COURT MARTIAL

Citation: *R. v. Merriam*, 2010 CM 3021

Date: 20100930
Docket: 201050

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and –

Leading Seaman J. C. Merriam, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Leading Seaman Merriam, 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.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence.

[3] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Forces which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct or in a more positive way, see the promotion of good conduct. It is through discipline that an Armed Force ensures that its members will accomplish in a trusting reliable manner successful missions. It also ensures that public order is maintained and that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] It has been long 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. 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. It also goes directly to the duty imposed to the court to: "impose a sentence commensurate to the gravity of the offence and the previous character of the offender," as stated at QR&O 112.48 (2)(*b*).

[5] Here in this case, the prosecutor recommended that this court sentence you to a reduction in rank to the rank of able seaman, a severe reprimand, and a fine in the amount of $1,600 in order to meet justice requirements.

[6] On the other hand, your defence counsel suggested that the court impose on you, as a sentence, a severe reprimand and a fine in the amount of $2,000.

[7] Imposing a sentence is the most difficult task for a judge. As the Supreme Court of Canada recognized in *R. v. Généreux*[1], "To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently". It 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 a 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.

[8] 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.

[9] When imposing sentences, a military court must also take into consideration the following principles:

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[1] [1992] 1 S.C.R. 259

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 was established by the Court Martial Appeal Court and the Supreme Court of Canada; 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.

[10] I came to the conclusion that in the circumstances of this case, sentencing should focus on the objectives of denunciation and general deterrence.

[11] Here the court is dealing with an offence for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act*, which is, with intend to defraud, submitted claims for rent for a monthly rate higher than it was in reality, in order to deprive the CF of the total amount of $9,100 for his own benefit, knowing the expense had not been incurred. It is a serious offence per se as defined in the *National Defence Act.*

[12] In *The Queen v. St-Jean*, a decision of the Court Martial Appeal Court reported in CMAC 2000, No. 2, a decision delivered in English, the Honourable Mr. Justice Létourneau highlighted the impact of fraudulent acts within public organizations such as the Canadian Forces. At paragraph 22, he stated the following:

> 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.

[13] 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 117(f) of the *National Defence Act*. This offence is punishable by an imprisonment for a term not exceeding two years or to less punishment.

b. Secondly the subjective seriousness of the offences in that for the court it covers three aspects:

i. The first aggravating factor from a subjective perspective is the breach of trust. As a Leading Seaman with some years of experience within the Canadian Forces, you knew that you had ethical obligations to fulfill such as integrity, loyalty, and judgement. However, you did exactly the opposite. You decided to deceive those who relied on you in order to make things work. Such conduct undermines respect that Canadian Forces members and the public must have in their institution.

ii. The second aggravating factor is the premeditation and the length of the period for committing the offence. You repeatedly and deliberately did the same thing, about once a month for 14 months, in order to take by a fraudulent mean and without any right, public funds that you were not entitle to posses. It means that you planned to act like this, which is far worse than acting on a unique set of unexpected circumstances that make you do something that you don't do normally.

iii. Finally, the total amount that you took without any rights is important. Here, we are not talking about some hundred dollars but nine thousand dollars. Such thing must be considered as an aggravating factor. However, the appreciation of this factor must be done in the context of the actual offence laid pursuant to section 117(f) of the *National Defence Act* and not in the context of section 380 of the *Criminal Code* as suggested by the prosecution.

[14] There is also mitigating factors that I consider:

a. First, there is your guilty plea. Through the facts presented to this court, the court must consider your guilty plea as a clear genuine sign of remorse and that you are very sincere in your pursuit of staying a valid asset to the Canadian Forces and it also disclose the fact that you are taking

full responsibility for what you did. You also confirmed to the court, during your testimony, that you regret what you did and you intent that such thing never occur again.

b. The fact that you recognize right away after you were put under investigation that your conduct was inappropriate. You fully cooperated with the police investigators, admitted what you did and provided explanation on the manner you operated.

c. The restitution made of the full amount on the day of the hearing.

d. The fact that you don't have a conduct sheet or criminal record related to similar offences.

e. The fact that you had to face this court martial. I'm sure it has had already some deterring effect on you and also on others.

f. Your record of service in the Canadian Forces. It appears from the evidence produced before this court that you are a good sailor, have good skills for your trade and that you are dedicated and trusted by your chain of command, to the extend that your unit did not make any action to preclude you to be promoted in 2010 to your actual rank and also indicated that despite what happen, it does not intent to initiate the procedure for your release from the Canadian Forces. Reality is that your supervisor and your chain of command have kept confidence in you.

[15] Here, in this case, considering the nature of the offence, the circumstances it was committed, the applicable sentencing principles including sentences imposed on similar offenders for similar offences committed in similar circumstances by military tribunals, which includes the recent decision of *R.* v. *Louis,* 2010 CM 3016, the aggravating and the mitigating factors mentioned above, I conclude that a severe reprimand and a fine in the amount of $2,500 would appear as the appropriate and the necessary minimum punishment in this case.

[16] The financial system in the Canadian Forces relies heavily on the integrity of its members. Public funds are money coming from many and spent for a few like Canadian Forces members in order to allow them to accomplish their missions. If many military members like you start to take more than they are allow receiving, our society is clearly heading into problems. I hope you learned something from this incident and that you will share your story to let know others that such thing must never be considered as a good thing to do.

[17] Leading Seaman Merriam, please stand up. Therefore the court sentences you to a severe reprimand and a fine in the amount of $2,500. The fine is to be paid in monthly instalments of $250 each commencing on 1st October 2010, and continuing for the following nine months.

Counsel:

Major P. Rawal, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major E. Charland, Directorate Defence Counsel Services
Counsel for Leading Seaman Merriam