



COURT MARTIAL

Citation: *R v Salera*, 2013 CM 3028

Date: 20131003

Docket: 201358

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal V. Salera, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Corporal Salera, having accepted and recorded a plea of guilty in respect of the first and only charge on the charge sheet, the court now finds you guilty of this charge. As the military judge presiding at this Standing Court Martial, it is now my duty 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] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces (see *R v Généreux* [1992] 1 SCR 259 at 293). The Supreme Court of Canada, in the same decision recognized at paragraph 31 that:

Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.

That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[4] Here, in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to imprisonment for a period of 60 days. Although this court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. "Cogent reasons" mean, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or would be contrary to the public interest (see *R v Taylor* 2008 CMAC 1 at paragraph 21).

[5] Imposing a sentence is still a difficult task for a judge. As the Supreme Court of Canada recognized in *Généreux* at page 293, in order "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 same court, in the same decision, emphasized that in the particular context of military justice, "breaches 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 the case. In other words, any sentence imposed by a court 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.

[6] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions 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 offenders.

[7] When imposing a sentence, a military court 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 it was established by the Court Martial Appeal Court of Canada and the Supreme Court of Canada decisions; and,
- (e) lastly, 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 objective of 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. The court is also of the opinion that the objective of denunciation and specific deterrence must receive some application.

[9] Here the court is dealing with the service offence of fraud. This type of offence involved some ethical principles that are very well known in the Canadian Forces, such as honesty, integrity, and loyalty. As mentioned by the prosecutor, the Court Martial Appeal Court articulated clear reasons why fraud and the impact of fraudulent acts in public organizations must be considered as something serious. As mentioned by the Court Martial Appeal Court in the decision of *R v St-Jean* [2000] C.M.A.J. No. 2, Judge Létourneau, at paragraph 22 commented in that matter:

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.

[10] Corporal Salera has been posted to VCDS OUTCAN, Coordination/Military Foreign Service section since 1 September 2009. From May to August, 2012, he was involved in processing requests for accountable advances of public funds for OUTCAN personnel. At three different occasions, he signed a request, forged the signature of his supervisor, Master Corporal Rahal, presented the request to the cashier, and he had the funds transferred in his own personal bank account. The first time, the amount was \$22,500; the second time, the amount was \$11,600; and the third time, the amount was \$8,875. There was no receipt to justify any spending on those advances.

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

- (a) The court considers as aggravating the objective seriousness of the offence. The offence you were charged with was laid in accordance with section 130 of the *National Defence Act* for fraud, contrary to section 380 of the *Criminal Code*. This type of offence is punishable by imprisonment for 14 years or to less punishment.
- (b) Secondly, the subjective seriousness of the offence, and for the court, it covers five aspects:
 - (1) The first one, and probably the most important one in such a case is the abuse of trust. You abused the confidence of your peers and that of your superiors who were confident that you were reliable in performing such a job. You were entrusted by your position to deal properly with those huge amounts of money. You also abused the confidence of the public in general, because this is public money you were dealing with.
 - (2) Secondly, there is the premeditation. It is not something that you thought about doing at the very last minute. Over a period of three months, you did, three times, the same thing, which discloses a real intent to plan and think about doing such a thing.

- (3) There is also the impact on the operations of your very small unit. As mentioned by your lawyer, it didn't have an impact on all of the Canadian Forces, and I understand also that you apologized for this, but you will understand that what you did had an impact on the morale and the ability of your peers and superiors to carry out their mission for some time, and it must be considered as an aggravating factor.
- (4) Also, there is your conduct sheet. I agree with your counsel that the annotations on your conduct sheet reflect three offences for service offences which are usually considered as pure military offences; however, it also discloses to the court that prior to the commission of this offence, you had some issues with discipline, and, as a matter of fact, the court has to consider this as an aggravating factor.
- (5) Finally, the court must consider the total amount of the fraud, which in the circumstances I would say is unusual and very high, especially considering the short period of time on which the offence was committed.

[12] So these are the factors that the court considers as aggravating. Also, there are mitigating factors that I have to consider:

- (a) Your guilty plea is a clear, genuine sign of remorse and it indicates to the court that you are sincere in your pursuit of staying a valued asset to the Canadian society and that you are taking full responsibility for what you did. I have also to consider, under the same topic, the fact that you apologized to those who you worked with and you are very sincere about the fact that you regret what you did. It is a mitigating factor.
- (b) Your age is also a mitigating factor in these circumstances. You still have a future; maybe, maybe not in the Canadian Forces. I do not know, but you have certainly a future in this society and you still have many years ahead to contribute positively to Canadian society. This court martial is not supposed to be the end of something, but it is supposed to be the start of something new for you. You are getting a lesson from this point and you may use it

and become better; just not for yourself, but for others, including your spouse.

- (c) The fact that you had to face this court martial. I do disagree with the prosecutor that being before a court martial for a military member is something part of the process. As we know, there are few courts martial, compared to summary trials in the military justice system and those who are before this court martial are here for, usually, serious matters, as the one before me. And the fact that you had to face this court martial which was announced and, as you can see, accessible to the public and took place in the presence of some of your peers has, no doubt, had a very significant deterrent effect on you, but also on others, and because it highlights this main objective I said I would keep on my mind to determine sentence, I think facing this court martial must be considered as a mitigating factor. It sends the message to others that the kind of conduct you displayed regarding fraud will not be tolerated in any way and will be dealt with accordingly.
- (d) I have also to consider the fact that you started reimbursement. I acknowledge the fact that they are small amounts, but at least it discloses the fact that you are determined to pay back what you took, one way or the other, and it is a starting point. It may take a long time and you may find other ways to reimburse the Canadian Forces and the public, but I have to consider this as a mitigating factor.

