COURT MARTIAL

Citation: *R. v. Riley*, 2024 CM 5011

Date: 20240507
Docket: 202241

General Court Martial

Her Majesty's Canadian Ship *Malahat*
Victoria, British Columbia, Canada

Between:

His Majesty the King

- and –

Petty Officer 1st Class S.M. Riley, Offender

Before: Captain(N) C.J. Deschênes, C.M.J.

SENTENCE

(Orally)

I. Overview

[1] At the commencement of his trial by General Court Martial, Petty Officer 1st Class (PO1) Riley pled guilty to a charge of stealing while entrusted by reason of rank, appointment, employment or lawful command with the custody, control or distribution of that property, for taking $5,200 from the non-public funds (NPF) accounts of Her Majesty's Canadian Ship (HMCS) *Regina*, the property of His Majesty in right of Canada. After accepting and recording his guilty plea, I granted leave to withdraw the remaining charges and discharged the panel. At the sentencing hearing, counsel proposed a joint submission, recommending that I sentence PO1 Riley to thirty days' imprisonment combined with a fine in the amount of $3,000 to be paid by monthly instalments of $250. They recommended that I suspend the carrying into effect of the punishment of imprisonment.

[2] The issue is whether imposing the sentence jointly recommended by counsel is contrary to the public interest in the circumstances of this case. For the reasons that follow, the Court accepts and will impose the sentence recommended by counsel.

Context

[3] The relevant facts surrounding the commission of the offence were summarized in the statement of circumstances that was read and introduced in Court. The document contains the following information:

"STATEMENT OF CIRCUMSTANCES

1. PO1 Riley (ret'd) was assigned to the HMCS Regina as the senior steward on 01 July 2015.

2. In addition to his steward duties, PO1 RILEY (ret'd) was entrusted as the Mess Manager of the HMCS REGINA.

3. As the Mess Manager PO1 Riley (ret'd) was entrusted with the NPF funds. This included all the NPF bookkeeping; the credit cards, line of credit, and petty cash associated with the account. PO1 Riley (ret'd) also had access to SimplyAccounting (the ships NPF accounting software).

4. PO1 Riley (ret'd) came to the attention of CFMWS finance and accounting personnel when he requested a $90,000 Imprest for the HMCS Regina.

5. An Imprest is the term used for a loan/line of credit that is issued to ensure the ship has enough money for alcohol and events that take place during a deployment.

6. A $90,000 Impress request is larger than a normal request of between $2,500-$4,000.

7. An investigation was started, and a Formation Review Report was prepared involving a team from the fleet accounting office.

8. The Formation Review Report identified two cheques in particular that were of concern as they were drawn on the NPF account and made out to PO1 Riley (ret'd).

9. There was no documentation found to justify the issuance of the two cheques to PO1 Riley (ret'd).

10. Cheque #0504600 from the HMCS Regina NPF account was made out to Sheldon RILEY for $1,600 CAD. The cheque was dated 4 Jan 2019.

11. VanCity Bank records show the $1,600 cheque drawn on the HMCS Regina NPF account was deposited to PO1 Riley (ret'd)'s VanCity Bank account the same day.

12. NPF Cheque #0504604 was made out to Sheldon RILEY for $3,600 CAD.

13. The memo portion of that cheque stated it was for the purpose of ship inventory.

14. The cheque was dated 25 Jan 2019 and was deposited into PO1 Riley (ret'd) VanCity account the same day.

15. [In September 2019,] a search was conducted of PO1 Riley (ret'd)'s office onboard the HMCS Regina as part of the Formation Review Report. Two bundles of cash, one $3,600 bundle and one $1,600 bundle, were [recovered] in the office.

16. At the time PO1 Riley (ret'd) cashed the cheques he intended to deprive the rightful owners of that money."

[4] PO1 Riley has admitted these facts as being true.

II. Whether imposing thirty days' imprisonment suspended, combined with a fine in the amount of $3,000 would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

Positions of parties

[5] The prosecution contended that the joint submission was agreed to in a time where public and governmental scrutiny of public spending is a current event; he argued that there is a pressing need to achieve better stewardship. It is in this context that PO1 Riley is going to be sentenced. The prosecution contended that PO1 Riley stole funds from his shipmates, and that he did so by writing cheques to himself with intent to take money from his brothers and sisters of arms. The prosecution also considered aggravating, the position of trust he occupied when the offender committed the infraction; the amount involved was relatively of high value; that the commission of the offence had an impact on his shipmates; and that he has a conduct sheet for the commission of a related offence. He considered mitigating PO1 Riley's guilty plea, which had the effect of saving two weeks of court time. The prosecution explained that the imprisonment would serve to denunciate the conduct; however, this punishment should be suspended because the military justice should not be in a business of

incarcerating members suffering from a diagnosis of post-traumatic stress disorder (PTSD), particularly as serving a term of imprisonment may hinder the offender's progress.

