Date: 20000208

Docket: CMAC-429

CORAM: LÉTOURNEAU J.A.
MEYER J.A.
LUTFY J.A.

BETWEEN:

PRIVATE M.J. ST. JEAN

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, Friday, January 21, 2000

Judgment delivered at Ottawa, Ontario, Tuesday, February 8, 2000

REASONS FOR JUDGMENT BY: **LÉTOURNEAU J.A.**

CONCURRED IN BY: **MEYER J.A.**
LUTFY J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal against the legality and the severity of a sentence imposed by the President of a Standing Court Martial on April 22, 1999. Pursuant to a guilty plea to a fraud charge under section 130 of the *National Defence Act* (Act), R.S.C. 1985, c. N-5, the appellant was sentenced to four months in prison.

Facts

[2] The appellant, at the time of the offence, was a Sergeant in the Canadian Armed Forces posted to the Directorate for Aerospace Equipment Program Management at National Headquarters in Ottawa.

[3] In 1998, he was charged with having committed three offences: one under section 130 of the Act which alleged fraud contrary to subsection 380(1) of the *Criminal Code* (Code), another one under paragraph 117(*f*) of the Act for an act of fraudulent nature not specified in sections 73 to 128 of the Act, and finally another offence under section 130 of the Act consisting in the uttering of a forged document contrary to subsection 368(1) of the Code.

[4] Pursuant to the appellant's guilty plea on the first charge, no evidence was offered by the prosecution on the other two charges. Consequently, the appellant was acquitted of these charges.

[5] The particulars of the first charge were that the appellant, between 28 August 1997 and 11 February 1998, at or near Ottawa, Ontario, did by deceit, falsehood or other fraudulent means, defraud the Department of National Defence of money, the sum of $30,835.05, by submitting false General Allowance Claims. [Charge Sheet, Appeal Book, page 1.] Indeed, the money was obtained by the appellant through his filing of 62 separate General Allowance Claims in which he falsely claimed that the money was used to pay tuition for authorized computer courses. He

never paid tuition fees nor attended courses. The fraud was perpetrated over a period of six months.

[6] During the same period (late 1997 and early 1998), the appellant made 74 cash deposits to an Ottawa bank account that is to the credit of a Ms. Lorraine Lortie. The deposits totalled $23,557.00. He also made cash payments to Ms. Lortie.

[7] The background to the appellant's commission of these offences allegedly lies in problems he was having in 1996 with his marriage of eleven years. At this time, he responded to a telepersonal advertisement, which put him in contact with Ms. Lortie. They spoke twice on the telephone and then arranged a meeting. When they met, she indicated that her interest was of a sexual nature. He declined to have that kind of relationship with her, saying that what he wanted was a confidante. Some days later she telephoned him with a blackmail threat: unless he paid her money, she would either tell his wife they were having an affair, go to the police with a false accusation that he had sexually assaulted her six-year old daughter, or have some of her friends "get" him.

[8] From that time onward, the appellant said that Ms. Lortie demanded, and that he paid, money to buy her silence. At first he paid from his salary and his savings, using up about $8,000 in this way. Then he borrowed about $4,000 from his mother. Then, when these licit sources had dried up, he embarked upon the scheme of submitting false allowance claims.

[9] The appellant was a first-time offender and his 26 year career with the Armed Forces was unblemished. The testimony of co-workers was generally laudatory. At the time of sentencing, allegedly under the advice of his lawyer, he had only repaid approximately $450 of the fraudulently obtained money.

The reasons for sentencing given by the President of the Standing Court Martial

[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. He looked at the need to enforce discipline in the Armed Forces. He considered the nature of the offence, its gravity (punishable by 10 years under subsection 380(1) of the Code as the amount defrauded exceeded $5,000), its surrounding circumstances and its consequences (a loss of more than $30,000).

[11] As mitigating circumstances, he factored in the appellant's cooperativeness, the stress created by the delay in prosecuting the charges, the testimonies in his favour, his clean disciplinary record, his good record at work, his social and economic circumstances as well as his rank and equity in the Armed Forces.

[12] Given all these circumstances, he considered that "the protection of the public and the maintenance of discipline would best be met in this case by the imposition of a sentence which would reflect the application of the principle of sentencing of deterrence".

