

Date: 19991217

Docket: CMAC-428

**CORAM: STRAYER C.J.
 WEILER J.A.
 GOODWIN J.A.**

B E T W E E N:

HER MAJESTY THE QUEEN,

Appellant,

- and -

LANCE CORPORAL J.P.P.D. LÉVESQUE,

Respondent.

Appeal heard at Ottawa, Ontario on Monday, November 29, 1999

JUDGMENT from the bench at Ottawa on Monday, November 29, 1999

REASONS FOR JUDGMENT by the Court

Date: 19991217

Docket: CMAC-428

**CORAM: STRAYER C.J.
WEILER J.A.
GOODWIN J.A.**

B E T W E E N:

HER MAJESTY THE QUEEN,

Appellant,

- and -

LANCE CORPORAL J.P.P.D. LÉVESQUE,

Respondent.

REASONS FOR JUDGMENT
**(Delivered from the bench at Ottawa
on Monday, November 29, 1999)**

BY THE COURT

[1] Following his guilty plea the respondent was convicted on counts 1, 2 and 6 of an indictment containing ten counts, namely,

(1) section 130 of the *National Defence Act* ("N.D.A.")

Conspiracy to commit an offence, namely fraud, contrary to s. 465(1)(c) of the *Criminal Code*.

- (2) section 130 of the N.D.A.

Mischief, by destroying or damaging property with the intent to commit fraud, contrary to s. 430(3) of the *Criminal Code*.

and

- (6) section 117(f) of the N.D.A.

Committed an act of a fraudulent nature not particularly specified in ss. 73 to 128 of the *National Defence Act*, namely submitting a claim for compensation of \$35,615.42 to an insurer with an intent to defraud.

[2] The President of the Standing Court Martial sentenced the respondent to a **severe reprimand** and a **fine of \$4,000**.

[3] As the Court submitted no evidence on the other counts, the President found him not guilty.

[4] The appellant sought leave to appeal and, if leave was granted, to appeal the sentence imposed. The appellant argued that the penalty was not severe enough and asked the Court Martial Appeal Court of Canada (“CMAC”) to substitute a term of six months’ imprisonment. However, at the hearing counsel indicated some flexibility regarding the penalty suggested.

[5] The facts, set out in a joint submission by the parties, may be summarized as follows:

[TRANSLATION]

Lance Corporal Lévesque was informed of a transfer from the Canadian Forces Base at Longue-Pointe to the Bagotville base,

taking effect on August 31, 1996.

On August 29, 1996 movers from the Transport Royal company came to Lance Corporal Lévesque's residence to pack his furniture and personal effects. While the truck was being loaded Lance Corporal Lévesque remarked to Luc Jetté (driver and mover) [TRANSLATION] "There are things which can be lost" or words to that effect. Lance Corporal Lévesque received the truck key from Mr. Jetté so he could make a copy of it and give it back to Mr. Jetté and arrange to have furniture disappear during the weekend preceding its transportation to Bagotville. The disappearance of the furniture was not accomplished as arranged.

On September 2, 1996, Mr. Jetté drove the truck to Chicoutimi and, accompanied by two movers, stayed at the Le Montagnais hotel. By chance, Mr. Jetté met Lance Corporal Lévesque in the hotel bar. They had a few drinks together.

On September 3, 1996 Mr. Jetté and the other two movers from the same company went to Lance Corporal Lévesque's new residence to deliver the furniture. He arrived 15 minutes late.

The three movers testified that Lance Corporal Lévesque gave them \$300 each and together, with the help of Lance Corporal Lévesque, they destroyed or damaged his property (listed in Appendix A of the indictment) so Lance Corporal Lévesque could submit a fraudulent claim to the UNIRISC Insurance Company. Lance Corporal Lévesque did submit a claim to the insurance company for compensation amounting to \$35,615.42. It paid nothing.

