



COURT MARTIAL

Citation: *R. v. Westcott*, 2015 CM 4016

Date: 20151117

Docket: 201550

Standing Court Martial

Canadian Forces Base Greenwood
Greenwood, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.R. Westcott, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

Declaration of guilt

[1] Corporal Westcott, having accepted and recorded your pleas of guilty in respect of charges one and five on the charge sheet, the court now finds you guilty of those charges under section 114 of the *National Defence Act* for stealing, while entrusted by reason of employment with the thing stolen, namely 14 laptop computers and for improperly selling those laptop computers, public property of the Government of Canada.

Matters considered

[2] It is now my duty as the military judge presiding at this Standing Court Martial to determine the sentence. In so doing, I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial.

I have considered, as well, the facts relevant to this case as disclosed in the statement of circumstances, the joint statement of facts and the other materials submitted during the course of the sentencing hearing. I have also considered the submissions of counsel, both for the prosecution and from the defence.

Purpose of the military justice system

[3] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Armed Forces, and a fundamental element of the military activity. The purpose of this system is the promotion of good conduct by allowing the proper sanction of misconduct. It is through discipline that an armed force ensures that its members will accomplish successful missions in a trusting and reliable manner. In doing so, it also ensures that the public interest in promoting respect for the laws of Canada is served by punishment of persons subject to the Code of Service Discipline.

Objectives of sentencing

[4] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

- (a) to protect the public, which includes the Canadian Armed Forces;
- (b) to denounce unlawful conduct;
- (c) to deter the offender and others from committing the same offences;
- (d) to separate offenders from society where necessary; and
- (e) to rehabilitate and reform offenders.

Principles applicable to sentences

[5] When imposing a sentence, a sentencing judge must also take into consideration the following principles:

- (a) a sentence must be proportionate to the gravity of the offence;
- (b) a sentence must be proportionate to the responsibility and previous character of the offender;
- (c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate; and

- (e) all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[6] That being said, punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. For a court martial, this means imposing a sentence composed of the minimum punishment or a combination of punishments necessary to maintain discipline.

[7] The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) requires a judge imposing a sentence at a court martial to consider any indirect consequence of the finding or the sentence and impose a sentence commensurate to the gravity of the offence and the previous character of the offender. Any sentence imposed must be adapted to the individual offender and the offence he or she committed. As well, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is not a result of slavish adherence to precedent, but because it appeals to our common sense of justice that like cases be treated in similar ways.

The offender

[8] Before the court is a 33-year-old aerospace telecommunication and information systems technician (ATIS Tech) serving here on 14 Wing in Greenwood. He joined the Regular Force in November 2007. Following basic and occupational training in St-Jean and Kingston, he has been posted to Greenwood since July 2009. On 29 October 2013, he pleaded guilty before a Standing Court Martial of two counts under section 130 of the *National Defence Act* for possession of property obtained by crime contrary to section 354(1) of the *Criminal Code of Canada*, relating to possession of two laptop computers between 1 April 2011 and 27 January 2013. He was sentenced to a severe reprimand and a fine of \$1500.

[9] The defence did not produce Personnel Evaluation Reports or any documents pertaining to the character of the offender or his performance in relation to his service as a member of the Canadian Armed Forces. Corporal Westcott was retained in the service following his conviction on 29 October 2013, attending some mandated training since. He was arrested on 30 October 2014 in the course of the investigation leading to the charges in this case and spent a number of hours in pre-trial custody before being released on conditions by a custody review officer, conditions which were minimal, yet entirely respected. Following his arrest, Corporal Westcott consented to a search of his residence by the military police to ensure that no more stolen items were in his possession. No stolen items were found on site.

[10] The court is informed by both counsel that, in all likelihood, Corporal Westcott will be compulsorily released from the Canadian Armed Forces as a result of his

conviction and sentence in the course of these proceedings. Corporal Westcott is married to Kathryn, who is currently unemployed and recovering from a surgical operation. Together, they form a blended family composed of four children: two are eight years old, one is three, and the youngest, the fruit of their current union, is two years old. Both parents have sole custody of their biological children.

The offences

[11] Turning now to the offences. In arriving at evaluating what would be a fair and appropriate sentence, the court has considered the objective seriousness of the offence as illustrated by the maximum punishment that a court could impose. Offences under section 114 of the *National Defence Act* for stealing when entrusted are punishable by imprisonment for 14 years or to less punishment. Offences under section 116 of the *National Defence Act* for improperly selling public property are punishable by imprisonment for less than 2 years or to less punishment.

