Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20200310

Docket: CMAC-599

Citation: 2020 CMAC 1

CORAM: **CHIEF JUSTICE BELL**
SAUNDERS J.A.
DINER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PETTY OFFICER SECOND CLASS S.J. DARRIGAN

Respondent

Heard at Halifax, Nova Scotia, on November 20, 2019.

Judgment delivered from the Bench at Halifax, Nova Scotia, on November 20, 2019 and edited for syntax and grammar with added reference to the relevant case law.

REASONS FOR JUDGMENT BY: SAUNDERS J.A.

CONCURRED IN BY: CHIEF JUSTICE BELL
DINER J.A.

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REASONS FOR JUDGMENT

SAUNDERS J.A.

[1] After thoroughly considering the written and oral submissions of counsel, we recessed and then returned to Court where the Chief Justice announced our unanimous decision that while leave to appeal was granted, the appeal was dismissed with reasons to follow. These are our reasons.

[2] I will begin by providing a brief summary of the background, adding such further detail as may be required during my consideration of the issues on appeal.

I. Background

[3] This is an appeal from a Standing Court Martial decision on sentencing.

[4] Petty Officer Second Class (PO2) Darrigan has been a member of the Regular Force of the Canadian Armed Forces (CAF) since October 2014. He served previously with the Naval Reserve beginning in June 2004. In 2007, after initially training as a maritime engineer, he changed occupations to become a cook. He served in senior positions as a cook both on ship and ashore at Canadian Forces Base (CFB) Halifax during his Regular Force service.

[5] At the time of the offence, PO2 Darrigan was employed as a kitchen supervisor at the Atlantic Galley while it was being refurbished as the new dining facility on CFB Halifax. As part of that process, new kitchen equipment was purchased and PO2 Darrigan was entrusted with its custody and control.

[6] On August 17, 2016, PO2 Darrigan stole a microwave, a meat slicer and a countertop chafer, valued together at $7,757.07, and sold them to a kitchen equipment reseller, receiving $750 for these items.

[7] The three (3) stolen items were recovered during the investigation and have since been returned to the Crown.

[8] PO2 Darrigan pleaded guilty to one (1) count of stealing when entrusted pursuant to s. 114 of the *National Defence Act*, R.S.C. 1985, c. N-5 [*NDA*], and to one (1) count of selling the items improperly pursuant to s. 116(a) of the *NDA*. Counts of receiving (s. 115), possession (s. 130) and trafficking (s. 130*)* were withdrawn by the prosecution.

[9] The sentencing hearing took place May 14-16, 2019. Both the prosecution and the defence called witnesses. The decision was rendered on May 16, 2019 (now reported as 2019 CM 4010).

[10] At the hearing, the prosecutor recommended a sentence of 90 days' imprisonment, emphasizing the need for general deterrence and denunciation. The prosecution took the position that detention was inappropriate since it, unlike imprisonment, does not automatically result in termination from the Canadian Armed Forces. For its part, the defence recommended a severe reprimand and a fine in the amount of $8,000. Alternatively, defence counsel recommended that if a custodial sentence were required, it should be detention with a view to allowing the offender to continue his service in the CAF.

[11] The Military Judge agreed that the sentence should focus on general deterrence and denunciation. However, he concluded that imprisonment or detention would be counter-productive to the rehabilitation of PO2 Darrigan. The Judge therefore sentenced the offender to a severe reprimand and a fine of $8,000, and ordered that restitution in the amount of $750 be made to the kitchen equipment reseller.

II. Issues

[12] In its amended Notice of Appeal, the Crown lists the following four grounds of appeal:

1. The Military Judge erred in principle in applying proportionality;
2. The Military Judge erred in principle in applying parity;
3. The Military Judge erred in principle by over-emphasizing the mitigating factors; and
4. The Appellant seeks leave to appeal and if granted, appeals the severity of the sentence imposed by the Military Judge on the basis that it was demonstrably unfit.

[13] In both their written and oral submissions, the parties differ in how they characterize and present the issues that arise in this appeal. This divergence can best be explained by what I would describe as the "tension" between the appellant's emphasis on civilian sentencing precedents, and the respondent's reliance upon this Court's own sentencing jurisprudence in cases of this kind. Accordingly, I prefer to consider the substance of this appeal by distilling the various grounds, issues and arguments into five discrete questions:

i. Did the Military Judge err in choosing to apply this Court's own military jurisprudence rather than follow certain civilian sentencing precedents?
ii. Does this Court's military jurisprudence establish categories of theft for which exceptional circumstances are required in order to justify a non-custodial sentence?
iii. Do the facts of this case place it in a category of theft for which exceptional circumstances are required in order to justify a non-custodial sentence?

iv. Did the Military Judge err in his consideration of proportionality; or parity; or the mitigating circumstances of the case; and if so, did the error have any impact on the sentence?

v. In any event, was the sentence demonstrably unfit?

III. Standard of Review

[14] Sentencing is an inherently discretionary exercise. Because of the highly contextual nature of the sentencing process, trial judges enjoy a broad discretion to impose the sentence they consider appropriate in a particular case. Accordingly, their sentencing decisions are accorded great deference on appeal.

[15] It is useful to remind ourselves of the Supreme Court's directions in *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15:

> [14] [A]ppellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that . . . the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > […] absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
>
> [Citations have been omitted.]
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion,

> the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required — for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. — to show deference to the sentence imposed by the trial judge.

[16] An important, additional criterion was established by the Supreme Court in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 [*Lacasse*]. There, Wagner, J. (as he then was), writing for the majority, explained at para. 44:

> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.
>
> [Underlining is mine.]

[17] Quite apart from errors seen to have had an impact on the sentence imposed, we may also intervene where the sentence itself is clearly unreasonable. It is possible of course for a sentence to be demonstrably unfit, even where the trial judge has not erred in principle. As Wagner, J. explained in *Lacasse* at paras. 52-54:

> [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of *the Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2 (a) and (b) of the *Criminal Code*.
>
> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality.

