COURT MARTIAL

Citation: *R v Arsenault,* 2013 CM 4007

Date: 20130425
Docket: 201254

Standing Court Martial

Valcartier Garrison
Valcartier, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer P.D. Arsenault, Offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Warrant Officer Arsenault, following a full trial the court convicted you of one charge laid under section 130 of the *National Defence Act*, namely, having committed a fraud contrary to section 380(1) of the *Criminal Code of Canada*, and one charge laid under subsection 125(*a*) of the *National Defence Act*, namely, having wilfully made a false statement in an official document signed by you. I must now impose an appropriate sentence, which must be the minimum required sentence in the circumstances of the case to ensure that discipline is served.

[2] The Court Martial Appeal Court of Canada states at paragraphs 30 to 33 of 2009 CMAC 5 *Private Tupper, R.J. and Her Majesty the Queen* that a military judge must consider the fundamental purposes of sentencing as found in sections 718 and following of the *Criminal Code*. "The sentence must also be proportionate to the gravity of the offence and the degree of responsibility of the offender", and it must be "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". An

offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

Section 718 of the *Criminal Code* reads as follows:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, 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:
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> (*a*) to denounce unlawful conduct;
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> (*b*) to deter the offender and other persons from committing offences;
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> (*c*) to separate offenders from society, where necessary;
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> (*d*) to assist in rehabilitating offenders;
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> (*e*) to provide reparations for harm done to victims or to the community; and
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> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[3] Counsel for the prosecution suggests that the minimum appropriate sentence for this offence is a 30-day period of detention and a reduction in rank to sergeant. He submits that the sentencing principles that apply in this case are denunciation, specific and general deterrence, and rehabilitation. Your counsel states that the appropriate sentence for this offence is a severe reprimand and a fine of $5,000. To determine what is the appropriate sentence in this case, I considered the circumstances surrounding the commission of the offences as shown by the evidence filed during the trial, the evidence filed at the sentencing hearing, the case law and the submissions of counsel. I analyzed these various factors in light of the objectives and principles applicable in sentencing.

[4] You were convicted of fraudulently obtaining Separation Expense and post living differential benefits during the period July 2005 to January 2007. At the time of the offences, you had just been posted to Gagetown in the 12 Régiment blindé du Canada. You had been separated from your common-law spouse since September 2004, and your children lived with her in Val-Bélair during your posting. You obtained these benefits because you had not informed your superiors about your new marital status and your family situation, and you had asked to be transferred on Imposed Restriction.

[5] Having summarized the main facts of this case, I will now concentrate on sentencing. In considering what sentence would be appropriate, I took into consideration the following aggravating and mitigating factors. I begin with the factors that mitigate the sentence.

Although you have a conduct sheet; the offence of impaired driving dates from January 12, 1990. Because of the nature of the offence and the fact that it took place in 1990, the court will not pay attention to this criminal record in sentencing.

Lieutenant-Colonel Boivin has been the commanding officer of the 12 Régiment blindé du Canada since June 2011. He has known you since he joined the regiment in 1997, and he was your troop commander in 1998. He was informed of the investigation and allegations in 2011. He testified that you have performed extremely well since he took command of the regiment. Your last annual performance evaluation report (PER) also indicates that you have performed exceptionally well for your rank. You have held the position of Squadron Quartermaster Warrant Officer since the summer of 2012. Although you are responsible for an annual budget of approximately $7,500, you do not have the authority to approve expenses. Lieutenant-Colonel Boivin also stated that there was a strict quartermaster control system to prevent any risk of fraud on the regiment.

He characterized this fraud as an error from an administrative perspective when he testified about the confidence he had in your abilities as a soldier and in your leadership. He also testified that he expected all members of his unit to demonstrate the values of honesty, integrity and loyalty. This testimony leaves the court somewhat perplexed. The court does not understand how Code of Service Discipline offences and a fraud of $34,043 can be described as an error from an administrative perspective.

Lieutenant-Colonel Boivin agrees that the monies obtained fraudulently will have to be reimbursed to the Crown. Although your commanding officer indicates that he has confidence in you as a soldier and leader, he also states that he expects better ethically speaking, and that he will have to consider career administrative action that will be imposed following a career review. He also stated that his assessment of your performance and your PER do not take this conviction into account and that your next PER will have to reflect this. Your commanding officer's confidence is a mitigating factor but with less weight.

The disciplinary proceedings and this trial surely have some deterrent effect on you and on anyone who becomes aware of them but as in any other disciplinary case.