[12] The circumstances of the offences were brought before the court in large part by means of a Statement of Circumstances produced as Exhibit 7, read by the prosecutor and accepted as conclusive evidence by Corporal Westcott. Those circumstances are as follows:

- (a) The investigation was undertaken by the military police on 10 March 2014, as a result of information received from Hewlett Packard (HP) to the effect that its customer services department had received calls for service to laptop computers that were identified as belonging to the Department of National Defence (DND), but apparently owned by civilians who had nothing to do with DND.
- (b) Through contact with one of the consumers, the military police learned that the HP laptops were obtained from a retail business of used computers in Wolfville, Nova Scotia. When contacted, the owner of that business reported that in 2011 and 2012, he acquired a number of HP laptops from Corporal Westcott.
- (c) The duties and responsibilities of Corporal Westcott as an ATIS Tech included the delivery, distribution, repair and installation of HP laptops amongst other systems. He had access to a secure storage space at 4 Hangar where laptop computers are stored to serve as replacements and backups to laptops issued to 14 Wing Greenwood personnel. Between 1 October 2011 and 30 June 2012, Corporal Westcott stole from 4 Hangar, 14 Wing Greenwood, each and all of the HP laptops listed at Annex A to the charge sheet.
- (d) Sometime prior to 17 November 2011, Corporal Westcott published an advertisement to sell HP laptops. The ad was noticed by the owner of the retail business in Wolfville who inquired repeatedly about the origin of

these laptops and the reason why they could be obtained for such a low price. Corporal Westcott mentioned that, as a computer tech for DND, he had access to DND surplus material at a good price through an Employment Buying Plan.

- (e) Between 17 November 2011 and 16 June 2012, a total of nine transactions of HP laptops took place between Corporal Westcott and the owner of the retail business in Wolfville. These transactions took place in Berwick, Nova Scotia. Each time, Corporal Westcott improperly sold between one and three HP laptops owned by DND. These computers were sold for \$200 each. These computers were in turn resold to various individuals through the retail business for anywhere between \$500 and \$750. The owner of the store also gave two of these HP laptops to members of his family.
- (f) With the help of the owner of the store, the military police were able to track and seize the fourteen HP laptops listed at Annex A to the charge sheet. These laptops were seized and were confirmed to be the same laptops that were stolen from 4 Hangar, 14 Wing Greenwood and improperly sold by Corporal Westcott. They are still kept in custody by the military police.
- (g) Corporal Westcott had no authority to sell or dispose of any of the HP laptops listed at Annex A to the charge sheet, which are public property. Each of these laptops were still in service and serviceable at the time Corporal Westcott improperly sold them. None of these laptops were ready to be disposed of by DND. Corporal Westcott was aware of that and, despite that knowledge, he wilfully and improperly sold each of them. The total value of all the HP laptops listed at Annex A to the charge sheet is \$13,790.

[13] The circumstances of the offences demonstrate to the court a pattern of dishonesty consisting of the theft and improper selling of computers, spanning a period of 20 months. The offender obtained \$2,800 for selling the laptop computers. This equipment was intended to be used in support of operations, logistics and administration conducted by military and civilian personnel on 14 Wing Greenwood. They are part of a limited stock of computers maintained at the Wing. It has been agreed that, in general, the loss of computers require new purchases as replacement, which, in addition to the cost of the replacement itself, entails work hours for personnel involved in the acquisition and distribution process to order, receive, prepare for distribution and distribute to end-user.

Aggravating Factors

[14] The court is of the view that serious crimes have been committed by Corporal Westcott. The offences consisted of diverting equipment obtained with Crown funds for

National Defence purposes for the sole, private benefit of the offender. In that sense, this is not a victimless crime. The value of the property stolen is \$13,790, far from being insignificant. Although Corporal Westcott has pleaded guilty to two charges, his criminal endeavours included several instances of theft and numerous efforts to sell the computers in a number of transactions, all along using the respect brought by his status as member of the Canadian Armed Forces to mislead the buyer on the suspicious origin of the goods he was obtaining. No explanations were provided for this behaviour.