[18] These various principles were recently distilled by Moldaver, J., writing for the majority, in *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496 at paras. 23-25:

> [23] It is well established that appellate courts cannot interfere with sentencing decisions lightly: see *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 48; *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132, para. 25; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 14; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 46; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 39. This is because trial judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*Lacasse*, at para. 39).
>
> [24] In *Lacasse*, a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, *and* such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate court may set aside the sentence and

> conduct its own analysis to determine a fit sentence in the circumstances.
>
> [25] A sentence that falls outside of a certain sentencing range is not necessarily unfit: see *Lacasse*, at para. 58; *Nasogaluak*, at para. 44. Sentencing ranges are merely guidelines, and are just "one tool among others that are intended to aid trial judges in their work" (*Lacasse*, at para. 69). It follows that deviation from a sentencing range does not automatically justify appellate intervention (*ibid*., at para. 67).

[19] I will now apply those sentencing principles to the issues that arise in this case.

IV. Analysis

A. *Did the Military Judge err in choosing to apply this Court's own military jurisprudence rather than follow certain civilian sentencing precedents?*

[20] Underpinning all of the appellant's submissions is the view that the Military Judge ought to have applied civilian sentencing precedents to the case before him. Had he done so, an automatic jail sentence was the inevitable outcome.

[21] In its factum, the Crown says:

> 23. The Military Judge failed to give effect to the principle by which stealing from an employer is considered a special category for sentencing requiring the imposition of a custodial sentence in the absence of exceptional circumstances. This principle was first stated by the Ontario Court of Appeal in *R. v. McEachern*, 7 C.R. (3d) S-8, [1978] O.J. No. 987 (ONCA). The Court took the view that general deterrence is the overriding objective for offences of theft committed by a person occupying a position of trust in the absence of exceptional circumstances.
>
> […]

> 24. In *R. v. Steeves*, the New Brunswick Court of Appeal confirmed the longstanding principles stated in *McEachern*
>
> […]
>
> 31. Despite the fact that the *McEachern* decision had been brought to his attention, the Military Judge chose to ignore it.

[22] The appellant's reliance upon earlier decisions from certain civilian appellate courts lies at the heart of its attack upon the sentence imposed in this case. In responding to questions from the Panel at the hearing, counsel for the appellant summarized his position very succinctly:

> We say that greed + trust = an automatic jail sentence unless there are exceptional circumstances.
>
> This is a clear case. Jail was called for. There were no exceptional circumstances. Ninety days' imprisonment ought to have been imposed at a minimum.

[23] I respectfully disagree.

[24] In a thoughtful and comprehensive analysis in which the Military Judge reviewed the statutory framework, addressed the relevant sentencing principles, and then applied those principles to his factual findings, he said at paras. 29-30 and 34-36:

> [29] The prosecution submits that theft from an employer requires a sentence of imprisonment, mainly on the basis of *R. v. McEachern*, [1978] O.J. No. 987, a 1978 case from the Ontario Court of Appeal and on the basis of a more recent court martial case of *R. v. Sorbie*, 2015 CM 3010. That is a very surprising submission to me if only because in the case of Master Corporal Sorbie, the offender pleaded guilty to stealing approximately $1,000 from the canteen and was not sentenced to imprisonment as requested in that trial by the prosecutor but rather to a reduction in rank to private, a severe reprimand and a fine in the amount of $1,000. Nowhere in *Sorbie* does the military judge state that a person guilty of stealing while entrusted must be sentenced to

imprisonment. The most that is stated is the doubly qualified statement to the effect that, "Usually, the denunciation and the deterrence of this type of infraction generally requires incarceration." Given the result of that case, I conclude that there are exceptions, an outcome not precluded by *McEachern*.

[30] Indeed, there are many court martial cases where theft from Her Majesty resulted in sentences not involving imprisonment or detention, the other form of incarceration available in courts martial.

[…]

[34] The prosecution made a point of stressing that imposing a sentence that would not include imprisonment would have the effect of sparing the accused from a sentence that would have been imposed on a civilian in his position, an outcome that has been described as unacceptable. The prosecutor pointed out that subparagraph 742.1(f)(vii) of the *Criminal Code* makes conditional sentences unavailable for offences of theft over $5,000. The prosecution submits that the offences here were committed in civilian circumstances, hence a failure to impose a sentence commensurate to what would have been imposed for a civilian supervisor in a similar position as Petty Officer 2nd Class Darrigan would erode public trust in the military justice system.

[35] I completely disagree with this submission for a number of reasons. First, this case deals mainly with a theft committed on a military establishment, in relation to public goods serving a military purpose, involving an offender entrusted with the control of these goods by virtue of military orders given to him as a full-time member of the Regular Force on active service, as he still is. I do not see how these circumstances are civilian. Further, Petty Officer 2nd Class Darrigan has not been charged with theft over $5,000 under the *Criminal Code*. He was charged with a military offence under section 114 of the *NDA* which does not recognize the $5,000 threshold *per se* as a factor leading to an increased punishment. If the circumstances were civilian and parity with civilians was deemed to be required, such a charge of theft under the *Criminal Code* could have been laid under section 130 of the *NDA.* At the time the charges were laid and preferred in this case, the *Beaudry* decision of the CMAC had not been rendered to prevent conviction on such a charge. The charges in this case are different than those considered by civilian courts such as the Ontario Appeal Court in *McEachern* and civilian precedents are therefore of limited use compared with jurisprudence from courts martial and the CMAC.

> [36] In relation to the principle of parity, therefore, I conclude that the range of sentences imposed in the past on similar offenders for similar offences varies from a reprimand and a fine, to imprisonment for ninety days. The submissions of counsel are in that range. Consequently, I do not intend to analyse any precedent further or impose a sentence more lenient or harsh than what is found within the range.

[25] I would endorse the Judge's reasoning.

[26] I will begin my analysis by emphasizing the importance of a separate system of military justice in preserving discipline, efficiency and morale. This function is of course essential in maintaining a state of readiness on the part of the Canadian Armed Forces in the defence of our nation's security. Respectfully, the Crown's attachment in this appeal to the civilian model of sentencing ignores the fundamental role of Canada's military and the disciplinary code which binds its members.