The application for leave to appeal the sentence

[13] By order of the Chief Justice dated October 22, 1999, this Court was to hear and dispose of two matters at the same time: the application for leave to appeal the legality and severity of the sentence and the appeal on the merits.

[14] Having heard the submissions of counsel for the appellant on the leave application as well as on the merits of the appeal, I am of the view that leave to appeal should be granted.

The appeal against sentence

[15] I am also of the view that the appeal should be allowed for the following reasons.

Standard of review of sentencing decisions or orders

[16] While this Court, like other Courts of Appeal, has the power to vary sentences and exercises it from time to time, it can do so only if the sentence is illegal or if it is convinced that the sentence imposed is not fit. In R. v. Shropshire,[1] Iacobucci J., writing for a unanimous Court, expressed the principle and its rationale in the following terms:

> An appellate court should not be given free reign [sic] to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of

[1] [1995] 4 S.C.R. 227, at p. 249.

> having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[17] This deferential approach set out in Shropshire also applies where an accused, as in the present instance, has entered a guilty plea. This was confirmed by Lamer C.J. in *R. v. M.(C.A.)*[2] writing for a unanimous Court:

> In the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling.

[18] He concluded that there are profound functional justifications for the deferential stance toward the orders of sentencing judges:[3]

> A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community.

[19] In the present instance, the President of the Standing Court Martial, as a military judge, also enjoys a privileged institutional position which indicates that, in this "delicate art" of

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[2] [1996] 1 S.C.R. 500, at p. 566.

[3] *Id.*

attempting to balance a number of weighty factors, his discretion "should thus not be interfered with lightly" [4] The legality and reasonableness of the sentence imposed

[20] This is not a case where the sentencing President omitted to take into consideration relevant factors whereby, as a result, the sentence could be said to be illegal or unreasonable. It is, I believe, common ground that the sentencing President considered all the relevant aggravating and mitigating circumstances. Under subsection 112.48(2) of the *Queen's Regulations and Orders for the Canadian Forces*, he had to take into consideration any indirect consequence of the finding of guilt or of the sentence and impose a sentence commensurate with the gravity of the offence and the previous character of the offender.

[21] However, counsel for the appellant submits that the President misdirected himself and overemphasized the principle of deterrence in this case as the prospect of recidivism was extremely low and the appellant was a first offender who should not have been deprived of his liberty since less restrictive sanctions could be appropriate in the circumstances and imprisonment was not warranted by the nature and the gravity of the offence. In other words, the imprisonment of a first offender with a favourable pre-sentence report should be reserved, from the perspective of both individual and general deterrence, for the most serious offences, particularly those involving violence or dangerous offenders. In addition, he submitted that the sentence was unduly harsh as it resulted in an automatic reduction of rank for the appellant which severely increased the penalty he received for the offence and affected his financial

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[4] *Id.*.

situation. Finally, he contended that the President erred in relying upon the need to maintain discipline to arrive at harsher sentence than would have been imposed on a civilian.

[22] 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. 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[5] Every case depends on its facts and circumstances.

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[5] Sa Majesté La Reine c. Caporal-Chef J.P.P.D. Lévesque, CACM-428, Nov. 29, 1999; Commander John T.Legaarden v. Her Majesty the Queen, CMAC-423, Feb. 24, 1999.

[23] Bearing these principles in mind, I believe that the sentencing President, in imposing a sentence of imprisonment, erroneously distinguished the decisions of this Court in *Legaarden*[6] *Lévesque*[7] and *Vanier*[8], and improperly relied upon an earlier decision of a Standing Court Martial in *Larocque*[9] .

[24] In *Vanier*, the accused was an officer of senior rank. He was found guilty of six charges of fraud and one of improperly receiving a benefit contrary to section 130 of the Act. The offences were committed over a period of four months and the sums obtained totalled more than $13,000[10]. The sentencing court took into account the fact that the accused was an officer in a position of trust and responsibility. Yet no imprisonment was ordered. Deterrence was achieved by means of a reduction in rank to Lieutenant-Colonel and a fine of $10,000.

[25] In *Legaarden*, this Court quashed a sentence of six months imprisonment imposed against an officer for falsification of documents with intent to defraud the government of a sum of $2,400 (U.S.). It substituted a fine of $10,000 and a severe reprimand.

