Date: 20030606

Docket: CMAC-468

Citation: 2003 CMAC 6

CORAM: **WEILER J.A.**
EVANS J.A.
GOODWIN J.A.

BETWEEN:

EX-PRIVATE C.F. CASTILLO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

WEILER J.A.

[1] The appellant appeals his sentence following his guilty plea to one count of fraud between July and October, 1998 of $3659, and one count of theft in the amount of $963 between the first of June 1999 and September 1999.

[2] The presiding Military Judge rejected a joint submission that a sentence of 30 days imprisonment be imposed, that the sentence of imprisonment be suspended and that the appellant pay a fine in the amount of $4500. He sentenced the appellant to 45 days imprisonment.

[3] The appellant submits that the Military Judge erred in law in imposing the sentence of 45 days and that the sentence is outside the appropriate range of sentence in all the circumstances. The Crown concedes that the appeal should be allowed.

[4] The Military Judge's reasons indicate that he was aware that a sentencing judge should not reject joint sentencing submissions unless the submission is contrary to the public interest or the sentence would otherwise bring the administration of justice into disrepute. See, e.g., *R. v. Dewald* (2001), 156 C.C.C.(3d) 405 at p. 415 and *R. v. Cerasuolo* (2001), 151 C.C.C.(3d) 445. As stated in *R. v. Douglas* (2002), 162 C.C.C.(3d) (Que. C.A.), at para. 43:

> Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are "unreasonable", "contrary to the public interest", "unfit" or "would bring the administration of justice into disrepute".

[5] The appellant acknowledges that the Military Judge instructed himself properly as to the law. It is in his application of the law that the appellant contends he erred.

[6] The Military Judge acknowledged that a fine was the usual sentence imposed for a first offender. Here, a suspended sentence and a fine were being proposed.

[7] The Military Judge rejected the imposition of a suspended sentence because he said that since the appellant had left the military there was no way of monitoring the sentence.

[8] Having rejected the imposition of a suspended sentence, the Military Judge then considered the options of a fine and imprisonment. He noted that the appellant had not paid any of the $2000 fine imposed by the previous court martial in May 2000. At that time the appellant pled guilty to four counts including one of fraud on the Department of National Defence that had been committed roughly during the same time period.

[9] The appellant's counsel responded that until now the appellant had not been in a financial position to pay the fine imposed in May 2000. He further submitted that the appellant had "put his house in order", paid off his other debts, no longer owned a credit card and was living with his parents in order to support his children and to save money to pay the fines. Although no evidence was put forward in support of these submissions they were not challenged.

[10] The Military Judge concluded that a fine was an unfit sentence in this case for two reasons. The first was that the appellant had a past record for similar offences. The second reason was that he had not paid the fine. In rejecting the option of a fine, the Military Judge made comments that indicated that he was also concerned that, the appellant having left the military, there was no effective mechanism to enforce payment of a fine short of a cumbersome civil suit.

Analysis

[11] While it was within the discretion of the Military Judge to reject the joint submission on the basis it was not a fit and proper sentence, he erred in principle in two respects when he rejected the proposed sentence. First, the Military Judge treated the appellant as a repeat offender. Second, he erred in rejecting the imposition of a suspended sentence on the basis that there was no way to monitor it because the appellant had left the military.

[12] For a particular conviction to be rightly considered by a sentencing judge as a "previous" conviction, it must be determined that the conviction in question was, in fact, prior to the current offence under consideration: See C.C. Ruby, *Sentencing*, 5th ed. (London: Butterworths, 1999) at p. 294, para. 7.50. The Military Judge erred in treating the appellant as a repeat offender given that one of the charges here pre-dated the offences to which he had pled guilty in May 2000, the other offences occurred at about the same time and their existence was known at the time of the May sentencing. While the non-payment of the previously imposed fine was a factor that the sentencing judge was entitled to consider in deciding whether to accept or reject the joint submission, in the context of this case it appears the Military Judge put too much emphasis on this particular factor. It cannot be said that the offences in the instant appeal constituted a repetition of prior offences.

[13] The question of whether the military judge was entitled to consider supervision of a suspended sentence is analogous to whether a judge is entitled to consider supervision of a conditional sentence as in both situations the offender is in the community and is not incarcerated in a penal institution. In *R. v. Nault* (2002), 59 O.R. (3d) 388 at paras. 5-17 (C.A.), the sentencing judge rejected the joint submission for a conditional sentence, not because he believed that the sentence proposed was an inappropriate one for the offender in all of the circumstances of the case, but because of his understanding that the community could not provide the resources necessary to supervise the sentence. Justice Feldman, writing for the court, held that the sentencing judge had erred in three ways:

