COURT MARTIAL

Citation: *R v Cyr*, 2012 CM 3015

Date: 20120921
Docket: 201213

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.S.F. Cyr, Offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Rendered orally)

[1] On 20 September 2012, this Standing Court Martial found Sergeant Cyr guilty of stealing contrary to section 114 of the *National Defence Act*, wilfully making a false statement in a document made by him and required for official purposes contrary to paragraph 125(*a*) of the *National Defence Act*, improperly selling public property contrary to paragraph 116(*a*) of the *National Defence Act*, and, lastly, an offence under section 130 of the *National Defence Act* for possessing a prohibited device contrary to subsection 92(2) of the *Criminal Code*.

[2] As the military judge presiding at this Standing Court Martial, it is my duty to determine the sentence.

[3] In the special 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, to promote good conduct. It is through discipline that an armed force ensures that its members perform their missions successfully, confidently and reliably. 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.

[4] Sentencing is one of the most difficult tasks for a judge. In *R v Généreux*, [1992] 1 SCR 259, the Supreme Court of Canada held that "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently". It also emphasized that, in the particular context of military justice, "[b]reaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct". However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of a case. In other words, any sentence imposed by a court, be it civilian or military, 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] In this case, counsel for the prosecution has suggested that the Court impose a punishment of reduction in rank to corporal and a fine in the amount of $5,000. Defence counsel representing Sergeant Cyr, on the other hand, recommends that the Court impose a severe reprimand or a reprimand and a fine in the amount of $5,000.

[6] The fundamental purpose of sentencing in a Court Martial is to ensure respect for the law and the maintenance of discipline by imposing punishments that have 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 the offender.

[7] When imposing sentences, a military court may 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 degree of 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) the Court has a duty, before considering depriving an offender of liberty, to consider whether 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; and

(e) last, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] The Court is of the opinion that sentencing in this case should focus on the objectives of denunciation of unlawful conduct and general deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from re-offending, but also others in similar situations from engaging in the same prohibited conduct.

[9] In *R v St. Jean*, CMAC 2000 no 2, Justice Létourneau of the Court Martial Appeal Court highlighted the impact of fraudulent acts within public organizations such as the Canadian Forces. At paragraph 22, he stated the following:

> 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.

Although this passage refers to the offence of fraud, I believe it is equally relevant to the offence of stealing, as both involve issues of breach of trust.

[10] Following two searches conducted by the Military Police on 29 and 30 October 2010, in his absence because he was outside of the country, Sergeant Cyr was arrested by the Military Police close to his home on 1 November 2010.

[11] The Military Police interrogated Sergeant Cyr. In response to these questions, Sergeant Cyr admitted that, between 2005 and 2010, he had stolen most of the objects mentioned by the investigator in the interview. He also stated that he had pawned the DeWalt tool kit and that he believed that the kit had been sold, given that he had not returned to the pawn shop to pick it up. He admitted to the investigator that he had made a false statement to his unit in a memorandum dated 12 October 2010, regarding the loss of this equipment. He also stated that he and his spouse had used marihuana.

[12] Sergeant Cyr was detained from about 1700 hrs on 1 November 2010 and was released early in the afternoon of 3 November. During his detention, he was alone in his cell and under constant supervision.

[13] Early in the afternoon of 3 November, the Military Police interrogated Sergeant Cyr a second time. He was questioned about certain other items of which he had declared himself to be the legitimate owner, the DeWalt tool kit and various other transactions he had allegedly carried out at the same pawn shop. He also admitted who had supplied him with the marihuana.

[14] At the end of the interview, he was released. He then went home, where he willingly showed the Military Police officers the items that were Canadian military property. He then returned to the Canadian Forces Base Kingston with some members of his unit.

[15] In arriving at what it considers to be a fair and appropriate sentence, the Court has therefore considered the aggravating and mitigating factors presented by the facts of this case.

[16] The Court finds the following factors to be aggravating:

(a) First, the objective seriousness of the offences. You have been found guilty of four military offences, including one under section 114 of the *National Defence Act* that is punishable by a term of imprisonment not exceeding seven years or a lesser punishment, another under paragraph 125(*a*) of the *National Defence Act* that is punishable by a term of imprisonment not exceeding three years or a lesser punishment, a third under paragraph 116(*a*) of the *National Defence Act* that is punishable by a term of imprisonment for less than two years or a lesser punishment, and finally, another under section 130 of the *National Defence Act* for possessing a prohibited device contrary to subsection 92(2) of the *Criminal Code* that is punishable by a term of imprisonment not exceeding ten years or a lesser punishment;