[27] In a long line of cases, the Supreme Court has provided clear and consistent direction with respect to the significance and necessity of a separate system of justice required to maintain the morale, discipline and efficiency of our Canadian Armed Forces. For example, in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, Ritchie, J., for the majority, wrote at p. 400:

> When the *National Defence Act* is considered as a whole it will be seen that it encompasses the rules of discipline necessary to the maintenance of morale and efficiency among troops in training and at the same time envisages conditions under which service offences may be committed outside of Canada by service personnel stationed abroad. … In my view these are some of the factors which make it apparent that a separate code of discipline administered within the services is an essential ingredient of service life.

[28] Concurring in the majority result, but for different reasons, McIntyre, J. emphasized the historical role of military officers in dispensing justice in accordance with military law. He admitted that an officer's connection with the military hierarchy would colour his or her attitude when serving on a court martial, however, he did not believe that this fact would diminish the independence or impartiality of the tribunal, noting at pp. 403-04:

> From the earliest times, officers of the armed forces in this and, I suggest, all civilized countries have had this judicial function. It arose from practical necessity and, in my view, must continue for the same reason. It is said that by the nature of his close association with the military community and his identification with the military society, the officer is unsuited to exercise this judicial office. It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline—which includes the welfare of their men—are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.
>
> […]
>
> I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters has been recognized as a reason for the creation of disciplinary tribunals within the separate professions.

[29] These observations were quoted with approval by Lamer, C.J.C. in *R. v. Généreux*, [1992] 1 S.C.R. 259. The Chief Justice went on to conclude at p. 293:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. 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. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

[30] These statements were affirmed by Cromwell, J., writing for a unanimous court, in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 where he said, in part at paras. 33 and 46:

> [33] It is common ground that the purpose of the military justice system, of which the challenged provisions form a part, relates to assuring the discipline, efficiency and morale of the armed forces.
>
> […]
>
> [46] I conclude that Parliament’s objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military.

[31] Finally, in *R. v. Stillman*, 2019 SCC 40, 436 D.L.R. (4th) 193, Moldaver and Brown, JJ., for the majority, declared at paras. 2, 35-36, and 66:

> [2] Since the earliest days of organized military forces in post-Confederation Canada, a separate system of military justice has operated parallel to the civilian justice system. Tailored to the unique needs of the Armed Forces, this system's processes "assure the maintenance of discipline, efficiency and morale of the

military" (*R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 46). Its foundation is the Code of Service Discipline ("CSD"), contained in Part III of the NDA. The CSD, which is "an essential ingredient of service life" (*MacKay v. The Queen*, [1980] 2 S.C.R. 370, at p. 400), establishes the core features of the military justice system, including the categories of persons subject to the CSD, the "service offences" (as defined in s. 2 NDA) which contravene the CSD, the jurisdiction of military courts (or "service tribunals", as defined in s. 2 NDA) to try these offences, and the processes for challenging their decisions.

[…]

[35] Canada's military justice system has always been separate from the civilian justice system. "[D]eeply entrenched in our history" (*Généreux*, at p. 295), its purpose is to provide processes that will "assure the maintenance of discipline, efficiency and morale of the military" (*Moriarity*, at para. 46; see also *Généreux*, at p. 293).

[36] The military justice system is therefore designed to meet the unique needs of the military with respect to discipline, efficiency, and morale. As Lamer C.J. wrote in Généreux, "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. 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" (p. 293). Further, "[r]ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military" (*ibid.*). And, while these purposes of the military justice system have remained consistent over the years, the complexion of the system itself has changed significantly over time in response to developments in law, military life, and society, more broadly.

[…]

[66] The role of a military panel is unique, bringing to bear upon the proceedings the military-specific concerns for discipline, efficiency, and morale. As Lamer C.J. observed in Généreux, it "represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military" (p. 295). Similarly, as noted in the Dickson Report, panel members "bring military experience and integrity to the military judicial process. They also provide the input of the military community responsible for discipline and military efficiency" (p. 55).

[32] While there are certain similarities between what I will broadly term the "civilian and military justice systems", one must recognize their differences. I will briefly address some of the more important provisions that are relevant to this case.

[33] The first and most obvious is the different statutory regime within which the prosecution chose to proceed with its charges against PO2 Darrigan. Having made that choice, the procedures and penalties relevant to the prosecution of PO2 Darrigan are codified in "Part III, Code of Service Discipline" commencing at s. 60 of the *NDA*. Following his guilty pleas, the sentencing provisions found in "Division 7.1 Sentencing" were triggered. Here we see some very significant differences in the approach taken to sentencing when comparing the military and civilian justice systems.

[34] For example, under the heading "Purposes and Principles of Sentencing by Service Tribunals" we read:

> **Fundamental purposes of sentencing**
>
> **203.1(1)** The fundamental purposes of sentencing are
>
> **(a)** to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
>
> **(b)** to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[35] From this we see that the fundamental purposes under the Code of Service Discipline of the *NDA* are two-fold, intended "to promote the operational effectiveness of the Canadian

Forces" and "to contribute to respect for the law and the maintenance of a just, peaceful and safe society".

[36] Whereas the *single* fundamental purpose of sentencing under the *Criminal Code*, R.S.C. 1985, c. C-46 is to:

> **Purpose**
>
> **718.** The fundamental purpose of sentencing is to protect society and to contribute […] to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions […]

Thus, on this issue of the fundamental purpose of sentencing, there is no requirement in the *Criminal Code* to promote the operational effectiveness of the offender's employer.

[37] Further differences are seen when comparing the stated "Objectives" intended to achieve these fundamental purposes. Of particular importance in this case is s. 203.1(2)(f) of the *CDA* which reads:

> **Objectives**
>
> **(2)** the fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:
>
> […]
>
> **(f)** to assist in reintegrating offenders into military service;

The objective of reintegration into military service is a key component of military sentencing, while reintegration into one's employment is not even a factor to consider in the civilian

sentencing scheme. In my view, reintegration is a much more focused objective than is general rehabilitation in the civilian context.