[26] *Lévesque* was a non-commissioned member who was found guilty under section 130 and paragraph 117(*f*) of the Act on three of the ten counts that he was facing: conspiracy to defraud

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6 *Id.*.

7 *Id.*.

8 *R. v. Vanier,* CMAC-422, February 17, 1999.

9 *R. v. Larocque*, Standing Ct. Martial, February 10, 1998.

10 I have not included the sum of $2,694 alleged in the third charge as an annotation to that charge mentions that the fraud was for a lesser amount, but does not specify that amount.

contrary to paragraph 456(1)(*c*) of the Code, mischief with intent to defraud contrary to subsection 430(3) of the Code and a fraudulent act by submitting a claim of $35,615.42. This Court underlined the seriousness of the offences, the loss of confidence and faith resulting from a fraud against an employer or an insurance company as well as the link existing between this case and the decisions in *Vanier* and *Legaarden*[11]. It upheld the decision of the President of the Standing Court Martial consisting of a fine of $4,000 and a severe reprimand.

[27] In *Deg* [12], the appellant, who was an officer, pleaded guilty to charges under sections 114, 125(*a*) and 129 of the Act: one charge of stealing while entrusted with the control of a standing advance, 23 charges of making false entries in documents required for official purposes and a charge of neglect to the prejudice of good order and discipline. It is true that the amount stolen from his position of trust was small ($619.00), but he forged the signature of his superior officer on all the false claims. This Court quashed a sentence of four months in prison and substituted a severe reprimand and a fine of $5,000.

[28] In *R. v. Benard*[13], the President of the Standing Court Martial found the accused, who was a Sergeant in the military police, guilty of stealing material while entrusted with the care and custody of that material and guilty of making a false certification of a document required for official purposes. The maximum punishment prescribed for the offence of stealing while entrusted is 14 years imprisonment compared to 10 years in the present instance. The sentencing

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[11] See at page 6 of the decision.

[12] *Lieutenant (N) Deg v. R.*, CMAC-427, October 26, 1999.

[13] Stand Ct. Martial, November 16, 1999.

President took into consideration the amount of $2,000 involved and the negative impact that the accused's conduct would have on the Military Police Academy where the accused was an instructor. After reviewing the decision of this Court in *Deg*, *supra*, the sentencing President wrote at page 4:

> The message from appellate courts and from Parliament is coming through. It is a clear message. Incarceration is a last resort. As a military judge, I have a broad range of penalties available. I have considered carefully the punishment of reduction in rank to the rank of corporal. This is a means of addressing the society's concerns and denunciation over policemen, be they military or civilian, who betray the trust we place in them. It also will be a visible reminder and a deterrent to others. The consequences of this punishment have been taken into account. Firstly and most directly, it will reduce pay. If release from the Canadian Forces occurs in the near future, and particularly if that release is of the honourable category, this will affect financial benefits upon retirement, or release. Since this is a property offence, I've also decided that a fine should be part of the sentence as well, however, it will not be as large as suggested by the defence in view of the reduced pay scale.

In the end, deterrence was achieved by a fine of $2,000 and a reduction in rank to the rank of Corporal.

[29] As previously mentioned, the sentencing President in our instance relied upon the case of *Larocque*, *supra*. In that case, Sergeant Larocque was convicted on one charge of fraud and one charge of stealing money while entrusted with the money stolen. The amount of the public funds obtained by fraud was $27,394.75 and the theft amounted to $621.43. The accused was a gambling addict who used the money to satisfy his addiction. The sentencing President appeared

to be of the view that theft by a person in a position of trust requires mandatory imprisonment[14]. Thus, he imposed an imprisonment of four months.

[30] This case, in my view, is different from the case at bar. While the amount obtained by fraud was comparable in the two cases, *Larocque* was also convicted of the more serious offence of theft of entrusted money. In addition, it precedes the jurisprudence of this Court in *Vanier*, *Legaarden*, *Lévesque* and *Deg* which, in comparable circumstances, did not impose imprisonment.

[31] Indeed, after a review of all these cases, I am at a loss to see how the sentence of imprisonment in the present instance can be said not to be unreasonable. The only matter which distinguishes this case from those previously discussed and might appear to be more incriminating is the amount of money fraudulently obtained by the appellant, i.e., $30,835.05. However, this factor alone, in my view, does not justify the imposition of a harsher treatment to a non-commissioned member when it was found that deterrence of officers, including one of senior rank and another guilty of the more serious charge of stealing while entrusted with the control of the stolen money, could be achieved by less restrictive sanctions. To maintain the sentence in the circumstances of the present instance would amount to creating two classes of offenders in the military justice system with differential treatment for each class: imprisonment for non-commissioned members and a less restrictive sanction for officers.