[6] Agreeing generally with the prosecution's arguments, the defence provided additional information in relation to the personal situation of the offender. PO1 Riley is currently unemployed because of his mental health condition in relation to the PTSD diagnosis from 2019. He earns about $5,200 per month from all sources (such as pension, etc.). He has an eleven-year-old daughter for whom he pays child support in the amount of $900 monthly, in addition to other expenses that are shared equally with her guardian. He also has expenses for travel cost to visit his daughter in Ontario, or for her to visit him in Victoria. According to his counsel, PO1 Riley has the means to pay a fine in the amount of $3,000 with the proposed monthly instalments. This punishment would have a powerful financial impact on him. The fine, together with a thirty days' imprisonment, would achieve the sentencing objective of denunciation. Counsel for the defence is advocating for a suspension of the term of imprisonment to prevent impairing the offender's recovery, because the consequences of serving even a short term in a civilian jail, could have devastating effects on PO1 Riley. Counsel for the defence reminded the Court that the offender's mental health condition is service-related; PO1 Riley is now burdened with a health condition as a result of his service to the country. His treatment continues, and he is slowly progressing. The defence clarified that the resolution of this file coming late is due to the difficulties that the offender experiences from his mental health condition. He concluded his submissions by mentioning that the offender's willingness to resolve this matter despite his circumstances should be commended.

Sentencing principles

[7] When determining a sentence, the Court must be guided by the sentencing principles contained in the *National Defence Act* (*NDA*). In this context, section 203.1 of the *NDA* provides that:

> The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.

[8] The fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of the sentencing objectives listed in the Act, such as to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct and to assist in rehabilitating offenders. Additionally, when imposing a sentence, the Court must take into consideration other sentencing principles, which include, but is not limited to that:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender […],

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances [which is referred to as the parity principle]; and
>
> (c) an offender should not be deprived of liberty […] if less restrictive punishments may be appropriate in the circumstances.

[9] The punishment imposed by any tribunal should constitute the minimum necessary intervention that is adequate in the circumstances. For a court martial, this means imposing a sentence composed of the minimum punishment, or combination of punishments, necessary to maintain discipline, efficiency and morale of the Canadian Armed Forces (CAF). Ultimately, a sentence must be proportionate to the circumstances surrounding the commission of the offence, and to the responsibility and previous character of the offender.

[10] When counsel agree and jointly recommend a punishment, these principles do not simply vanish. They must be considered in light of the specific circumstances of the case in the context of a joint submission. A sentencing judge dealing with a joint submission must assess the recommended sentence within the boundaries established by the Supreme Court of Canada (SCC).

The public interest test

[11] Indeed, in *R. v. Anthony-Cook*, 2016 SCC 43 the SCC established the public interest test. The public interest test requires that the joint submission be rejected only when it is so unhinged from the circumstances of the offence and the offender, that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. In other words, in light of the circumstances of the case and of the offender, the joint submission is either so severe, or so lenient, as the case may be, that accepting it would bring the administration of the military justice system into disrepute. Consequently, a joint submission should not be rejected lightly. This high threshold means that I, as the sentencing judge, have limited discretion when considering a fair and fit sentence to impose and must exhibit restraint when considering rejecting a joint submission.

Benefits of joint submissions

[12] Guilty pleas in exchange for joint submissions are a necessary part of the administration of criminal justice. When properly conducted, plea resolutions benefit not only the accused, but also victims, witnesses, counsel, the unit, and the administration of justice generally. Accused persons who plead guilty are able to minimize the stress and legal costs associated with trials, and for those who are truly remorseful, a guilty plea offers an opportunity to begin making amends. For many accused, maximizing certainty as to the outcome is paramount and provides a level of comfort and prevision. Indeed, generally, accused persons will not give up their right to

a trial on the merits, and all the procedural safeguards it entails, unless they have some assurance that the agreements entered into with the prosecution will be honoured. The prosecution also relies on the certainty of joint submissions to see a fast and fair resolutions of its case.