[38] Finally, whereas the principle of restraint is seen in s. 718.2(d) of the *Criminal Code*,

> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;

that very same principle of restraint is explicitly emphasized *twice* in the *NDA*:

> **Other sentencing principles**
>
> **203.3** A service tribunal that imposes a sentence shall also take into consideration the following principles:
>
> […]
>
> **(c)** an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
>
> **(d)** a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces;

[39] It is obvious that the Military Judge was alive to these statutory directives. He clearly understood that his responsibility was to arrive at a fit and proper sentence for PO2 Darrigan based upon a proper application of the purposes, objectives and principles applicable to sentencing as contained in the Code of Service Discipline. I am satisfied that the Judge did not err in fulfilling his responsibility.

[40] While it was certainly open to the Military Judge to *consider* the persuasive value of sentencing decisions in the civilian context, he was in no way bound to apply them. Preferring to

apply this Court's own military jurisprudence was undoubtedly correct and well within his authority in presiding over PO2 Darrigan's trial and subsequent sentencing.

[41] Before leaving this subject, I would reject the appellant's heavy reliance upon two appellate decisions, *R. v. McEachern* (1978), 42 C.C.C. (2d) 189 [*McEachern*] and *R. v. Steeves and Connors*, 2005 NBCA 85, 288 N.B.R. (2d) 1 [*Steeves*], as supporting the proposition that there are certain "categories of theft" which will invariably require sentences of imprisonment. For convenience, I will repeat the appellant's principal argument as presented in its factum:

> 23. The Military Judge failed to give effect to the principle by which stealing from an employer is considered a special category for sentencing requiring the imposition of a custodial sentence in the absence of exceptional circumstances. This principle was first stated by the Ontario Court of Appeal in *R. v. McEachern*, 7 C.R. (3d) S-8, [1978] O.J. No. 987 (ONCA). The Court took the view that general deterrence is the overriding objective for offences of theft committed by a person occupying a position of trust in the absence of exceptional circumstances.
>
> 24. In *R. v. Steeves*, the New Brunswick Court of Appeal confirmed the longstanding principles stated in *McEachern*
>
> […]
>
> 31. Despite the fact that the *McEachern* decision had been brought to his attention, the Military Judge chose to ignore it.

[42] Respectfully, this is an overstatement of the precedential weight currently accorded those decisions. *McEachern* was decided more than 40 years ago. As I will show, the approach taken in that case, and later endorsed in *Steeves*, has not been universally adopted in other jurisdictions, nor consistently applied in Ontario. And fundamentally, *McEachern* predates the codification of sentencing principles in s. 718 of the *Criminal Code*. Neither is it accurate to say that "[…] the Military Judge chose to ignore it". On the contrary, the Judge carefully considered that case as

well as the other civilian precedents cited by the appellant before concluding that they were "of limited use compared with jurisprudence from courts martial and the CMAC".

[43] In *R. v. Adams*, 2009 ONCJ 383, Green, J. noted the changes in sentencing law since *McEachern*. The accused was a bookkeeper who had expropriated $144,690 from her employer over a six-year period. The trial judge imposed a conditional sentence of two years less one day plus three years' probation. Green, J. emphasized that imprisonment should be a penal sanction of last resort, especially for first-time offenders. He said at paras 15-16:

> [15] The Court of Appeal has frequently reaffirmed the propriety of custodial dispositions for serious breach-of-trust offences: see, for example, *R. v. Holub*, [2002] O.J. No. 579 (Ont. C.A.), *R. v. Dobis*, [2002] O.J. No. 646 (Ont. C.A.); *R. v. Bogart*, [2002] O.J. No. 3039 (Ont. C.A.) and, most recently, *R. v. Drakes*, 2009 ONCA 560 (Ont. C.A.), at paras. 25-26.)
>
> [16] Of course, the length and quality of the appropriate sentence is not driven solely by the nature of the offence or its consequences. It is, at least here, leavened by certain other sentencing considerations that reflect principles of restraint. Most important is the general recognition (as codified in s. 718.2(e) of the Code) that imprisonment should be the penal sanction of last resort - and, by extension, that imprisonment, when imposed, should be no longer than is minimally necessary to achieve the legitimate sentencing objectives in the individual case. This proposition is particularly pertinent in the case, as here, of a first offender.
>
> [Underlining is mine.]

[44] In *R. v. Bruyns*, 2016 ONCJ 527, Harris, J. sentenced an offender who had been appointed by her father as his power of attorney. Over a five-month period, the accused diverted $4,000 of her father's money for her own use. She was convicted of theft under $5,000, fraud under $5,000, and criminal breach of trust. The Court stated at paras. 31-32:

> [31] Section 718.2(a)(iii) provides that evidence that an offender, in committing an offence, abused a position of trust or authority in relation to the victim, shall be deemed to be an aggravating circumstance and that the sentence should be increased to reflect that.
>
> [32] I note that numerous decisions of the Ontario Court of Appeal preceding the enactment of this section of the *Code* had already stated that a judge must at least consider imprisonment when sentencing someone for a breach of trust (For an even stronger position on this see for example *R. v. McEachern*, [1978] O.J. No. 987 (Ont. C.A.) per Howland (C.J.O.) at para. 9.). I note further though that there were still many non-custodial sentences and even conditional discharges imposed for such offences (See for example *R. v. Ward*, [1975] O.J. No. 873 (Ont. C.A.) per Brooke J.A.).
>
> [Underlining is mine.]

Harris, J. sentenced the accused to a suspended sentence with 18 months' probation, without finding exceptional circumstances.

[45] This more recent approach is consistent with case law across Canada on this issue. In *R. v. Connell*, 2015 NSSC 11, the accused stole approximately $160,000 from her First Nation employer. Chipman, J. accepted a joint recommendation from the Crown and defence and sentenced the offender to a custodial sentence of two years and restitution. In doing so, he recognized that cases involving trust-theft situations did not invariably require a jail sentence absent exceptional circumstances. While s. 718.2(a)(iii) of the *Criminal Code* obliges a sentencing judge to treat the abuse of a position of trust as an aggravating circumstance, Chipman J. stated at paras. 18-19:

> [18] For every different set of circumstances, we have a different decision with varying sentences.

