prior to the full payment of the fine, the remaining of that fine will be payable immediately prior to your effective date of release.

Colonel M. Dutil, C.M.J.

COUNSEL

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⁴R. c. *Gamache*, 2002 CM 72