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[14] *Supra*, note 9, at p. 187.

[32] I believe counsel for the appellant is right in his submission that the sentencing President over-emphasized deterrence and the need for imprisonment. It is not contested that the appellant was a victim of blackmail and that the money obtained was given to the blackmailer. This, of course, is no excuse for the commission of the crime but it sheds a different light on it. The appellant fully cooperated with military police both with respect to his own crime and that of the blackmailer. Restitution is in progress although it will take some time before the whole amount is reimbursed. It is the appellant's first encounter with the justice system after more than 26 years of service in the Armed Forces. It occurred in special circumstances and at a time where, as a result of an earlier transfer, he and his wife who had lost her employment pursuant to his transfer were having significant marital problems. Notwithstanding the crime committed, the appellant has retained the confidence of his employer. In my view, these mitigating circumstances were given insufficient weight by the sentencing President.

[33] Counsel for the respondent relied upon the decision of *R. v. Blaquière*[15] where, it submitted, a sentence of seven months imprisonment which had been imposed upon a senior non-commissioned officer for submitting false claims in a total amount of $13,500 was upheld by this Court. With respect, I do not think that this decision stands for the position advanced by the respondent.

[34] First, the sentence imposed by the Standing Court Martial as well as the decision of this Court refusing leave to appeal preceded our decisions in *Lévesque*, *Deg*, *Vanier* and *Legaarden*.

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[15] CMAQC-421, February 5, 1999.

[35] Second, the only purpose of the appeal was to obtain a suspension of the imprisonment sentence with conditions. Our Court found that it had no jurisdiction to grant the suspension requested by the appellant. No arguments were presented on the severity or reasonableness of the sentence itself and, therefore, the application for leave was refused. The decision of our Court does not stand for an endorsement of the sentence imposed by the Standing Court Martial.

[36] In view of the conclusion that I have come to on the issue of deterrence, I do not need to address the second question raised by the appellant, i.e., whether the sentencing President over-emphasized the need for a more severe punishment than would normally be imposed upon a civilian in order to enforce military discipline.

[37] Having said that, I hasten to add that I understand the concern of the appellant in this respect. The following excerpt from Lamer C.J. in R. v. Généreux[16] has become a stereotyped assertion in just about every sentencing case before military tribunals:

> 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.
>
> (My emphasis)

[16] [1992] 1 S.C.R. 259, at p. 293.

It is often difficult to determine what is being made of the underlined quote and the impact it has on the severity of the sentence imposed. This case is no exception.

[38] In this regard, it is worth re-emphasizing that Lamer C.J. did not say that more severe punishment is required in every case. In addition, there has to be a breach of military discipline. The chief purpose of military discipline is the harnessing of the capacity of the individual to the needs of the group. I have no doubt that Lamer C.J., when he referred to breaches of military discipline, contemplated breaches of the imposed discipline which is necessary to build up a sense of cooperation and forgo one's self-interest. He would also have contemplated a breach of self-discipline in the context of a military operation or one which affects the efficiency, the operational readiness, the cohesiveness and, to some extent, the morale of the Armed Forces. I do not think, however, that he intended the rule to apply to offences punishable by ordinary law, such as *Criminal Code* offences, where these offences are committed outside the military context, in what I would call civilian-like circumstances. The fact that these offences are made part of the *Code of Service Discipline* by section 130 of the Act and that the offender is a member of the military does not necessarily mean that these offences pose a challenge to "military discipline".

[39] For these reasons, I would allow both the application for leave to appeal the sentence and the appeal. I would set aside the sentence of imprisonment imposed by the President of the Standing Court Martial. I would order, as of the date of this decision, a reduction in rank of the appellant to the rank of Corporal and impose a severe reprimand. I would also impose a fine but,

in view of the severe financial hardship resulting from the reduction in rank, I would fix the amount at $8,000.

"Gilles Létourneau"

J.A.

"I concur
Perry Meyer, J.A."

"I concur
Allan Lutfy, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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