> First, the sentencing judge appeared to rely on his own knowledge or understanding of the availability of resources in the community without a record before the court. Crown counsel had been clear that the Crown had seriously considered the situation of the accused before agreeing to recommend a sentence to be served in the community. If the Crown was not satisfied that appropriate resources were available to supervise or enforce such a sentence, the court is entitled to assume that the recommendation would not have been made.
>
> In a situation where the sentencing judge is concerned about the available resources, the judge should ask counsel to advise the court of the proposed supervision plan, and if necessary, provide evidence that the proposed supervision will be in place. In that way, the judge can consider the submission and his or her concerns in the context of a record, both counsel will have an opportunity to assist the court and provide input into the record, and a court on appeal of the sentence will have a record on which to base its consideration of the issue.
>
> Second, the record that does exist suggests that there are, in fact, sufficient resources in the Timmins community to supervise this offender on a conditional sentence. . .
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> * * * * * * * * * *
>
> Third, it is not clear from the record, what type or level of supervision the sentencing judge had in mind in order to be able to adequately enforce the punitive aspects of a conditional sentence.

The comments of Feldman J.A. relating to the first consideration are particularly apt in this case. The Military Judge appears to have rejected the joint submission on the basis of judicial notice of a lack of resources in the community to monitor the conduct of a former member. No evidence of community resources was called nor did the Military Judge ask counsel to advise of a proposed supervision plan. In addition, it would appear that one of the reasons he rejected the imposition of a fine, in addition to the fact the previous fine had not been paid, was a concern that enforcement of payment would be cumbersome and expensive now that the appellant had left the military. The Trial Judge should have been prepared to consider the options proposed by the prosecution and defence for enforcement. In our opinion, it was an error of law for the Military Judge to have taken the approach he did: See also *R. v. Makar*, [2000] M.J. No. 458 (C.A.) And *R. v. Roberts*, [2000] O.J. No. 3750 (C.A.).

[14] Having concluded that the Military Judge erred in rejecting the joint submission and in imposing a sentence of 45 days imprisonment, I must now consider a fit and appropriate sentence. Pending this appeal, the appellant was initially denied bail and spent four days in jail before being released. On the appeal the panel has received fresh evidence that the fine imposed by the court martial in May 2000 had been paid. In addition, the appellant now has a very serious medical condition. A joint submission has been made to the panel that a fine of $4500 be imposed. I would accept this submission.

[15] Accordingly I would allow the appeal as to sentence, set aside the sentence of 45 days imprisonment and in its place substitute a sentence of a fine of $4500 to be paid at the rate of $500 a month.

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

I agree
"John M. Evans" J.A.

GOODWIN J.A. (dissenting reasons)

[16] The sentence of 45 days imprisonment by the Military Judge appears severe but not unreasonable in these circumstances, when all relevant factors are considered.

[17] In law the Military Judge did instruct himself properly.

[18] He appropriately exercises his residual discretion in rejecting the joint submission.

[19] Ex-Private Castillo engaged in deviant conduct by planning and committing more than one wrongful act of stealing and fraud while in a position of trust.

[20] To this day, he has not made any attempt to refund any of the amounts stolen from the Crown on these charges.

[21] In passing sentence the Military Judge summarized his analysis as follows:

> I have very carefully considered whether any other sentencing options short of a custodial sentence would suffice in this case. I have also instructed myself that any sentence I impose must be the minimum required to maintain discipline in the Canadian Forces. I have also considered in arriving at a fit and proper sentence, or I should also say that I have been instructed in arriving at a fit and proper sentence by the provisions of section 718, 718.1 and 718.2 of the Criminal Code. As I have already stated, these are serious charges. Our financial and administrative systems depend to a very large extent on trust in its members and that trust has been abused in this case. The only motive was greed. A sentence must be imposed that will deter other like members from committing such offences. A sentence must be, as I said earlier, meaningful and seen to be meaningful.
>
> Stand up Mr. Castillo. The court sentences you to 45 days imprisonment. Sit down. (Appeal Book pp. 56-57, line 12).

[22] I have no doubt that Counsel in this case, as in others, did carefully and seriously consider all options before proposing the sentence by joint submission.

[23] However, at the same time, judicial discretion must be maintained.

[24] Here, the discretion was properly exercised when the Military Judge considered, in August, 2002 that a $4500 fine was “an illusory sentence” since no attempt had been made to pay even some of the fine imposed in May, 2000.

[25] In my mind, the fresh evidence accepted by this Court that the earlier fine of $2000 although imposed in May, 2000, was paid in April, 2003, a month before this Court convened, is not a mitigating circumstance.

[26] Finally, I again suggest a review of the sentencing provisions under the *National Defence Act*, to ensure that sentencing options in Court Martial and in this Court are up to par with those available under the Criminal Code. (See e.g. *Larocque c. La Reine*, CACM-438, October, 2001).

[27] With respect, I would dismiss the Appeal and maintain the sentence of 45 days imprisonment.

(s) “Ross Goodwin”
J.A.