**Citation**:*R. v. Leading Seaman D.B. Clarke,*2004CM08

**Docket**:S200408

**STANDING COURT MARTIAL**
**CANADA**
**ONTARIO**
**437 SQUADRON TRENTON**

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**Date**: 14 April 2004

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**PRESIDING: COMMANDER P.J. LAMONT, M.J.**

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**HER MAJESTY THE QUEEN**
**v.**
**LEADING SEAMAN D.B. CLARKE**
**(Accused)**

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**SENTENCE**
**(Rendered orally)**

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[1] You may break off and be seated beside your defence counsel.

[2] Leading Seaman Clarke, having accepted and recorded your pleas of guilty to charge number one and to charge number two, the court now finds you guilty of charge number one and of charge number two. It now falls to me to determine and to pass a sentence upon you. In so doing I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have, as well, considered the facts of the case, as described in the statement of circumstances, Exhibit 6, the evidence heard in the course of the mitigation proceedings and the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways. Nevertheless, in imposing sentence, the court takes account of the many factors that distinguish the particular case it is dealing with, both the aggravating circumstances that may call for a more severe punishment and the

mitigating circumstances that may reduce a sentence. The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, which includes, of course, the Canadian Forces, by fostering and maintaining a just, a peaceful, a safe and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender and the denunciation of unlawful behavior. One or more of these goals and objectives will inevitably predominate in arriving at a fit and just sentence in an individual case. Yet, it should not be lost sight of that each of these goals calls for the attention of the sentencing court and a fit and just sentence should be a wise blending of these goals tailored to the particular circumstances of the case.

[4] Section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at courts martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment and are further limited to the jurisdiction that may be exercised by this court.

[5] Only one sentence is imposed upon an offender whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline. In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the findings of guilt and the sentence I am about to impose.

[6] The facts surrounding the commission of these offences are not complicated. As a flight steward by military occupation, the offender was advanced sums of money belonging to the Canadian Forces to cover catering expenses for two service flights in September and October of 2002. The offender was required to account for the advances within approximately one month of their issuance but failed to do so until 24 January 2003, after promptings by members of his unit. On that date he returned only a portion of the funds advanced to him. He did not account for a total of $6788 of the advanced monies which he had applied to discharge personal obligations he had incurred during his previous posting to Halifax.

[7] The prosecutor urges the court to consider the punishment of reduction in rank. I am mindful of the consequences, some financial and others less tangible for both the offender and for his family of reduction in rank.

[8] The offences here are objectively serious. Parliament has recognized this by providing a maximum punishment that is well in excess of the maximum punishments available for many military offences under the Code of Service Discipline. As well, Parliament has distinguished less serious kinds of stealing offences from more serious cases by providing a greater maximum punishment when the stealing involves a breach of trust created by the employment relationship such as the present case.

[9] The principle aggravating factors in this case are the amount of money involved, the fact that none of it has been recovered, and the breach of trust demonstrated by the offender.

[10] As the prosecutor has pointed out, the Canadian Forces relies on the honesty and trustworthiness of its members. There is no workable system of accounting for public monies that would be sufficiently rigorous to protect public funds if it were not the case that nearly all members of the Canadian Forces are honest and trustworthy in their dealings with public money.

[11] But there are also many mitigating features of this case. In the first place, the offender has pleaded guilty, thereby demonstrating remorse, the first step on the road to rehabilitation. One of the effects of his guilty plea is to save the public expense and inconvenience to witnesses involved in presenting a case at trial. The offender demonstrated remorse by his cooperation with the investigating authorities. This was not a sophisticated theft. It does not appear to involve any planning, nor did it involve enlisting the cooperation of other people to perpetrate. The offences appear to have been motivated by straightened financial circumstances. Importantly, the offender has had no previous difficulty with the law over the course of 17 years of service in the Canadian Forces.

[12] To my mind, the most salient and difficult aspect of this case is the mental and emotional condition of the offender. In his psychological treatments update report of 6 April 2004, Doctor Ely confirms that the offender suffers from severe anxiety, severe depression, and severe despair. These conditions are not responding to treatment. I am satisfied that there is a direct relationship between the depression, which Doctor Ely diagnosed as pre-existing the offences and the commission of the offences themselves.

[13] In my view, the concerns of general and specific deterrence are attenuated to some degree when there is a direct relationship between the offences and a pre-existing mental condition. This is the kind of circumstance of which Chief Military Judge Carter spoke in the case of Warrant Officer Gallagher as amounting to exceptional circumstances in which deterrence has less significance than it would otherwise have in a case of abuse of trust by an employee.

[14] For the reasons I have referred to above, deterrence, both of the offender and especially of other persons, remains a concern. I consider that there is deterrent value in the punishment of reduction in rank. At the same time, I am not overlooking the rehabilitation of the offender.

[15] I was invited by counsel for the prosecution to consider suspending a sentence of incarceration in addition to a reduction in rank, I have given anxious consideration to this submission. There is no doubt that in most circumstances, stealing public property in the amounts involved in this case in breach of a duty of trust created by the employment relationship will ordinarily be met with a sentence of incarceration. That is because the sentencing principle of general deterrence assumes such great importance in these kinds of cases and often only a sentence of incarceration is sufficiently severe to vindicate that principle.

[16] As I have already stated, the concerns of general and specific deterrence are not as weighty in the present case. In addition, however, incarceration is not called for in the present case for another reason, I accept the submission of defence counsel that the psychiatric and psychological information before me supports the inference that a sentence of incarceration would be unduly severe considering the current fragile mental state of the offender. The same conclusion applies even if a sentence involving incarceration were to be suspended. Doctor Kelly clearly states in his letter of 17 March 2004 that the delay in dealing with this case since the charge was first laid in June of 2003 has adversely affected the mental and emotional health of the offender. I can not imagine that the prospect of the lifting of a suspension of a sentence of incarceration would have any more benign consequences for the offender's health.

[17] Stand up Leading Seaman Clarke. Your are sentenced to reduction in rank to able seaman. March out Able Seaman Clarke.

[18] The proceedings of this court martial in respect of Able Seaman Clarke are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Captain A.J. Carswell, Director Military Prosecutions Ottawa
Counsel for Her Majesty the Queen
Major L. Boutin, Directorate of Defence Counsel Services
Counsel for Leading Seaman D.B. Clarke