> [19] By contrast we have other cases that impose non-custodial or custodial sentences of less than two years. Nevertheless, at the end of the day, for all of the reasons set forth, I find the joint recommendation to be appropriate.
>
> [Underlining is mine.]

[46] In *R. v. Wheeler,* 2012 ABPC 127, a store manager pleaded guilty to unlawfully stealing money and sports fitness equipment, having a value exceeding $5,000, from his employer. At the sentencing hearing, the Crown urged that a jail sentence of between 12-18 months, plus three years' probation, be imposed, together with an order for restitution. Counsel for the accused sought a sentence of two years less one day to be served as a conditional sentence, including house arrest and a period of probation of three years, plus restitution. Redman, J. decided that a conditional sentence would not be appropriate, and sentenced the accused to incarceration of 10 months to be followed by three years' probation, and imposed a stand alone restitution order in the amount of $40,000 payable to the employer. In doing so, Redman, J. conducted an extensive analysis of Alberta jurisprudence at both the trial and appellate levels establishing appropriate sentencing ranges in trust-theft situations. He included a lengthy Appendix "A" canvassing a host of cases with the observation at para. 74:

> [74] The cases in Appendix A all consider the appropriateness of a conditional sentence order. There are many cases, however, where Courts have concluded that lesser forms of punishment are appropriate in trust-theft situations. For example, there are cases where conditional discharges are considered and sometimes granted.

[47] In *R. v. Sutherland* (2011), 310 Nfld. & P.E.I.R. 298 (NLPC), Gorman, J. sentenced a 24-year-old accused following his conviction of having stolen money from his employer on two occasions, approximately 10 months apart, as well as breach of probation. In that case, the

Crown sought a jail sentence of between 2-4 months, plus probation. Counsel for the accused recommended a suspended sentence with probation. After a very detailed review of Newfoundland and Labrador jurisprudence at both the trial and appellate level, Gorman, J. sentenced the accused to consecutive sentences for the three offences resulting in a total period of four months' imprisonment, to be served as a conditional sentence under house arrest followed by a probation period of one year. In doing so, Gorman, J. observed at paras. 15 and 17:

> [15] Section 718.2(a)(iii) of the *Criminal Code* indicates that "evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim" is "deemed to be" and [sic] "aggravating" factor in the imposition of sentence. However, this does not mean that every time a person commits an offence which involves the breach of a position of trust that a period of imprisonment will result. In *R. v. Kelly*, [2010] N.J. No. 242 (P.C.), for instance, I granted the offender a conditional discharge though he had committed two thefts, one of which involved a theft from his employer.
>
> […]
>
> [17] In ***Kelly***, I noted that at one time, "incarceration was the principal if not exclusive sentence of choice among jurists in this Province for theft/fraud offences committed by offenders in a position of trust", but that "more recently, jurists in this Province have generally resorted to non-custodial sentences for those who have committed thefts and frauds while in a position of trust":
>
> > At one time, incarceration was the principal if not exclusive sentence of choice among jurists in this Province for theft/fraud offences committed by offenders in a position of trust. In ***R. v. Acharya*** (1986), 58 Nfld. & P.E.I.R. 188 (N.L.C.A.), for instance, the Court of Appeal in setting aside a non-custodial sentence reminded trial judges that it has "repeatedly held that the public interest must transcend personal welfare when those in a position of trust violate that trust and commit the offence of theft, and that a custodial term is usually required to satisfy the principle of general deterrence." Similarly, in ***R. v. Rennie***, [1990] N.J. No. 8 (C.A.), Goodridge, C.J.N. indicated that "Courts have generally considered that breaches of

trust demand a custodial term" and "normally" where "there is a breach of trust even if it is a first offence (and most offences of this nature are first offences as the convicted person seldom repeats), there should be a custodial term."

More recently, jurists in this Province have generally resorted to non-custodial sentences for those who have committed thefts and frauds while in a position of trust (see, for instance, ***R. v. Cole*** (1995), 132 Nfld. & P.E.I.R. 271 (N.L.S.C.)); or conditional periods of imprisonment for such offenders (see, for instance, ***R. v. Hewitt***, (2004), 236 Nfld. & P.E.I.R. 313 (N.L.S.C.); ***R. v. Meadus*** (2008), 283 Nfld. & P.E.I.R. 150 (N.L.S.C.); ***R. v. Kearley***, [2007] N.J. No. 334 (P.C.); ***R. v. Savoury***, **[**2006] N.J. No. 187 (P.C.); ***R. v. Bradbury*** (2004), 243 Nfld. & P.E.I.R. 1 (N.L.C.A.); ***R. v. Glynn***, [2004] N.J. No. 145 (S.C.); ***R. v. Smith*** (1999), Nfld. & P.E.I.R. 197 (N.L.S.C.); ***R. v. Quinlan*** (1999), 173 Nfld. & P.E.I.R. 1 (N.L.C.A.); ***R. v. Rolls*** (1999), 177 Nfld. & P.E.I.R. 178 (N.L.S.C.); ***R. v. Simms*** (1998), 164 Nfld. & P.E.I.R. 172 (N.L.S.C.); ***R. v. Ford***, [1998] N.J. No. 114 (S.C.); ***R. v. Molly***, (1997), 153 Nfld. & P.E.I.R. 81 (N.L.S.C.); ***R. v. Estep*** (2003), 229 Nfld. & P.E.I.R. 340 (N.L.S.C.); and ***R. v. Cleary*** (1998), 161 Nfld. & P.E.I.R. 234 (N.L.S.C.)). However, the use of incarceration has not disappeared entirely from the judicial landscape for these type of offences in this Province (see, for instance, ***R. v. Spencer*** (1995), 132 Nfld. & P.E.I.R. 230 (N.L.S.C.); ***R. v. Clarke*** (2000), 190 Nfld. & P.E.I.R. 263 (N.L.S.C.); ***R. v. Briand***, [2009] N.J. No 209 (P.C.); ***R. v. Byrne*** (2009), 286 Nfld. & P.E.I.R. 191 (N.L.P.C.); ***R. v. Murray*** (2010), N.J. No. 84 (S.C.); and ***R. v. Collins*** (2010), 293 Nfld. & P.E.I.R. 80 (N.L.S.C.)). In one case, both a period of incarceration and a conditional period of imprisonment was imposed (see ***R. v. Stevens*** (2008), 275 Nfld. & P.E.I.R. 277 (N.L.S.C.)).