[13] Additionally, both the prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. Counsel have an in-depth knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. In addition to their professional and ethical obligations and accountability toward their respective client, the Court and the public, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest. They are in this context, expected to have considered the sentencing principles of the military justice system, in particular the fundamental purposes of sentencing, which is to maintain the discipline, efficiency and morale of the CAF. Counsel are required to ensure that their joint submission is proportionate to the gravity of the offence and the degree of responsibility of the offender.

Circumstances of the offence – Aggravating and mitigating factors

[14] As part of my analysis to decide whether I will accept and impose the joint submission, I have considered the objective gravity of the offence, an offence punishable under section 114 of the *National Defence Act* (*NDA*). This section provides a maximum punishment of fourteen years' imprisonment. The maximum punishment confirmed that the offence of stealing while entrusted is a very serious offence.

[15] I have also considered the aggravating factors specific to this case. First, an offence of stealing, in particular stealing NPF, which implies stealing from comrades, constitutes a breach of trust. More aggravating is that PO1 Riley held a high rank and was the senior steward, a position that commends trust from the chain of command and from all ranks. Expectations of integrity and professionalism are rightfully high. The consequences of his conduct in this regard are likely to cause great disappointment toward him as well as toward his rank, affecting morale within the unit. On this note, the offender's chain of command on board HMCS *Regina* should have been aware of his conduct sheet; PO1 Riley would have regained the trust of the CAF when he was assigned the responsibility of mess manager and entrusted with the control of the Ship's NPF. Unfortunately, he took advantage of this position to steal from the NPF.

[16] Also aggravating is the amount stolen, while not chokingly high, it was just over $5,000, it is still a non-negligible amount. On a positive note, the total amount was recovered a few months later. I find aggravating that there was a level of sophistication when PO1 Riley committed the offence.

[17] Additionally, the military impact statement signed by Lieutenant-Commander (LCdr) Thwaites, the executive officer (XO) of the Ship, speaks volume to the long lasting and multi-faceted impacts the commission of the offence had on the Ship and her

crew. In particular, PO1 Riley's shipmates were deprived of some of the benefits the NPF normally provide, because HMCS *Regina*'s NPF accounts were frozen and accounting oversight transferred ashore, resulting in the Ship's annual holiday party being cancelled because the remaining funds were insufficient. The offender's contention that the event was cancelled for other reasons in the two preceding years does not contradict that conclusion, since the cancellation of the Ship's annual holiday party for that year would have taken place after PO1 Riley left the crew.

[18] As of today, HMCS *Regina* still does not have full control of her NPF accounts and has just repaid her final Canada Revenue Agency tax bill and penalties. Nevertheless, the XO confirmed in his statement that the greatest impact of the offender's conduct was in fact the loss of trust of many members of the Ship's company in the cadre of senior non-commissioned officers (NCOs) which he represented. LCdr Thwaites wrote that the trusted leadership in NCOs remains fragile on HMCS *Regina* and will require more time to rebuild.

[19] I now turn to mitigating factors. I considered the offender's guilty plea, which spared the resources of a contested trial which was estimated to last two weeks, with approximately ten witnesses and the introduction of documentary evidence. PO1 Riley's waiver of a longer and costlier trial shows that he accepts responsibility for his actions. Another mitigating factor is that, but for the one conviction contained on his conduct sheet, he had an unblemished career and served twenty-two years with the Royal Canadian Navy.

Circumstances of the offender

[20] As for the offender's personal situation, the documentary evidence listed at article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces* reveal that he is forty-five years old, single and has one dependent. He is currently unemployed.

[21] PO1 Riley enrolled in the CAF on 10 January 2000, and was promoted on 3 June 2016 to the rank he held on release. He received: the South-West Asia Service Medal, the Operational Service Medal – EXPEDITION, the Special Service Medal – EXPEDITION, the Article 5 NATO Medal for Operation ACTIVE ENDEAVOUR, the Non-Article 5 NATO Medal for Service on NATO Operation UNIFIED PROTECTOR - LIBYA, the Canadian Forces' Decoration and served overseas on four occasions, generally as part of an exchange. He was released under Item 3(b) for medical reasons effective 16 May 2022. I have unfortunately no information regarding his performance in the CAF prior to his release, other than to note that when he was released, he held a senior rank within the NCOs' cadre.