[13] Concerning the fact that this court will impose a sentence of incarceration on Corporal Salera, it has been well established in the Supreme Court of Canada's decision in *R. c. Gladue*, 1999 1 SCR 688 at paragraph 38 and 40 that incarceration should be used as a sanction of last resort. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or combination of sanctions is not appropriate for the offence and the offender. This court is of the opinion that those principles are relevant in a military justice context, taking into account the main differences between the regimes for punishments imposed by civilian tribunals sitting in criminal matters and the one set up in the *National Defence Act* for a service tribunal.

[14] This approach was confirmed by the Court Martial Appeal Court in *R. v. Baptista*, 2006 CMAC 1 at paragraphs 5 and 6 where the court also said that incarceration should be imposed as a last resort. Here, in this case, considering the nature of the offence, which is a criminal offence, per se, the circumstances it was committed, the applicable sentencing principles, the aggravating and the mitigating factors mentioned, I conclude that there is no other sanction or combination of sanctions other than incarceration that would appear as an appropriate punishment in this case.

[15] Now, what would be the appropriate type of incarceration in the circumstances? The military justice system has disciplinary tools such as detention, which seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. However, when the act as charged goes beyond the disciplinary framework and constitutes a strictly criminal activity, it is necessary to examine the offence not only in the light of the particular values and skills of members of the Canadian Forces, but also from the perspective of the exercise of concurrent criminal jurisdiction. Also, as mentioned by Judge Dutil in his decision of *R. v. Poirier*, 2007 CM 1023, at paragraph 10, a significant fraud such as this one, when it is committed by a person in a position of trust who is vested with financial authority, the sentence shall emphasize the need to protect the public by ensuring general deterrence and with a serious type of imprisonment. As mentioned in this decision by Judge Dutil, since 2004, since the amendment of the *Criminal Code*, things have changed in the sense that the maximum punishment has been raised in the provision and the approach in the last ten years has been different for this type of offence.

[16] It seems clear to this court that incarceration in the form of imprisonment is the only appropriate sanction in the circumstances and that there is no other sanction or combination of sanctions that is appropriate for the offence and the offender. As mentioned by Judge Dutil in *Poirier* at paragraph 15:

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.

[17] Then now, the question is what the duration of such a sentence of imprisonment should be to protect the public and maintain discipline. In the decision of *Poirier*, the judge found the decision lenient but accepted it, and it was 30 days' imprisonment. Some circumstances were different, but as mentioned by the defence counsel, it is the closest decision. Considering that decision, and considering the nature of the offence, the applicable sentencing principles, including sentences imposed on similar offenders for similar offences committed in similar circumstances, the aggravating and mitigating factors, I conclude that imprisonment for 60 days, as suggested by counsel, would appear as appropriate and the necessary minimum punishment in this case.

[18] You have to remember, Corporal Salera that in addition, this punishment will remain on your conduct sheet unless you get a pardon for the criminal record you already have, but it will add to the time when you will be able to get a pardon. The reality is that your conviction will carry out a consequence that is often overlooked, which is that you will now have a criminal record, and it is not insignificant.

[19] In consequence, the court will accept the joint submission made by counsel to sentence you to imprisonment for a period of 60 days, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[20] Now, the prosecutor equally requested that the court makes an order authorizing the taking of bodily samples for the purpose of forensic DNA analysis under subsection 196.14(3) of the *National Defence Act*. The court can only make such an order in the circumstances if it is satisfied that it is in the best interest of the administration of military justice to do so after taking into consideration the nature of the offence and the circumstances surrounding its commission; any previous convictions by the service tribunal or civil court; any previous finding of not responsible on account of mental disorder for a designated offence; and the impact of such an order would have on the person's privacy and security of the person and shall give reasons for the decision.

[21] This specific provision does not impose any burden on the prosecution or defence. The prosecution seeking the order must put forward sufficient information to raise the issue. The court must then be satisfied after weighing and balancing all the relevant considerations that the order should be made. Fraud is a very serious offence which may have detrimental effects on society. The circumstances surrounding the commission of the offence committed by Corporal Salera have been thoroughly described by the court and they are serious. However, the extents of the actions of Corporal Salera were limited and were based on personal circumstances that, according to my opinion, would not justify such intrusion. This situation does not correspond, in the circumstances of this case, to the important interests served by the DNA databank. It is my conclusion that these circumstances do not outweigh the public interest in favour of his privacy and security interests; therefore, the court will not make the order.

FOR THESE REASONS, THE COURT:

[22] **FINDS** you guilty of an offence punishable under section 130 of the *National Defence Act* for fraud, contrary to section 380 of the *Criminal Code*.

[23] **SENTENCES** you to imprisonment for a term of 60 days. Your sentence will be served at the Superintendent, Ottawa-Carleton Detention Centre, as suggested by counsel. The sentence was passed at 1531 hours, 3 October 2013.

Counsel:

Major J.E. Carrier, Canadian Military Prosecutions Service
Counsel for Her Majesty the Queen

Major J.L.P.L. Boutin, Directorate of Defence Counsel Services
Counsel for Corporal Salera