Grounds of appeal

[6] The appellant raised the following grounds of appeal, which we will summarize:

- (1) that the trial court erred in law in applying the CMAC decisions *Vanier* and *Legaarden* to the instant case to determine the appropriate penalty;

- (2) that in *Vanier* the CMAC did not lay down a rule of law that a prison term cannot be imposed in a fraud case:

in *Legaarden*, although the Court mentioned that there was no rule of law that fraud against one's employer necessarily deserves a prison term, the Court also did not lay down a rule to the contrary;

Vanier and *Legaarden* should be distinguished because they concern fraud against the employer: these are special cases based on the particular facts; here what is at issue is fraud against an insurance company; additionally, there was evidence of planning and premeditation by Lance Corporal Lévesque;

- (3) that the President of the Standing Court Martial erred in law in his assessment of the delay to be considered as a circumstance mitigating sentence, considering the time that elapsed before the indictment, contrary to well-settled precedent:

the time elapsed before the indictment should not be taken into account in calculating the time limit for trial in a reasonable time (*R. v. Morin*, [1992] 1 S.C.R. 78); the period prior to the charge or indictment may be taken into account, but only if the right to a full and complete defence was compromised or if the integrity and fairness of the trial was affected (*R. v. Finn*, [1997] 1 S.C.R. 10);

- (4) that the sentence was too lenient in view of the amount involved, the nature and seriousness of the offences and the circumstances surrounding the commission of the offences and the decisions of Canadian courts of appeal on the point.

[7] We agree that there is no rule of law stating that a term of imprisonment is or is not automatically imposed for fraud against one's employer. Each case rests on its particular facts.

[8] Nevertheless, there is a connection in this case with *Vanier* and *Legaarden*. When fraud is committed against an employer the relationship of trust is broken. There is a certain similarity with fraud against an insurer. Both involve a breach of the relationship of trust and good faith that should exist. Lance Corporal Lévesque's breach of trust could have resulted in a term of imprisonment. However, based on the particular facts, the President chose not to impose such a sentence.

[9] In *R. v. Shropshire*, [1995] 4 S.C.R. 227, the Supreme Court of Canada set out the standard of control that an appeal court should apply. The court should not vary an order regarding determination of a penalty unless "it has found the sentence to be clearly unreasonable".

[10] In view of various factors, including the fact that the respondent pleaded guilty to three counts, the insurance company had suffered no financial loss and Lance Corporal Lévesque had no criminal record, we consider that the penalty imposed was not "clearly unreasonable".

[11] Leave to appeal is granted but appeal from sentence is dismissed.

[12] As to the cross-appeal, we all consider that the Court Martial had jurisdiction to try the offences concerned in the given circumstances.

[13] We feel that the rules in *Reddick* ((1996) 12 C.C.C. (3d) 491) apply in the case at bar. In view of the charges and the circumstances surrounding them, this area is within federal jurisdiction under s. 91(7) of the *Constitution Act, 1867* and accordingly the charges in question fall within the purview of military justice.

[14] The cross-appeal is dismissed.

[15] **We affirm the three guilty verdicts.**

(s) B.L. Strayer
Chief Justice

(s) K.M. Weiler
J.A.

(s) Ross Goodwin
J.A.

Certified true translation

Bernard Olivier, LL. B.

**COURT MARTIAL APPEAL COURT OF CANADA
NAMES OF COUNSEL AND SOLICITORS OF RECORD**

FILE: CMAC-428

STYLE OF CAUSE: Her Majesty the Queen v. Lance
Corporal J.P.P.D. Lévesque

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 29, 1999

REASONS FOR JUDGMENT OF THE COURT (Strayer C.J. and Weiler and
Goodwin JJ.A.)

DELIVERED FROM THE BENCH BY THE COURT: November 29, 1999

APPEARANCES:

Lt. Col. Benoît Pinsonneault	FOR THE APPELLANT
Lt. Col. D. Couture	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Office of the Judge Advocate General Ottawa, Ontario	FOR THE APPELLANT
Office of the Judge Advocate General Montréal, Quebec	FOR THE RESPONDENT