[22] PO1 Riley has a conduct sheet indicating that he was found guilty on 16 June 2010 by summary trial for an offence of stealing committed in September 2009. The particulars of the charge states that while the offender was employed as a steward in the

19 Wing Officer's mess and entrusted with $500 in petty cash, he stole approximately $269. He was sentenced to pay a $375 fine.

[23] I was not provided with any evidence regarding the cause of his mental health condition, other than an admission from counsel that the offender has been diagnosed with service-related PTSD in 2019. PO1 Riley continues to be treated by a registered psychologist, Dr Anthony, who has testified as an expert witness during preliminary hearings as part of these trial proceedings, mainly to explain that being in a military environment may be a significant trigger for symptoms, such as experiencing anger and anxiety.

[24] PO1 Riley has now attended sixty-five treatment sessions of a duration of one hour to one hour fifteen minutes each. Although he may, in time, progress in a way that would allow him to function as a member of society, he will always have to deal with this condition.

Parity

[25] Having considered the circumstances surrounding the commission of the offence and the offender's personal situation, the Court examined precedents to determine whether the submission is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishment that would be appropriate in this case.

[26] As recognized by the Court Martial Appeal Court (CMAC) in *R. v. Darrigan*, 2020 CMAC 1 at paragraph 57, the range of sentences imposed in the past for stealing while entrusted varies from a reprimand combined with a fine, to imprisonment for ninety days. This range has remained relatively the same following this decision, see for example, *R. v. Manuel*, 2021 CM 2024, a master sailor who pled guilty to one charge of fraud and one charge of stealing when employed as bar supervisor at the mess and so entrusted with the custody, control or distribution of the Officer's mess daily revenues, stole $2,057.70. The joint submission of a severe reprimand and fine in the amount of $5,000 was accepted and imposed.

[27] I have also reviewed the cases submitted by the prosecution: *R v Coulombe*, 2013 CM 3001, a guilty plea, joint submission of imprisonment for a period of thirty days with a severe reprimand, related to theft of items valued at over $1,200; *R. v. Tardif*, 2014 CM 1022, a joint submission of imprisonment for a period of ninety days for a retired sergeant who stole multiple Department of National Defence items and used a CAF gas card repeatedly, resulting in the theft of a value of nearly $50,000; and *R. v. Whaley*, 2017 CM 2001, another case involving a higher value theft, where a joint submission of fourteen days' detention and a fine of $3,000 was accepted and imposed. Although these cases predate *Darrigan*, they are confirmative of the range as stated by the CMAC. I conclude that the joint submission of counsel is in that range.

Principles of sentencing deserving greatest emphasis

[28] In light of the offence to which PO1 Riley pled guilty and in light of the circumstances surrounding this case, the fundamental purposes of sentencing shall be achieved by imposing a sanction that has the objectives of deterring him and others from adopting the same conduct and to denounce unlawful conduct. When the objectives of sentencing deserving greatest emphasis are denunciation and deterrence, a more severe sentence is warranted. That said, the offender's rehabilitation should not be ignored.

The sentence to impose

[29] Therefore, while the emphasis of his sentence must be placed on general and specific deterrence as well as denunciation, I must ensure that the sentence would not hinder the progress he is making to address his mental health condition.

[30] Considering the joint submission, a sentence of incarceration should be imposed only as a last resort. Stealing is a serious offence, more so in a military context when trust constitutes the foundation for achieving discipline, efficiency and morale in the CAF. The commission of such an offence has the potential to dramatically impact morale and cohesion thus, interferes with the mission. In PO1 Riley's case, the XO confirmed that the theft did have an impact for the Ship and amongst the crew. Considering the nature of the offence, the applicable sentencing objectives and principles, including sentences imposed on similar offenders for similar offences committed in similar circumstances by military tribunals, the aggravating and the mitigating, factors mentioned above, I conclude that imposing a short term of imprisonment, being thirty days, with a fine of $3 000, would not be contrary to the public interest test.

[31] Having concluded that imposing a punishment of thirty days' imprisonment would not be contrary to the public interest test, I must now turn to the issue of whether ordering a suspension of imprisonment in accordance with section 215 of the *NDA* would not be contrary to the public interest test. The test to apply for this determination was developed and applied over time by courts martial in *R. v. Paradis*, 2010 CM 3025 at paragraphs 74 to 89 and *R. v. Masserey*, 2012 CM 3004 at paragraphs 21 to 32. Two requirements must be met:

> (a) the offender must demonstrate, on the balance of probabilities, that their particular circumstances justify a suspension of the punishment of imprisonment or detention; and
>
> (b) if the offender has met this burden, the court must consider whether a suspension of the punishment of imprisonment or detention would undermine the public trust in the military justice system, in the circumstances of the offences and the offender including, but not limited to, the particular circumstances justifying a suspension.

