Citation: *R. v. Corporal D. Petten*, 2007 CM 2023

Docket: 2006106

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA

Date: 21 November 2007

PRESIDING: COMMANDER P. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL D. PETTEN
(Offender)

SENTENCE
(Rendered orally)

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[1] Corporal Petten, having accepted and recorded your plea of guilty to the first charge, a charge of accessing child pornography, this court now finds you guilty of the first charge.

[2] It now falls to me to determine and to pass a sentence upon you. 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, as well, considered the facts of the case as described in the Statement of Circumstances, Exhibit 6, the evidence heard and received during these proceedings, and the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in an individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways. But in imposing sentence the court takes account of the many factors that distinguish the particular case it is dealing with, both

the aggravating circumstances that may call for a more severe punishment and the mitigating circumstances that may reduce a sentence.

[4] The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally, they relate to the protection of society, which includes, of course, the Canadian Forces, by fostering and maintaining a just, a peaceful, a safe, and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender, and the denunciation of unlawful behaviour.

[5] One or more of these goals and objectives will inevitably predominate in arriving at a fit and just sentence in an individual case. Yet it should not be lost sight of that each of these goals calls for the attention of the sentencing court, and a fit and just sentence should be a wise blending of these goals, tailored to the particular circumstances of the case.

[6] As I explained to you when you tendered your plea of guilty, section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at courts martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment, and are further limited to the jurisdiction that may be exercised by this court. Only one sentence is imposed upon an offender, whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline. In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the finding of guilt and the sentence I am about to impose.

[7] The facts of the offence are described in Exhibit 6. In brief, the offender, a supply clerk with the 2nd Regiment, Royal Canadian Horse Artillery, came to the attention of the military police in connection with the suspected unauthorized use of his work computer. Investigation disclosed that the user had accessed Internet sites known to display images of child pornography. The following month, similar activity was observed and the Canadian Forces National Investigation Service was called in. With the use of specialized software the investigators were able to retrieve images on the offender's computer, despite apparent attempts to permanently delete the material. In January of 2005, the investigators obtained a general warrant authorizing the video surveillance of Corporal Petten and the live monitoring of the use of his work computer. As a result, the investigators obtained evidence of the offender using his work computer

to access child pornography sites on the Internet, over a period from 26 January to 14 March 2005.

[8] The offender was arrested for this offence on 24 March 2005 and interviewed by the investigators. During the interview the offender confessed to having accessed and knowingly viewed child pornography for a period exceeding a year on his work computer. He cooperated with the investigators and expressed remorse for his actions. Approximately 850 images and 25 movies were accessed, depicting children engaged in sexual acts. Although the images accessed by the offender are not before me, they are described to some extent in the agreed facts. There is no doubt that the material, as described, is child pornography within the meaning of that term in section 163.1 of the *Criminal Code*.

[9] The prosecution submits that taking into the account all of the aggravating and mitigating circumstances, a fit sentence in this case would be detention for a period of 14 to 30 days. As well, the prosecution seeks an order requiring the offender to provide suitable samples for DNA analysis. Counsel on behalf of the offender agrees that a sentence of detention is called for, and urges the court to impose a period of 14 days. The defence agrees that a DNA order is appropriate.

[10] Defence counsel characterizes the submission of a sentence of detention as a joint submission of both parties, despite the disparity in the recommended length of the sentence. While I have doubts that this submission is accurate in law, ultimately, I find I do not have to deal with the issue of whether this is a joint submission in this particular case.

[11] I have considered the aggravating and mitigating circumstances referred to by counsel that relate both to the offence and to the offender. The material was accessed, apparently, during working hours on a DND computer, despite clear instruction against the unauthorized use of DND computers. The conduct continued over a period of some months. It does not appear that anyone else was exposed to these materials as a result of the offender's conduct, but, rather, he appears to have taken some steps, however unsuccessful, to electronically hide the fact he was committing the offence.

[12] The nature of the pornographic materials is also relevant. As I stated in the case of *Master Corporal Winstanley*:

> In my view, the nature of the material in question can be an important factor in sentencing. Child pornography is defined in the *Criminal Code*, but within that definition, there may be variations in the nature of the materials limited only, apparently, by the perverted imaginings of the persons that produced these materials. All of it is offensive, but where the material is especially offensive or degrading of the children involved, a higher sentence will usually be appropriate.

[13] I also consider the personal circumstances of the offender. He is presently aged 40; twice married, although now separated, and supporting his children; he has no record of previous disciplinary infractions and is considered a valuable member of his unit. He cooperated fully with the investigation and has entered a guilty plea at the earliest possible stage after indicating his intention so to do. The offence was discovered a long time ago and he has had to endure the uncertainty of a lengthy police investigation before the matter resulted in a charge, and, eventually, came to trial. I accept his in-court apology as genuine. The offender has sought and followed the advice of a highly qualified psychologist, Dr Firestone, whose written report is before me. On the basis of the report, I conclude that the offender does not pose a high risk to re-offend.

[14] As the prosecutor has observed, in this kind of case the court is especially concerned with the sentencing objectives of denunciation and general deterrence. The Court Martial Appeal Court endorsed this view in the case of *R. v. Dixon*, 2005, CMAC 2. In that case the court considered that a sentence of 10 days' imprisonment, to be suspended, coupled with a substantial fine, to be a severe sentence for a first-time offender in circumstances somewhat different from the present case. Since the commission of this offence, Parliament has expressed its view as to the objective seriousness of this kind of offence by requiring the imposition of minimum periods of imprisonment. This demonstrates the objective seriousness of this kind of conduct.

[15] I am satisfied that the range of sentence suggested by counsel is appropriate, and taking account of all the circumstances of the offence and of the offender, I am satisfied that the lower end of the range is fit in this particular case. I'm also satisfied that it is in the best interests of the administration of justice to make a DNA order as sought by the prosecution and to which the defence agrees.

[16] Stand up, Corporal Petten. You are sentenced to detention for a period of 14 days. As well, I order that you provide samples suitable for DNA analysis. The sentence is pronounced at 1115 hours, 21 November 2007.

COMMANDER P. LAMONT, M.J.

Counsel:

Captain D. Kirk, Director of Military Prosecutions
Counsel for Her Majesty the Queen
Major C.E. Thomas, Directorate of Defence Counsel Services
Counsel for Corporal Petten