Citation: *R. v. Master Corporal C. Poirier*, 2007 CM 1023

Docket: 200712

STANDING COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE

Date: 21 September 2007

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

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL C. POIRIER
(Offender)

SENTENCE
(Rendered orally)

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[1] Master Corporal Poirier, having accepted and recorded a plea of guilty in respect of charges 1, 3, 4, 5, and 6, this court finds you guilty of these charges. The first and third charges are punishable under section 130 of the *National Defence Act,* contrary to section 380 of the *Criminal Code* for the offence of fraud, where the fourth, fifth and sixth charges refer to violations of paragraph 117(*f*) of the *National Defence Act* for acts of a fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act*. The combined amount of money obtained by fraud as it relates to the first and third charge is $31,109.15, whereas the money obtained by means of other fraudulent acts with regard to the fourth, fifth, and sixth charges represents $2,838.60.

[2] It has been long recognized that the purpose of a separate system of military justice or tribunals is to allow the Armed Forces to deal with matters that pertain directly to discipline, efficiency, and morale of the military. It is also recognized that the military context may, in appropriate circumstances, justify and, at times, dictate a sentence that is more severe than if committed in a purely civilian context in order to promote military objectives. That being said, the punishment imposed by any tribunal, military or civil, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[3] As your counsel stated, sentencing is an individualized process. Moreover, I would add that cases of fraud committed by persons in a position of trust in the context of the Armed Forces should not be punished more severely than persons in similar positions in government unless there is clear and compelling evidence that the misconduct affected the efficiency, operational readiness, cohesiveness, and morale of the Canadian Forces.

[4] To be more precise, if these offences are committed in civilian-like circumstances, they should not be punished more severely. The mere fact that a person is charged and dealt with under the Code of Service Discipline does not suffice to give it a military context. For example, a fraud committed by a person in a specific position of trust in the Canadian Forces should not be treated more severely than a person occupying a similar position at Treasury Board prosecuted for similar offences before the ordinary criminal courts.

[5] In determining the sentence, the court has considered the circumstances surrounding the commission of the offences as revealed by the Statement of Circumstances, the evidence heard during the sentencing hearing; namely, the documentary evidence provided to the court, as well as the testimonies of Lieutenant-Colonel Hind, Master Warrant Officer Ballermann, and Master Corporal Poirier. This court has examined this evidence in light of the applicable principles of sentencing, including those set out in sections 380.1, 718, 718.1, and 718.2 of the *Criminal Code*, when they are not incompatible with the sentencing regime provided under the *National Defence Act*. The court has also considered the representations made by counsel, including case law provided to the court.

[6] Where a court must sentence an offender for offences that he has committed, certain objectives must be pursued in light of the applicable sentencing principles. It is recognized that these principles and objectives will slightly vary from case to case, but they must alway be adapted to the circumstances and to the offender. In order to contribute to military disciple, the sentencing principles and objectives could be listed as: Firstly, the protection of the public, and the public includes the Canadian Forces; secondly, the punishment and the denunciation of the unlawful conduct; thirdly, the deterrent effect on the offender and other persons from committing similar offences; fourthly, the separation of offenders from society, including from members of the Canadian Forces, where necessary; and fifthly, the rehabilitation of offenders; sixthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender; seventhly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; eighthly, an offender should not be deprived of liberty if less restrictive punishment, or combination of punishments, may be appropriate in the circumstances; and, finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

[7] As stated by counsel for the prosecution, in *R. v. St-Jean*, a decision of the Court Martial Appeal Court, reported as [2000] C.M.A.J. No. 2, Létourneau, J.A., speaking for the court, did put in perspective the impact of fraudulent acts in a public organization such as the Canadian Forces. Counsel for the prosecution read Justice Létourneau's comments at paragraph 22:

> 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.

[8] The principles set out by the Court Martial Appeal Court in *St-Jean*, as well as in the decisions of *Lévesque*, *Leegarden,* and *Vanier*, preceded the amendment to section 380 of the *Criminal Code* in 2004, where Parliament increased the maximum punishment for the offence of fraud exceeding $5,000 from 10 to 14 years. As recognized in *St-Jean*, the principle of general deterrence is the primary aspect that courts shall emphasize in fraud cases. This is even more so today. The principle of general deterrence must, however, be weighed with every other sentencing principle and objective.

[9] When dealing with offences of employee fraud or substantial commercial fraud, recent jurisprudence by civilian courts and courts of appeal provide useful guidance. In *R. v. Stymiest*, (2006) 70 W.C.B. (2d) 66, a judgement from the New Brunswick Court of Queen's Bench, McNally J. enunciated the relative importance of the sentencing principles in fraud related offences and the emphasis that should be placed on one or more principles when a court must sentence an offender in employee fraud or substantial commercial fraud at paragraph 53 and 54:

[53] The New Brunswick Court of Appeal recently confirmed its view that absent exceptional circumstances, the principles of denunciation and general deterrence trump considerations of an accused's first offender status and positive rehabilitation prospects, generally warranting a sentence of incarceration when dealing with offences of employee fraud or substantial commercial fraud – see *R. v. Kuriya* [2003] N.B.J. No. 336 and *R. v. Steeves* [2005] N.B.J. No. 150.