Mitigating factors

[15] The court also considered the following mitigating factors, as mentioned in submissions by counsel, especially by defence counsel:

- (a) Corporal Westcott's guilty plea which the court considers as a genuine sign of remorse and an indication that he is taking full responsibility for what he has done. The plea was announced early, sparing the preparation of a complex trial. This admission of responsibility occurred in a very formal and public forum of this court martial, in the presence of members of his unit and chain of command.
- (b) Even if the conviction for two similar offences on the offender's conduct sheet completes the demonstration of a pattern of misbehaviour in relation to the charges for which the sentence is currently being imposed, it remains that these convictions were awarded on 29 October 2013, that is after the offences for which the offender is being sentenced today were committed. As explained by the Court Martial Appeal Court in the case of *R. v. Castillo*, 2003 CMAC 6, that conviction cannot be considered a previous conviction for sentencing purposes as it did not occur prior to the current offences under consideration. Consequently, Corporal Westcott must be considered as having no previous record.
- (c) The pre-trial custody of approximately eight hours and the collaboration of the offender with the military police immediately after his release from custody. In addition, the behaviour of the offender has been in compliance with conditions and, indeed, appears to have been exempt of ill behaviour since the offender's conviction by court martial on 29 October 2013. The court takes this as a sign indicating that the offender may already be on the road to rehabilitation.
- (d) The present situation of the offender as the sole breadwinner for his wife and four children, which will be compounded by his almost certain release from the Canadian Armed Forces in the near future.
- (e) Finally, the age and potential of Corporal Westcott to rehabilitate and make a positive contribution to Canadian society in the future.

Objectives of sentencing to be emphasized in this case

[16] I came to the conclusion that in the particular circumstances of this case, sentencing should place the focus on the objectives of denunciation and general deterrence. Indeed, the Court Martial Appeal Court in *R. v. St-Jean*, CMAC 429, on 8 February 2000, had this to say at paragraph 22 by Justice Létourneau about the objectives to be emphasized in cases of fraud by members of the Canadian Armed Forces in relation to their employment:

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.

Even if this case was rendered in the context of fraud, I find the words of Justice Létourneau to be entirely applicable in the case of stealing while entrusted.

[17] In addition, I also believe that the objective of rehabilitation here remains present in this case. Any sentence that I impose should not have extensive detrimental effects on the efforts the offender will have to make to reintegrate as a productive member of society. Yet, this objective is in the background, not at the forefront.

The appropriate punishment

[18] The prosecution and defence have agreed that imposing a punishment of imprisonment is required and adequate in a case such as this one. I agree with their assessment. Imprisonment is the minimum punishment required to maintain discipline here.

The joint submission of counsel and its effect

[19] As for the duration of the punishment of imprisonment, both counsel jointly suggested that imprisonment be for a period of 60 days. Although this court is not bound by this joint recommendation, it has been determined by the Court Martial

Appeal Court in *R. v. Taylor*, 2008 CMAC 1, at paragraph 21, that the sentencing judge at a court martial cannot depart from a joint submission unless there are cogent reasons for doing so. Cogent reasons mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

[20] In the course of the sentencing hearing, the prosecution presented the court with legal precedents which may be considered as useful to appreciate the range of punishment imposed by military tribunals in previous circumstances, allowing me to evaluate not only what a proper sentence might be, but also to assist in my obligation to determine if the proposed sentence is unfit. That being said, every case is different. Even if none of the precedents presented to me were exactly on point, I am confident, considering the nature of the offences, the applicable sentencing principles and the aggravating and mitigating factors mentioned earlier, a sentence of imprisonment for a period of 60 days as jointly proposed by counsel is not contrary to the public interest and will not bring the administration of justice into disrepute. The Court will, therefore, accept it.

[21] Both counsel agreed to suggest to this court that the sentence of imprisonment be served in a civilian custodial facility here in the province of Nova Scotia as opposed to a service facility. Having ensured, as it is my duty, that this submission was duly considered, I have no reason to depart from what has been agreed to by counsel. The committal order that I am signing reflects that I am committing Corporal Westcott to the Superintendent of the Central Nova Scotia Correctional Facility in Dartmouth.

[22] Corporal Westcott, the circumstances of the charges you pleaded guilty to reveal an unacceptable and, indeed, criminal pattern of dishonest behaviour incompatible with the legitimate expectations that Canadians must have towards persons entrusted with public assets in the performance of their service with the Canadian Armed Forces. You stand once again convicted of offences of dishonesty for stealing and selling stolen property. You will soon remove your uniform and head to a civilian correctional facility. Yet, in agreeing to impose the sentence jointly proposed to me, I believe you recognize the wrong you have done and I truly hope that you will be able to overcome the challenges lying ahead of you in civilian streets and endeavour not to reoffend.

FOR THESE REASONS, THE COURT:

[23] **SENTENCES** you to imprisonment for a period of 60 days.

Counsel:

The Director of Military Prosecutions, as represented by Major D.G.J. Martin and Major M.E. Leblond

Major B.L.J Tremblay, Defence Counsel Services, Counsel for Corporal D.R. Westcott