[32] First, it needs to be clarified that, in the context of sentencing an offender, a diagnosis of PTSD, whether it is service related or not, should not, by any means, constitute a "get-out-of jail free card". Rather, in determining a sentence that is proportionate, the Court must assess the circumstances of the case, as well as the specific circumstances of the offender. In the context of the recommendation that the sentence be suspended, I was asked to draw inferences from the expert evidence provided during the preliminary applications that if the offender was to serve a term of imprisonment, it would have a detrimental effect on him. Unfortunately, Dr Anthony did not provide any evidence regarding such effect. He rather testified generally that being in a military environment may trigger PTSD symptoms. In addition, I was not provided any evidence regarding whether he would be allowed to continue his session with Dr Anthony if he was to serve a term of imprisonment in a civilian prison.

[33] While it would have been prudent to provide evidence in regard to the effects serving a term of imprisonment may have on this offender's mental health, I am mindful that the recommendation to suspend the carrying into effect of the punishment is an integral part of the joint submission. Also, in his submissions, the prosecutor aptly applied the proper test for the Court to decide if the imprisonment should be suspended in his case, as established in *Paradis*, and applied in other court martial cases, see *R. v. Boire*, 2015 CM 4010. The prosecutor clearly has turned his mind to the test when agreeing on the sentence. I further considered that the resolution of the case came the Friday before the start of the trial scheduled for the following Monday, giving little time for the prosecution to prepare to gather evidence in this regard for sentencing and to travel on location. Additionally, I considered the history of the case, including initial concerns over PO1 Riley's fitness to stand trial, and postponements being granted to allow him to improve in time to allow his full participation at the trial because his symptoms are severe when they unpredictably manifest themselves. Finally, his treating clinician has continually expressed concerns with his mental health fragility and his slow progress, and the need for PO1 Riley to continue his sessions with him, sessions that I do not know he could continue if he was incarcerated. I conclude therefore that the thirty days' imprisonment, suspended, is not contrary to the public interest, particularly when combined with $3,000 fine, even though the amount suggested is at the lower end of the range, but not outside of that range. In sum, I find that the proposed sentence is not contrary to the public interest.

[34] Consequently, although there was little evidence on certain aspects of this sentencing case as I have alluded to, in light of the records, the history of the case, the evidence before me, including the aggravating and mitigating factors as well as his personal situation and considering counsel's admissions and their submissions, I am satisfied that the joint submission is not contrary to the public interest. A thirty-day imprisonment, suspended, with a $3,000 fine is a punishment also respectful of the parity principle.

III Conclusion

[35] In conclusion, it is difficult to comprehend the reason that pushed PO1 Riley to act the way he did. His dishonest conduct had a detrimental and long-lasting effects on the Ship's crew, depriving them of some of the NPF benefits that were designed to boost morale. However, he did take responsibility for his actions when he pled guilty. He has a long road to improve his mental health condition, and I hope that he will one day be a fully functioning member of our society.

FOR THESE REASONS, THE COURT:

[36] **FINDS** PO1 Riley guilty of a charge of stealing while entrusted by reason of rank, appointment, employment or lawful command with the custody, control or distribution of that property.

[37] **SENTENCES** him to imprisonment for a period of thirty days, with a fine in the amount of $3,000, to be payable with monthly instalments of $250 for twelve months starting 1 June 2024.

[38] **SUSPENDS** the sentence of imprisonment.

[39] **ORDERS** the offender, in accordance with subsection 215(2) of the *NDA*, to comply with the following conditions for the next thirty days, that is until the punishment of imprisonment is remitted under subsection 217(2) of the *NDA*, to:

(a) keep the peace and be of good behaviour;

(b) attend any hearing as ordered; and

(c) notify the Provost Marshal in advance of any change of name or address, and to promptly notify the Provost Marshal of any change of employment or occupation.

Counsel:

The Director of Military Prosecutions as represented by Major D.G. Moffat.

Lieutenant(N) B. Wentzell, Defence Counsel Services, Counsel for Petty Officer 1st Class S.M. Riley