[54] In *R. v. Bogart* (2002), 167 C.C.C. (3d) 390 (Ont. C.A.) the accused was a physician who over a period of seven years submitted false billings to the Ontario Health Insurance Plan totaling nearly $1,000,000.00. At the time of sentencing, the accused continued to practice medicine and continued to treat a large group of devoted patients, many of whom were HIV-positive or had AIDS. After a preliminary inquiry, he pleaded guilty to fraud over $5,000.00 and received a conditional sentence of two years less a day and three years' probation. In granting the Crown's appeal of the conditional sentence and substituting a jail sentence of eighteen months, Laskin, J.A. writing for the Ontario Court of Appeal stated:

> Two aspects of the need to give effect to general deterrence come into play in this case. First, general deterrence is the most important sentencing principle in major frauds. Second, when general deterrence is "particularly pressing", as it is here, the preferable sanction is incarceration.
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> This court has affirmed that in cases of large-scale fraud committed by a person in a position of trust, the most important sentencing principle is general deterrence. Mitigating factors and even rehabilitation become secondary. In *R. v. Bertram and Wood* (1990), 40 O.A.C. 317, this court observed that most major frauds are committed – as this one was – by well educated persons of previous good character. Thus the court held, at page 319. The sentences in such cases are not really concerned with rehabilitation. Instead, they are concerned with general deterrence and with warning such persons that substantial penitentiary sentences will follow this type of crime, to say nothing of the serious disgrace to them and everyone connected with them and their probable financial ruin. In *R. v. Gray (L.V.)* 1995 CanLII 18 (ON C.A.), (1995), 76 O.A.C. 387 at 398-399, our court again stressed the need for general deterrence in fraud cases:…there are a few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from sentences given to others.

[10] In their submissions, both counsel stressed the importance of the principle of rehabilitation in this matter in order to allow Master Corporal Poirier to pursue a career in the Canadian Forces as she could still be gainfully employable, provided that she is not put in a position of trust with regard to public funds, therefore avoiding potential temptation, and employed to fulfil administrative duties as opposed to financial duties. Both Lieutenant-Colonel Hind and Master Warrant Officer Ballermann testified to her potential future employment in the Canadian Forces. However, I agree with the proposition that absent exceptional circumstances, the principles of denunciation and general deterrence trump considerations of an accused's first offender status and positive rehabilitation prospects. In cases of significant fraud such as this one, when committed by a person in a position of trust, such as a Resource Management Support (RMS) Clerk, vested with financial authority that abuses its position in order to commit the fraudulent acts, the sentence shall emphasize the need to protect the public by ensuring general deterrence, denunciation and punishment, and specific deterrence. Rehabilitation is considered to a lesser degree.

AGGRAVATING FACTORS

[11] In arriving at what the court considers to be a fair and appropriate sentence, the court has considered the following factors to aggravate the sentence:

> First, the objective gravity of this offence. A person found guilty of the offence of fraud under section 380 of the *Criminal Code* is liable to imprisonment for a maximum of 14 years. In this case, the first and third charges amount to a fraud in excess of $30,000. It is objectively a very serious offence. With regard to the other charges laid under paragraph 117(*f*) of the *National Defence Act*, the maximum punishment is much less serious; that is, imprisonment for less than two years. The court noted that these fraudulent acts referred to in the fourth, fifth and sixth charges represent less than ten per cent of the frauds related to the first and third charge.
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> Second, the position of trust that you occupied at the time. During the operative time frame from August 2004 to October 2005, you were employed as an RMS Clerk for 28 Service Battalion as the deputy chief clerk for the unit orderly room. In that capacity you were solely responsible for making requests for contingency payments for Reserve Force members in the unit. You also processed claims for unit members. While so employed, you had been provided with your own and your supervisor's user ID and password. As a result of training, experience, and responsibilities you were familiar with every procedure and program used in the Canadian Forces claim and pay systems. You used not only your knowledge and experience to commit your crimes, but, more

importantly, you used your specific position in order to fabricate, submit, and process false requests for contingency payments that were ultimately deposited in your personal bank account.

Thirdly, the frauds and other fraudulent acts were planned and deliberate. Your stratagem also took place for an extended period of time; that is, over 12 months. This shows a high level of sophistication and repetitive scheme that would not have been possible without your knowledge, experience, and position that characterizes your actions.

And fourth, the importance of the amount defrauded as it relates, mostly, to the offences that are the subject of the first and third charges; namely, $31,109.15 for which you have personally benefited.