[Underlining is mine.]

[48] Finally, in *R. v. Harvey*, 2006 BCPC 444, Chapman, J. considered the case of the Mayor of the City of Vernon who had pleaded guilty to a charge of breach of trust by a public officer, having used his credit card for purposes other than the city's business, contrary to s. 122 of the *Criminal Code*. At the sentencing hearing, the Crown recommended a jail sentence of 18 months' incarceration. The defence position was that if imprisonment were ordered it should be served as a conditional sentence. After considering counsels' submissions, Chapman, J. sentenced the accused to a conditional sentence of 12 months (the first half of which would be served under house arrest) followed by probation for one year. In doing so, the sentencing judge did not identify any "exceptional circumstances" nor indicate that such proof was required.

[49] From this brief survey, we see that following the codification of sentencing principles in s. 718 of the *Criminal Code*, trial courts across Canada have recognized that when sentencing offenders for theft or fraud involving the property of their employers, the *Criminal Code* obliges them to treat breach of trust as an aggravating factor; however, such convictions will not invariably result in a custodial sentence, nor require proof of exceptional circumstances to avoid jail.

B. *Does this Court's military jurisprudence establish categories of theft for which exceptional circumstances are required in order to justify a non-custodial sentence?*

[50] The short answer is no. For more than 20 years this Court has expressly rejected the proposition that absent exceptional circumstances, theft from employers mandates a term of imprisonment. What the Crown proposes would cast aside settled law and replace it, not with a range, but with a rule. Such a position would virtually turn on its head the highly discretionary,

contextual and individualized nature of sentencing. I will refer to five cases to illustrate this Court's consistent disapproval of the position taken by the Crown in this appeal.

[51] In *R. v. Vanier* (1999), CMAC-422, the Crown sought leave to appeal a sentence imposed by a General Court Martial of reduction in rank to Lieutenant-Colonel and a fine of $10,000 following the accused's conviction on seven fraud-related charges. In dismissing the appeal, Hugessen, J.A., writing for the Court, said at paras. 6-7:

> [6] First, the prosecution has failed to persuade us that the learned Judge-Advocate erred in law in any way whatsoever in his instructions to the members of the Court on the question of the sentence. … In particular, he mentioned the fact that the accused held a senior rank in the Canadian Forces and that his position was one of responsibility and trust. … it cannot be said that the members of the Court were unaware of the fact that they might accede to the prosecution request and pronounce a jail sentence.
>
> [7] Second, nothing in the circumstances of this case or in the nature of the crimes of which the accused has been convicted necessitates, as a question of law, a minimum sentence of imprisonment.
>
> [Underlining is mine.]

[52] In *Legaarden v. R.* (1999), CMAC-423, Strayer, C.J., writing for the Court, said at para. 8:

> [8] Secondly, the President seems to have viewed it as axiomatic that, save in very special circumstances, anyone who steals from his employer must be imprisoned. No compelling jurisprudence to this effect was mentioned by him or put before us. Indeed, this Court recently in the Vanier case involving similar facts held that there is no such rule of law.
>
> [Underlining is mine.]

[53] In *R. v. Deg* (1999), CMAC-427 [*Deg*], the accused pleaded guilty to one charge of stealing while entrusted with the custody, control and distribution of a standing advance, and another of neglect to the prejudice of good order and discipline. The charges resulted from the fact that he made 23 false entries in documents required for official purposes. He did that because he had miscalculated and erroneously believed that there was a discrepancy in the accounting. He stole, while entrusted, a sum of $619. His sentence of four (4) months' imprisonment was replaced by a fine of $5000 and a severe reprimand for his negligence in performing his duties.

[54] Writing for the Court, McGillis, J.A., observed at para. 4:

> [4] At the time of the imposition of the sentence, the President of the Standing Court Martial did not have the benefit of the recent decisions of this Court in *R. v. Vanier* (February 17, 1999), Doc. CACM-422 (Can. Ct. Martial App. Ct.) and *R. v. Legaarden* (February 24, 1999), Doc. CMAC-423 (Can. Ct. Martial App. Ct.) in which non-custodial sentences were imposed for offences of a similar nature. Counsel for the respondent sought to distinguish those cases on the basis that neither of them involved the more serious charge of stealing while entrusted. Although we agree that those cases did not involve such a charge, they nevertheless dealt with offences of stealing by officers who were in a position of trust and responsibility by virtue of their rank and positions. We are therefore of the opinion that the decisions in *Vanier* and *Legaarden* are instructive with respect to the principles to be applied and the approach to be adopted in sentencing for offences of this nature.

[Underlining is mine.]

[55] In *R v. St. Jean* (2000), CMAC-429, the accused, a sergeant in the CAF, pleaded guilty to fraud, having defrauded the Department of National Defence of approximately $31,000 by submitting false general allowance claims in which he falsely claimed that the money was used

to pay tuition for authorized computer courses. The fraud was perpetrated over a period of six months. He was a first time offender with a 26-year unblemished career in the CAF. Following a guilty verdict by a Standing Court Martial, Private St. Jean was reduced in rank and sentenced to four months in prison. He appealed. In allowing the appeal and replacing the sentence with a reduction in rank to the rank of Corporal, a severe reprimand, and a fine of $8,000, Létourneau, J.A., writing for this Court (and citing *Deg, supra*) said at paras. 10 and 22:

> [10] The President chose the sentence from among a range of options: imprisonment, dismissal from service, detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand and a fine.
>
> […]
>
> [22] In a large and complex public organization such as the Canadian Forces … the management must inevitably rely upon the assistance and integrity of its employees. … 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 [citation omitted]. Every case depends upon its facts and circumstances.

