



COURT MARTIAL

Citation: *R v Keenan*, 2013 CM 4011

Date: 20130730

Docket: 201337

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick

Between:

Her Majesty the Queen

- and -

Corporal N.L.M. Keenan, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

[1] Corporal Keenan, at the conclusion of a full trial, the court found you guilty of charges number 2 and 3 and ordered a stay of proceedings for charges 1 and 4. The court has found you guilty of uttering a forged document and of an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act*. The court must now impose a fit and just sentence.

[2] You submitted an itinerary and claim worksheet that did not truly reflect the reasons for a change in rooms when you travelled on duty to Ottawa. As such, you claimed an amount of \$135.60 that exceeded what you had been authorized.

GENERAL PRINCIPLES OF SENTENCING

[3] As indicated by the Court Martial Appeal Court (CMAC), sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge. (see *R v Tupper* 2009 CMAC 5 para 13)

[4] The Court Martial Appeal Court also clearly stated in *Tupper* at paragraph 30 that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society" by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community;
and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[5] The sentencing provisions of the *Criminal Code*, ss. 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. A sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing. Proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. But a sentence is also a "form of judicial and social censure." A proportionate sentence may express, to some extent, society's shared values and concerns.

[6] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentencing along the scale of appropriate sentences for similar offences.

[7] The Court Martial Appeal Court also indicated that the particular context of military justice may, in appropriate circumstances, justify and, at times, require a sentence which will promote military objectives. But one must remember that the ultimate aim

of sentencing in the military context is the restoration of discipline in the offender and in the military society. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[8] Only one sentence is imposed upon an offender, whether the offender is guilty of one or numerous offences, and the sentence may be composed of more than one punishment.

[9] The prosecution and your defence counsel have jointly proposed a sentence of a reprimand and a fine in the amount of \$300. The Court Marital Appeal Court has stated clearly that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest.

[10] The prosecution suggests that the following principles of sentencing apply in this case: denunciation and general and specific deterrence. The prosecution has provided this court with four cases in support of its submission that the proposed joint sentence is the minimum sentence in this matter. Defence counsel asserts that rehabilitation is an important sentencing principle in this case.

[11] I have considered the following aggravation factors:

- (a) although I would never consider a member of the Canadian Forces to be simply an employee of the Government of Canada, the present case is one akin to fraud involving an employee-employer relationship. Canadian law considers this type of fraud to be more serious than other cases of fraud. I refer to paragraph 22 from the 2000 Court Martial Appeal Court decision of *Private St Jean and Her Majesty The Queen* CMAC-429 to illustrate this aggravating factor:

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 the court that 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.

- (b) having said this, I do note the amount in question is \$135.60 and is a relatively small amount when compared to the usual fraud cases tried by courts martial.
- (c) you exercised your right to plead not guilty. You were found guilty by this court at the end of a complete trial. This exercise of your right cannot be viewed in a negative manner and it cannot be considered as an aggravating factor. Canadian jurisprudence generally considers an early plea of guilty and cooperation with the police as tangible signs that the offender feels remorse for his or her actions and that he or she takes responsibility for his or her illegal actions and the harm done as a consequence of these actions. Therefore, such cooperation with the police and an early plea of guilty will usually be considered as mitigating factors;
- (d) this approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions; and
- (e) an accused that pleads not guilty cannot hope to receive the same consideration from the judicial process. This does not mean the sentence is increased because the accused has been found guilty after pleading not guilty, it only means that his or her sentence will not be affected by the mitigating factor of a plea of guilty.

[12] I will now examine the mitigating factors in this case:

- (a) you do not have a conduct sheet; thus you are a first time offender. You were 33 years old at the time of the offence. You had joined the Canadian Forces in May 2006. As such, I will consider your relative inexperience as a mitigating factor;

- (b) I have carefully reviewed Exhibit 8, four Personnel Evaluation Reports. Your performance has been rated as mastered or exceeded standard and your potential was assessed as above average. They are excellent evaluation reports and indicate that you have earned the respect of your peers and superiors through your consistent efforts. The letters of appreciation found at Exhibit 10 also demonstrate that you perform your tasks very well and are appreciated. This evidence as well as the character letters found at Exhibit 9 leads one to believe that these offences are out of character for you; and
- (c) as mentioned earlier, the amount in question is not significant and it was never actually paid to you. The offences cannot be described as elaborate or sophisticated nor did they entail much premeditation.

[13] This sentence must focus primarily on the denunciation of the conduct of the offender and on general deterrence but it must also focus on the rehabilitation of the offender.

[14] In determining the appropriate sentence the court has considered the circumstances surrounding the commission of these offences, the mitigating and aggravating circumstances and the representations by the prosecution and by your defence counsel as well as the applicable principles of sentencing.

[15] The court has thus come to the conclusion that the proposed sentence would not bring the administration of justice into disrepute and that the proposed sentence is in the public interest. Therefore, the court agrees with the joint submission of the prosecutor and of your defence counsel.

FOR THESE REASONS, THE COURT:

[16] **SENTENCES** you to a reprimand and a fine in the amount of \$300.

Counsel:

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
Counsel for Corporal Keenan