These offences took place from 2005 to 2007. Master Corporal Bussières testified that an investigation could have been launched in this case in February 2007 but that certain persons at Gagetown decided not to take action. Military authorities began to deal with the case when Warrant Officer Arsenault arrived at the 12 RBC in the summer of 2009 when the problem with the PLD was discovered and also through a certain confluence of events because Master Corporal Bussières had also been transferred to the 12 RBC before Warrant Officer Arsenault arrived. A police investigation took place, and a Record of Disciplinary Proceedings was prepared on April 2, 2012.

I certainly agree with defence counsel when he says that the authorities at Gagetown should have taken the necessary action at that point. They failed to do so. The pre-charge delay should have been much shorter, but the post-charge delay is not excessive. Although it is true that the lack of action at Gagetown definitely did not help the proper administration of Canadian Forces' allowances or military discipline, the court has no evidence that the period from 2009 to today caused stress and anxiety for Warrant Officer Arsenault, who deserves to have the delay considered a mitigating factor.

[6] I will now discuss the aggravating factors.

The nature of the offence and the punishment provided for by Parliament. The maximum punishment for the charge of fraud where the value of the subject-matter of the offence exceeds $5,000 is 14 years' imprisonment and three years' imprisonment for the offence under section 125 of the *National Defence Act.* Objectively, these offences are serious.

You were not posted in the summer of 2004 because you had informed your chain of command that you were having marital problems. You were posted to Gagetown in the summer of 2005 a few months after your separation. You went to visit your children in Quebec City every other weekend, and those trips cost you a certain amount of money. You told the Chief Clerk of the 12 RBC and the military police that the money you were receiving from the allowances helped pay for these trips to Quebec City. This is not a situation like the one in *Private St-Jean* who himself had been a victim of blackmail and had committed a fraud to buy silence. Although the court understands that you were experiencing an emotionally difficult situation in 2005 and the court is prepared to believe that you used this money to visit your children, that does not excuse your actions in any way. Although you did not simply spend the money on luxury items, you consciously decided to commit this fraud for personal gain.

It is difficult for the court to characterize these offences as being out of character and that this is an isolated case of dishonesty considering the evidence before the court. Warrant Officer Arsenault continually tried to hide his real family situation from government and military authorities. He also caused problems for Ms. Loisel. He informed the military authorities only after Ms. Loisel forced him to provide her with a note so that she could resolve her problems with the Quebec government. He told her at the time that her request would cause problems for him and that he would have to repay $15,000. In addition, he perpetrated this fraud over a 19-month period. Although the court dares to hope that Warrant Officer Arsenault has learned from this situation, nothing in the evidence submitted to the court indicates that Warrant Officer Arsenault acknowledges his unlawful conduct and takes responsibility for it. Accordingly, the court cannot state that your risk of re-offending is low.

These offences were premeditated and were committed over a 19-month period. He went to the orderly room every month to sign a false claim and thereby obtain these monies. He gave no indication that he wishes to voluntarily repay these amounts.

The amount of the loss or the risk of loss, namely, $34,034, was proven beyond a reasonable doubt at trial. This is not a disputed aggravating fact as provided in article 112.52 of the QR&O. The court on its own initiative directed the Chief Clerk at the 12 RBC, Warrant Officer Bergeron, to provide it with details about the field operations allowances that Warrant Officer Arsenault received from July 2005 to January 2007. Exhibit 37 was submitted to the court with the agreement of the prosecution and the defence on this point, but the court needed further explanations to understand this evidence and to assist it in determining the sentence. Warrant Officer Bergeron testified

that, based on the Canadian Forces' pay system, Warrant Officer Arsenault had received the field operations allowance for a cumulative 30-day period during the period of the offences. Section 205.39 of the Compensation and Benefit Instructions, (CBI), field operations allowance, that applied at the time of the offence stated that a member was entitled to $16.41 per day. Warrant Officer Arsenault received approximately $490 based on this instruction during this period.

The court had requested that this information be provided because it was mentioned during the trial that Warrant Officer Arsenault had to spend periods of time in the field and would therefore have been entitled to this allowance. Because he could not receive the field operations allowance and certain expenses based on Separation Expense, the court wanted to know the amount of the field operations allowances that Warrant Officer Arsenault might have received to determine the real financial loss.

It is possible that Warrant Officer Arsenault spent more time in the field, but the accused did not submit any evidence on this point during the trial or the sentencing hearing. The evidence indicates that Warrant Officer Arsenault never informed the military authorities that he was receiving field operations allowances when he finalized his claims. Thus, Warrant Officer Arsenault received $34,043 that he was not entitled to as well as approximately $490 in field operations allowance. The fact that he received both these allowances simultaneously leads to the conclusion that the actual loss of this fraud is $34,043. This situation with respect to the field operations allowance is considered an aggravating factor, but the court gives it little weight given the amount of the field operations allowance compared to the amount of the fraud.