[Underlining is mine.]

[56] In *R. v. Libby*, 2007 CM 4025, Petty Officer First Class (PO1) Libby was a first-time offender with an unblemished career of 26 years in the Canadian Forces. He was found guilty of one charge of public mischief for having lied to a member of the military police in an attempt to divert suspicion from himself, and two charges of stealing gasoline from the CAF valued at

$313.05. The offences were repeated on seven occasions over a period of ten months. PO1 Libby was described as dedicated, honest, reliable and efficient. His performance reviews were glowing. The Military Judge considered the accused's early guilty plea as a mitigating factor. The Court Martial imposed a severe reprimand and a fine of $2,500.

[57] Based on these unequivocal and longstanding authorities, the Military Judge in this case was right to conclude as he did:

> [36] I conclude that the range of sentences imposed in the past on similar offenders for similar offences varies from a reprimand and a fine, to imprisonment for 90 days.
>
> [37] In choosing a sentence within the range, in reference to the scale of punishment found at Section 138 of the *NDA*, I am of the view that all punishments, including any punishment lesser than imprisonment, are available to me. This includes reduction in rank.

[58] Having correctly identified the range of available penalties, the Military Judge then turned his mind to where on that spectrum the circumstances of this offence and this offender would fit. The Judge recognized that choosing its placement within that range would require a close examination of the aggravating and mitigating circumstances, as he found them. However, the choice of punishment in no way required any additional or separate proof of "exceptional circumstances" in order to qualify for a non-custodial sentence.

C. *Do the facts of this case place it in a category of theft for which exceptional circumstances are required in order to justify a non-custodial sentence?*

[59] Having demonstrated that there is no special category of theft which requires exceptional circumstances to justify a non-custodial sentence, it will not be necessary for me to address this

third question. I do, however, recognize that the Military Judge in this case did refer to circumstances he described as "exceptional". In doing so, I took him to mean "unique" in the sense of identifying the important mitigating factors the Judge took into account when crafting a fit and proper sentence for PO2 Darrigan. In other words, these "unique" factors were not intended to exempt him from imprisonment – since, as I have already explained, no such "exceptional" precondition or threshold is required. Rather, this was simply the Judge's way of explaining the many factors which informed his reasoning, and the weight he chose to attach to them.

[60] I will say more about those factors in answering the remaining questions.

D. *Did the Military Judge err in his consideration of proportionality; or parity; or the mitigating circumstances of the case; and if so, did the error have any impact on the sentence?*

[61] As I will explain, I am satisfied that the Military Judge did not err in his consideration of the principle of parity, or in his assessment of the mitigating circumstances in this case. While he did err at one point in his articulation of the principle of proportionality, the mistake does not require our intervention because it had no impact on the sentence imposed upon PO2 Darrigan.

[62] After setting out the purpose, objectives and principles of sentencing as expressed in the *NDA*, the Military Judge explained his analysis of "the most important principle … proportionality" by saying, in part at paras. 16-21:

> [16] [T]he circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence in sentencing the offender. Indeed, as the offences in this case

involve a breach of trust in the course of employment, deterrence and denunciation have to be the paramount sentencing objectives.

[17] That being said, the objective of rehabilitation is also important, especially in cases such as this one where there is evidence of satisfactory post-offence conduct for a rather lengthy period of time, suggesting a significant potential for reintegration of the offender into military service.

[18] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence in this case. The most important of these principles is proportionality. Section 203.2 of the NDA provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In conferring a privileged position in the recently enacted sentencing scheme Parliament acknowledges the jurisprudence of the Supreme Court which has elevated the principle of proportionality in sentencing as a fundamental principle in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37 of this case, Lebel J. explains the importance of proportionality in these words:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[19] Then, the principle of proportionality obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender, a concept that has been traditionally associated with the character of the offender, as expressly provided for in the former provision found at QR&O article 112.48 before 1 September 2018. What is important to keep in mind is that respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process.

> ***Circumstances of the offender***
>
> [20] Having previously discussed the circumstances of the offence, it is proper at this point to discuss the circumstances of the offender in my analysis of the principle of proportionality.
>
> [21] Petty Officer 2nd Class Darigan's annual performance evaluations reveal a member whose performance consistently exceeds standards and has an above average to outstanding potential for promotion, including to the next rank of petty officer 1st class.

[63] On appeal, counsel for the respondent concedes the Military Judge erred when in para. 19 of his reasons he said:

> The principle of proportionality […] a concept that has been traditionally associated with the character of the offender.
>
> [Underlining is mine.]

[64] To the extent the Military Judge's remarks might be taken as an acceptance of the proposition that he was entitled to consider evidence of PO2 Darrigan's good character, when assessing the gravity of the crimes and his moral blameworthiness in committing them, I agree he erred.

[65] While consideration of character (good or bad) may be a relevant factor in the sentencing phase when assessing such things as the mitigating or aggravating circumstances of the case, the prospects for rehabilitation, reintegration into military service, or the need for specific deterrence, it has long been recognized that character, *per se*, has no relevance to an assessment of the gravity of the offence or the accused's culpability in its commission (see for example: *R. v. Ellis*, 2010 CMAC 3, 414 N.R. 117, at paras. 14-15; *R. v. St-Onge*, 2010 CMAC 7, 332 D.L.R.

(4th) 261, at para. 54, reversed but not on this point, per Fish, J. in *R. v. St-Onge*, 2011 SCC 16, [2011] 1 S.C.R. 625; *R. v. Lees*, [1979] 2 S.C.R. 749 at pp. 754-55; re-affirmed in *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 19). That said, I am satisfied the Judge's misstatement did not skew his analysis or ultimate imposition of sentence. He expressly recognized the very serious nature of the charges and their impact upon the morale, discipline and operational effectiveness of the Canadian Armed Forces. The Judge found as a fact that PO2 Darrigan:

> acted out of greed, for his own financial benefit in a manner that is entirely incompatible with the expectations of his superiors, peers and subordinates, as well as the public.

A careful review of the Judge's reasons as a whole satisfies me that he properly considered PO2 Darrigan's character *not* when examining his culpability but rather, at the end of the analysis, when assessing the aggravating and mitigating circumstances of the case.