(b) In terms of subjective seriousness, I have gleaned four points from the evidence presented to me:

i. First, there is a breach of trust. Sergeant Cyr, first and foremost you breached the trust of your unit. By entrusting you with public property, they placed you in a position that required unquestionable integrity; you were entrusted with the property of the unit used for operations, according to the testimony of Captain Durepos. There is also the more general breach with respect to the Canadian Forces as a whole, who placed their trust in you, as in the Canadian Forces it is considered a privilege to wear a uniform. There is also your rank. The ranks you held at the time, which I understand were Master Corporal and Sergeant, mean something in our organization. It appears that you have leadership responsibilities, and the example that you have set in that respect is disappointing. You were supposed to show integrity and set an example for your subordinates, and I understand from the evidence that you would occasionally take it upon yourself to give certain items to certain individuals because of the work they had done or as a token of appreciation for their efforts toward the accomplishment of a task or a mission. That was not the proper example to be setting. There is also your position: you were responsible for the Quartermaster for a long period. There were people relying on you to ensure that they had everything they needed to carry out their tasks or missions, and in that respect, you betrayed their trust.

ii. The second point relates to the objects stolen. There is the nature, value and quantity of the items you stole. There was quite a variety, but there was some computing equipment, as well as items of a somewhat different nature: an axe, shovels, modular tents, or rather modular tent structures. It has been demonstrated to the Court that the cumulative value of all of these items is approximately $4,500. That is a significant amount when considered as a whole.

iii. There was premeditation. This is the third factor or point that I consider to be an aggravating factor. Premeditation implies some sort of planning. This is not something that you did spontaneously, and you were not forced by circumstances into situations in which you had to decide quickly whether something was or was not the right thing to do. On the contrary, when one looks at the period of time during which the acts were committed, one sees that real planning was involved. I must also consider the fact that when you pawned public property belonging to the Canadian Forces, knowing that you would not be able to recover it, you deliberately planned to make a statement orally and in writing that you knew to be completely false. This relates to the issues of trust and integrity, but also to the issue of premeditation.

There is the repetition; this occurred with several items. It is apparent that this was not something you did only once, but several times. With respect to premeditation, it was quite apparent that you had access to various support resources, resources to provide you with psychological assistance, and that that you did not take advantage of this. Without necessarily criticizing you for failing to use those resources at the time to try to treat or solve your problem, the fact remains that it has been demonstrated to the Court that following your 2004 diagnosis and the fact that you had access to people who could help you deal with your problem, absolutely nothing was done; on the contrary, it happened in parallel, which is to say that the stealing was ongoing while, on the other hand, you were probably meeting people from time to time to help you solve or improve your issues relating to the post-traumatic stress syndrome and its aftermath.

iv. The fourth and final factor—the fourth and final point I am taking into consideration—is recklessness. You are aware that with respect to bringing ammunition magazines home and keeping them, from a security perspective, there is a reason, as you and most military members probably know, that the law prohibits such objects from being held without authorization, the fact that they were entrusted to you as part of your military duties and that you brought them home to keep them for one reason or another with no intention of returning them, you were quite aware of the security issues, and by keeping them in your home, you demonstrated a certain recklessness. You also showed recklessness in pawning the DeWalt equipment. The equipment, the tools that were—that you took from the Quartermaster, you were not concerned about returning them, you were concerned with covering it up as fast as possible, solving one problem by creating another. Nor did you necessarily concern yourself with the unit's operations or the impact of your conduct on its operations, or at least they appeared to be very low on your list of priorities. The evidence seems to show that, whether with respect to yourself or your career at the time, that is, while you were committing the offences, you did not really seem to care what would happen to you personally or professionally.

[17] However, the Court also notes certain mitigating factors:

(a) First, and I am addressing this point first because I attribute a certain amount of importance to it, there is your cooperation. You have heard me talk about this over the past two days when this factor was raised by counsel. Indeed, I must note that even though you did not plead guilty,

and nobody is holding that against you, you nevertheless admitted certain facts and, two years ago, when faced with a *fait accompli*, as counsel for the prosecution so aptly put it, you collaborated. You made no attempt to hide, and so the Court must consider this a mitigating factor.

(b) You also have no criminal record and no entries in your conduct sheet indicating that you have committed offences of the same nature or similar offences.

(c) I also note, as a mitigating factor, the lack of any real consequences. The Court has not seen any evidence of impact on the unit's operations, despite the fact that some of the equipment was missing. All of the property was recovered except for the DeWalt tool kit. That makes this a mitigating factor, as the consequences in the form of losses are limited.

(d) There is also your professional performance, particularly over the past two years, and I must also point out that if I rely on Captain Durepos's testimony, he considered you trustworthy, so you must have at least been performing normally if he trusted you. I also understand that Major Jones watched you evolve over a period that was, in principle, difficult for you, as these charges were pending, and you demonstrated, I will use the words that the psychiatrist used in his letter, [TRANSLATION] "demonstrated a great deal of resilience", which means that, despite the adversity you were experiencing in your professional and personal lives, you were able to deal with all of the negative things that were occurring, and this is a mitigating factor to which the Court attributes some importance.