The court considers that the extent and duration of the fraud are significant but that Warrant Officer Arsenault did not unduly take advantage of his reputation for integrity. This was a $34,043 fraud over a 19-month period, i.e. a considerable amount spread over a long period of time. The evidence does not show that his reputation for integrity was more known or more significant than any other member who went to the orderly room over the course of these offences. Thus, the court takes into consideration only the aggravating factor stipulated in paragraph (1)(*a*) of section 380.(1) of the *Criminal Code.*

The court does not believe that the offences constitute an abuse of trust under paragraph 718.2(*a*)(iii) of the *Criminal Code*. Warrant Officer Arsenault did not abuse a special position of trust when he committed this fraud although he betrayed the trust that the Canadian Forces place in each of us as regards complying with laws and directives. Moreover, the fraud committed by Warrant Officer Arsenault is by its very nature an abuse of trust that is taken into consideration in sentencing. The CMAC summarized this concept very well in paragraph [22] of *Private St. Jean and Her Majesty the Queen* 2000 CMAC 429 as follows:

> 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.

Canadian jurisprudence on fraud clearly states that general deterrence and denunciation are the required sentencing objectives in the vast majority of fraud cases. The Chief Military Judge, Colonel Dutil, described this approach very well in paragraphs 15 and 16 of his sentence imposed during the court martial of *Master Corporal Roche*, and I quote him:

> [15] Despite the decisions of the Court Martial Appeal Court in *St-Jean, Lévesque, Deg* and *Vanier*, it must be said that since the 2004 amendments to the *Criminal Code* related to the maximum sentence applicable to the offence of fraud where the subject-matter of the offence exceeds $5000 under paragraph 380(1)(*a*) of the *Criminal Code*, Canada's appellate courts have generally imposed prison sentences when the fraud is significant or when it is committed against an employer, whether it took place over a longer or shorter periods.
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> The courts may impose a custodial sentence on any grounds they consider appropriate to achieve the paramount objectives of general deterrence and denunciation in this type of case, even if the offender has no judicial record, has registered a guilty plea and expressed remorse, has repaid the victims fully or in part, has little chance of re-offending and is known and respected in the community.
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> [16] In considering what sentence would be appropriate, the Court must take into account the objective seriousness of the offence and the offender's degree of responsibility in light of the aggravating and mitigating factors related to the commission of the offence or the situation of the offender. In assessing the offender's responsibility in relation to the imposition of an adequate sentence in the case of fraud, the following factors, among others, should be examined: the nature and scope of the fraud and the victim's actual economic or financial losses; the degree of premeditation in the planning and implementation of the fraud; the offender's conduct after the commission of the offence, including the repayment of the victims; whether the offender cooperated with the authorities and pleaded guilty at the first opportunity; the judicial record; the personal gain realized from the fraud; the relationship of authority and trust with the victim; and the motive underlying the commission of the fraud. Some of these factors may be considered aggravating or mitigating circumstances, but this is not the case for those factors arising from the fundamental principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as set out in section 718.1 of the *Criminal Code*.

[7] Warrant Officer Arsenault, you have not demonstrated the qualities that we look for in a senior non-commissioned officer, and this behaviour is not the kind of example

that can be tolerated. The Canadian Forces expects more from a warrant officer; it is not a case of simply being a good soldier and a good leader in an operational context; you must also have and demonstrate certain personal qualities that are essential to the good order and discipline of the Canadian Forces and to respect for the law. Breaching the Code of Service Discipline as you have done undermines discipline and respect for the rule of law. No one can decide for personal reasons when he or she will comply with the law and the directives.

[8] Given the aggravating and mitigating factors and the need to denounce the offender's conduct and to dissuade such illegal activities within the Canadian Forces, I will impose a sentence that will send both you and other members of the Canadian Forces the message that such behaviour is unacceptable and has serious consequences. Imprisonment is normally the punishment imposed in a significant fraud case, not detention. Moreover, I took into consideration counsel's submissions and the evidence adduced.

[9] Given the particular facts of this case, I believe that the sentence I am about to pronounce is the minimum possible sentence to ensure the protection of the public and the maintenance of discipline in the circumstances and also to promote the offender's rehabilitation.

FOR THESE REASONS, THE COURT:

[10] **SENTENCES** Warrant Officer Arsenault to a 30-day period of detention and a reduction in rank to sergeant.

[11] I would have sentenced you to a longer term of imprisonment were it not for the fact that a reduction in rank to sergeant will be a very tangible sign for you and all other members of the Canadian Forces that this type of conduct is not accepted. This combination of punishments achieves the objectives of deterrence and denunciation.

Counsel:

Major G. Roy, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander M. Létourneau, Defence Counsel Services
Counsel for Warrant Officer P.D. Arsenault