[66] The Military Judge then described the sentencing principles that would guide his assessment of parity at para. 23:

> [23] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss other principles relevant to the determination of the sentence, which are listed as the paragraphs of section 203.3 of the NDA as follows:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender […]
>
> Here, a number of aggravating circumstances are listed in this section, including one applicable in this case, namely that "the offender, in committing the offence, abused their rank or other position of trust or authority,"

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> That is known as the principle of parity;
>
> (c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances;
>
> (d) a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and
>
> Those two paragraphs embody the principle of restraint;
>
> (e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[67] The Military Judge then reviewed the evidence he thought important to his consideration of parity. In doing so, he went on at some length (at paras. 28-45) to address and reject the prosecution's submission that civilian jurisprudence ought to be applied when sentencing PO2 Darrigan. I will not repeat my endorsement of the Military Judge's reasons in that regard. Suffice it to say that having correctly established the range of available penalties he did not err in concluding as he did at paras. 36 and 38:

> [36] In relation to the principle of parity, therefore, I conclude that the range of sentences imposed in the past on similar offenders for similar offences varies from a reprimand and a fine, to imprisonment for ninety days.
>
> […]
>
> [38] Most importantly, I must consider the principle of restraint, obliging me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale, and the obligation not to deprive the offender of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances.

[68] Finally, it is obvious that the Military Judge paid very close attention to the aggravating and mitigating circumstances relevant to this offence and this offender. The Judge explicitly referenced the "objective gravity of the offences". Among the aggravating factors were the "breach of trust that the offence constitutes", that in the Judge's opinion PO2 Darrigan "acted out of greed, for his own financial benefit" from which it could be inferred that his actions "had a negative impact on the morale and efficiency of subordinates". I also consider it significant that four superior officers testified on behalf of PO2 Darrigan at his sentencing hearing. During the appeal before this Court his counsel told us that this fact alone was hardly commonplace. Among the many mitigating factors identified by the Military Judge were PO2 Darrigan's guilty plea, his genuine acceptance of responsibility, the fact that he was a first-time offender, his close to 15 years of honourable service with the Navy, and that his superior officers in the chain of command:

> testified in public to express unequivocally their confidence that the offender not only will generally be able to make a valuable contribution to the CAF in the future but specifically that they would take him back on their ship and would consider entrusting him with greater responsibilities.

[69] Based on all of the evidence before him, the Military Judge found as a fact at paras. 39, 43, and 45 that:

> [39] Petty Officer 2nd Class Darrigan is a significant asset to the RCN and the CAF.
>
> […]
>
> [43] This is a difficult decision. As a former seagoing officer, I do believe in discipline and understand the reluctance of those who would hesitate to place confidence in a person guilty of stealing while entrusted. Yet, the mitigating factors in this case are significant and the evidence I heard is compelling as to the circumstances of the offender and his value to the CAF.

> […]
>
> [45] I am aware that I am imposing a sentence that may be seen as lenient in light of the significant breach of trust involved in this case. I am making this decision with my eyes wide open, confident that the sentence I am choosing to impose is within the range of sentences imposed for similar cases in the past and also confident that the exceptional circumstances of the offender in this case warrant such leniency.

[70] The Military Judge did not err in his assessment of all relevant aggravating and mitigating factors, nor the weight he chose to attach to them. I am satisfied that all of the Judge's findings and conclusions are amply supported in the evidentiary record.

E. *In any event, was the sentence demonstrably unfit?*

[71] In its factum the Crown says at para. 72:

> [72] [T]he Military Judge committed several errors in principle on his application of proportionality, parity and in balancing the aggravating and mitigating factors. As a result, the sentence imposed in this case was significantly below the appropriate range, and was based on a faulty analysis. Independently of the errors in principle committed, the sentence imposed was demonstrably unfit and must be corrected by this Court.

[72] I have already dispensed with the Crown's argument that the Judge's "errors" require our intervention. I will now turn to its collateral submission that quite apart from such "errors" the sentence imposed is demonstrably unfit.

[73] In conducting this separate analysis, it is important to recall the directions provided by Wagner, J. (as he then was) in *Lacasse* at paras. 52-54 and 58:

[52] [T]he courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" [citation omitted]. All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

[53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2 (a) and (b) of the *Criminal Code*.

[54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[…]

[58] The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a

> sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.

[74] I am satisfied that the sentence imposed upon PO2 Darrigan reflects a proper application of the principles described by Wagner, J. We owe a high level of deference to the sentence imposed. The Military Judge had the advantage of observing the witnesses and hearing counsels' submissions first-hand. As both a Military Judge and "former seagoing officer", he was certainly familiar with the highly contextualized circumstances surrounding this offence and this offender, and their impact upon the military community in which the crime was committed (*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at pp. 565-66). The evidence fully supported the Judge's conclusion that denunciation and deterrence, promoting the operational effectiveness of the Canadian Forces, and contributing to the respect for the law could all be achieved by preserving PO2 Darrigan's status as a valuable asset to the Navy.

[75] Respectfully, having regard to the record in this case, there is no merit to the appellant's submission that the sentence imposed is demonstrably unfit.

V. Conclusion

[76] I wish to repeat our expression of appreciation to both counsel at the hearing, for the quality of their written and oral advocacy. Leave to appeal sentence is granted. The appeal is dismissed.

"Jamie W.S. Saunders"
J.A.

I agree:

"B. Richard Bell"
Chief Justice

I agree:

"Aland S. Diner"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-599
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. PETTY OFFICER SECOND CLASS S.J. DARRIGAN
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	NOVEMBER 20, 2019
REASONS FOR JUDGMENT BY:	SAUNDERS J.A.
CONCURRED IN BY:	CHIEF JUSTICE BELL DINER J.A.
DATED:	MARCH 10, 2020

APPEARANCES:

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LCdr Brent Walden	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecution Service Ottawa, Ontario	FOR THE APPELLANT
Defence Counsel Services Ottawa, Ontario	FOR THE RESPONDENT