(e) There is also your age. At this stage, you have acquired considerable knowledge and experience, and you still have something to contribute to the Canadian Forces and to society in general.

(f) I would like to return to the subject of your psychological state. I alluded to it in the context of the aggravating factors, but it must also be considered a mitigating factor. What happened personally and psychologically can be explained to a certain extent. Without excusing everything that happened, the fact remains that it is a problem that, as Major Thomas said, you did not ask for, that was aggravated by your condition, that is to say symptoms related to—post-traumatic stress symptoms, and I must note that, particularly since the moment you were confronted by the Military Police about what was going on, you made a commitment to deal with the problem, and you have attempted to do so, and so far you seem to have succeeded. In fact, you regained control over yourself, but it took the police to make you face up to your problem.

(g) I must also take into consideration that your actions have influenced your employability over the past two years. I understand that because you lacked the necessary security clearance, even if your commanding officer had wanted to employ you in certain positions in light of your experience, training and rank, he could not do so, since your security clearance had been revoked as a result of what had happened and probably because of the charges; I do not have complete evidence on this point, but the Court may infer this, so there has nevertheless been a consequence, in that you have not been employed to your full capacity in one position or another simply because of what happened.

(h) Another factor that the Court must take into account is the fact that you have had to face this Court Martial. The Court Martial is public and accessible to anybody who is interested in the case. It is a part of military justice. It is clear that this has a deterrent effect, both on you and on anybody in attendance or who is aware of what is happening, and I must take that into account.

(i) One thing that the Court notes is that as a consequence of the fact that you have been convicted by this Court, you will have a criminal record. This means that you will have to go through the process of applying for a pardon, as required by law, once the sentence has been fully served.

[18] The Court must take another factor into account, namely, parity in sentencing. I believe that the relevant fact is that considering the role that a person such as yourself has played in this case, and also taking into account your rank and your duties at the time these incidents took place, you are liable to a sentence ranging from a reprimand and a substantial fine to a reduction in rank and a substantial fine. In the most serious cases, a sentence of imprisonment may be considered.

[19] I agree with the suggestion of counsel for both parties that imprisonment would not be appropriate in the circumstances. This is a measure of last resort, and the objectives, principles and circumstances do not at all weigh in favour of such a sentence.

[20] As for a reduction in rank, I am of the view that, in the circumstances, such a sentence would adequately reflect the objective of deterrence. Taking into consideration the aggravating and mitigating factors, the objective pursued and the applicable principles, I conclude that this sentence is the minimum sentence that must be imposed in the circumstances.

[21] Even if the Court reduces your rank today, it is evident that you will be able to continue making the same efforts that you have been making, both personally and professionally, to earn back the trust of your peers, your superiors, your entourage and even yourself, by making up for lost ground. The road may well be a long one, but you

will have the opportunity to prove to everybody just how sincere you are in your rehabilitation efforts.

[22] Collaterally, this sentence will send a message to anyone in a similar situation not to commit the same illegal acts.

[23] As for accompanying this punishment with a fine, the Court is of the view that this would be appropriate in the circumstances of this case. Moreover, counsel, in their respective submissions to the Court, agreed that it would be appropriate in light of the objectives of denunciation and general deterrence.

[24] The amount of the fine remains to be determined. On this point, I believe that because of the mitigating factors submitted to this Court, it would be appropriate to consider something less than the amount proposed by the two parties. In my opinion, a fine of $2,000 would fully meet our objectives in the circumstances of this case.

[25] I have also considered whether this is an appropriate case for a weapons prohibition order, as stipulated under section 147.1 of the *National Defence Act*. In my view, such an order is neither desirable nor necessary to protect the security of others or of the offender in the circumstances of this trial, particularly in light of the applicable criteria listed in section 109 of the *Criminal Code* in the context of an offence of possession of a prohibited device, as he did not hold any kind of authorization licence. Even though the above offence carries a 10-year maximum sentence of imprisonment, I am of the opinion that in the commission of this offence, violence against a person was not used, threatened or attempted and I will not make an order to that effect.

[26] A just and equitable sentence should take into account the seriousness of the offence and the offender's degree of responsibility in the particular circumstances of the case. Consequently, the Court finds that the imposition of a reduction in rank to corporal and a fine of $2,000 would be consistent with this principle in light of all the circumstances and the aggravating and mitigating factors identified by this Court. The Court sees this as the minimum punishment in the circumstances.

[27] Sergeant Cyr, please stand up.

FOR THESE REASONS, THE COURT:

[28] **SENTENCES** Sergeant Cyr to a reduction in rank to corporal and a $2,000 fine. The fine is to be paid in monthly instalments of $100 each commencing on 1 October 2012 and continuing for the following 19 months on the 1st of each month. If you are released from the Canadian Forces for any reason before the fine is paid in full, the then-outstanding unpaid amount is due and payable prior to your release.

Counsel:

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