MITIGATING FACTORS

[12] The court considers the following factors to mitigate the sentence:

The fact that you have acknowledged full responsibility for your actions by pleading guilty before this court for these offences, and I think in the context of this case it is a genuine sign of remorse.

Second, your previous unblemished record in the Canadian Forces mitigates the sentence. Your commanding officer testified to your high level of competence and dedication. Master Warrant Officer Ballermann praised your work and described it as being outstanding. You were also described as being an excellent instructor; however, Exhibit 7, which is a Personnel Evaluation Report for the period 2003 and 2004, described you as being extremely trustworthy and ethical in your work habits. The facts of this case demonstrate that you abused the trust vested in you, which is often the main characteristic of deceitful conduct in employee fraud-related activities.

Third, your financial and family situation. The evidence indicates that you are, and have been, the main provider in your household, composed of three children and a common law spouse. Your level of debt is important, but the reasons for which you contracted these debts raise some questions. Whether you wanted to buy an expensive weight-loss programme rather than relying on the programmes in place in the Canadian Forces to correct fitness or medical shortcomings is a personal decision. It may have contributed to your fraudulent acts, but this does not mitigate the sentence to the same extent that the purchase of an expensive beyond-your-budget car or vehicle does not mitigate the same

> fraudulent acts. I consider these reasons to be neutral factors and to provide context for these offences.
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> Fourth, the fact that although no restitution has been made, you signed a promissory note to reimburse the amount defrauded and tried to make arrangements in order to repay the sums of money. However, this situation does not carry the same weight as if full or partial restitution had been made prior to trial.
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> And fifth, the absence of a criminal record and conduct sheet.

[13] The increased objective seriousness for the crime of fraud further to the amendment of section 380 of the *Criminal Code* does not, in my view, require that a fraud committed by a member of the Armed Forces against his employer must be punished by a mandatory custodial sentence. As stated in *St-Jean*, every case depends on its circumstances. For example, a non-commissioned member who submits a false claim further to a posting, absent of compelling circumstances, is unlikely to be sentenced to incarceration. However, in those cases where significant amount of public funds are defrauded by a person occupying a position of trust, who uses not only its knowledge and experience, but, more importantly, its very position in order to defraud the Canadian Forces, where that person is responsible to manage the very processes used to commit the crime, the court believes that absent exceptional circumstances incarceration is warranted.

[14] Counsel for the prosecution recommends that the court sentence you to detention for a period of 30 days and reduction in rank to the rank of private. Counsel for the defence suggests that the reduction in rank would be too severe in the context of this case. As I previously mentioned, counsel for the prosecution recommended the punishment of detention in order to reflect the need for rehabilitation, and has an indication that you are still employable in the Canadian Forces. Note A to article 104.09 of the *Queen's Regulations and Orders for the Canadian Forces* provides:

> In keeping with its disciplinary nature, the punishment of detention seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society. Specialized treatment and counselling programmes to deal with drug and alcohol dependencies and similar health problems will also be made available to those service detainees who require them. Once the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career.

[15] The offence of fraud in section 380 of the *Criminal Code* must be distinguished, for example, from traditional military offences such as absence without leave, insubordination, or disgraceful conduct. The offence of fraud is not the result of a lost habit of obedience in the structured military setting that can be the subject of a sentence that would emphasize the institutional values and skills that distinguish the Canadian Forces from other members of society. That is not to say that the punishment of detention is not appropriate for certain offences that are punishable by ordinary law, including small frauds; however, the objective and subjective seriousness of the criminal conduct of Master Corporal Poirier must be reflected in a sentence that will strongly emphasize the need for general deterrence and denunciation of this type of conduct for those who occupy similar roles and responsibilities in the Canadian Forces. In the circumstances, only the imposition of a significant period of imprisonment would constitute the minimal punishment for the maintenance of discipline and serve the interests of military justice.

[16] A fair sentence in this case would normally consist of a period of imprisonment for a period of three to six months. A combination of punishments of detention accompanied with reduction in rank is simply not appropriate in the circumstances of this case. However, the representations made by counsel for the prosecution did not accurately reflect both the objective and subjective seriousness of your criminal conduct and the appropriate sentencing principles. As a result, the prosecutorial approach should benefit the offender, and I am, therefore, prepared to be extremely lenient in sentencing you. I will further indicate to whom it may concern that this sentence should not be interpreted in favour of your potential release or possible retention in the Canadian Forces. The facts and circumstances of this case, including the testimonies heard during the sentencing hearing, should be examined closely prior to any decision with regard to your future employment in the Canadian Forces.

[17] Therefore, this court sentences you to imprisonment for a period of 30 days. This sentence was passed at 5:25 p.m., on 21 September 2007.

COLONEL M. DUTIL, C.M.J.

Counsel:

Major S.A. MacLeod, Director of Military Prosecutions
Counsel for Her Majesty the Queen
Major C.E. Thomas, Directorate of Defence Counsel Services
Counsel for Master Corporal C. Poirier