



## COURT MARTIAL

**Citation:** *R. v. Cawthorne*, 2014 CM 1014

**Date:** 20140605

**Docket:** 201336

General Court Martial

Canadian Forces Base Esquimalt  
British Columbia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Ordinary Seaman W.K. Cawthorne, Offender**

**Before:** Colonel M. Dutil, C.M.J.

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### **ORDER RESTRICTING PUBLICATION**

**By court order pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code of Canada*, any information that could identify any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of section 163.1 of the *Code*, shall not be published in any document or broadcast or transmitted in any way.**

### **REASONS FOR SENTENCE**

(Orally)

[1] The panel of this General Court Martial pronounced its finding in respect of each charge against Ordinary Seaman Cawthorne on 16 April 2014. The offender was found guilty of one count of possession of child pornography, an offence punishable under section 130 of the *National Defence Act*, contrary to subsection 163.1(4) of the *Criminal Code*. He was also found guilty of one count of accessing child pornography, an offence punishable under section 130 of the *National Defence Act*, contrary to

subsection 163.1(4.1) of the *Criminal Code*. These offences were committed outside Canada, between 30 June and 20 July 2012.

[2] In determining sentence, I shall accept as proven all facts, expressed or implied, that are essential to the court martial panel's findings of guilty. I have also considered the facts of the case as disclosed in the evidence heard during the trial and the other evidence and materials submitted during the sentencing hearing that we had earlier this week, including the testimony of Ordinary Seaman Cawthorne's treating psychiatrist. Finally, I have considered the submissions of counsel as it relates to the appropriate punishments to be imposed in this case as well any additional order that the court should make in the circumstances.

[3] The facts surrounding the commission of the offences for which Ordinary Seaman Cawthorne was found guilty reveal that, during the relevant period, Ordinary Seaman Cawthorne was a member of Her Majesty's Canadian Ship (HMCS) ALGONQUIN who participated in the RIMPAC exercise off the coast of Hawaii. On 16 June 2012, the ship left Esquimalt to go to San Diego, California, where the ship arrived three days later. They departed San Diego a few days later to arrive in Pearl Harbor, near Oahu, on 29 June 2012. The ship stayed alongside Pearl Harbor approximately 10 days before leaving for the conduct of the multilateral exercise to return at the end of July 2012.

[4] During the early hours of 21 July 2012, while HMCS ALGONQUIN was sailing near the coast of Oahu, Hawaii, Ordinary Seaman Cawthorne was living in 14 Mess along with approximately 50 persons that belonged to the combat operations detachment or group. The dormitory had three racks. The space between the racks was very tight and some members had placed a divider between two racks for privacy purposes. Able Seaman Butchers shared the rack immediately adjacent to Ordinary Seaman Cawthorne. After finishing his long shift at approximately midnight, on or about 21 July 2012, Able Seaman Butchers went to his bunk and found Ordinary Seaman Cawthorne's iPhone between the two racks. Upon finding the phone, Able Seaman Butchers pressed the "home button" located on the phone and an image appeared immediately on the phone showing a very young girl clearly under the age of 16 involved in a very explicit sexual act. He then hit the "home button" on the phone and yelled to two other sailors higher in rank to tell them what he had found. He went to them and they quickly browsed some other pictures of a similar nature. The iPhone was turned in shortly after to the ship's Coxswain, before it was ultimately seized by the police and ultimately analysed by a forensic computer expert of the Royal Canadian Mounted Police. A redacted copy of the forensic extraction report in DVD format was filed before the court by consent and it contained several digital graphic images, as well as their associated image files, that depicted young children engaged in or depicted as engaged in explicit sexual activity, or the dominant characteristic of which was the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years.

[5] During the sentencing hearing, the court heard the testimony of Dr Oliver Robinow, an experienced clinical psychiatrist who has been the offender's treating psychiatrist for almost two years. He explained the treatment programme put in place to help Ordinary Seaman Cawthorne's mental health issues that consist of male paraphilia and personality problems, including self-detachment from one's own emotions that go back to his patient's childhood, which included being the victim of child abuse himself for several years. Dr Robinow described the offender's treatment programme and he expressed his expert opinion that Ordinary Seaman Cawthorne has been compliant with the programme for two years, which includes regular psychiatric and psychotherapy sessions as well as medication. He stated that rehabilitation is well underway and that the likelihood of recidivism is low and that the normative behaviour will persist if the patient is maintained in proper self-esteem. Dr Robinow expressed the view that incarceration would not assist in the rehabilitation of the offender, but it would impact negatively on his self-esteem if the treatment programme is not continued should Ordinary Seaman Cawthorne be incarcerated for a lengthy period of imprisonment. Questioned by the prosecutor to the effect that the offender's testimony at trial concerning the knowledge of the presence of child pornography on his iPhone differed from what Ordinary Seaman Cawthorne had told him during therapy, Dr Robinow explained why persons would act this way. And despite that fact, the psychiatrist did not see this inconsistency to affect his opinion that Ordinary Seaman Cawthorne's condition continues to improve, although he should require a lifelong treatment programme.

[6] Dr Robinow emphasized that the urges felt by a patient suffering from male paraphilia cannot be totally eradicated. The treatment programme is designed to help the patient to change the behaviour and increase his self-esteem. He further stated that inducing an acceptance of responsibility is also important as part of the treatment; however, Dr Robinow expressed his view that the offender's remorse may be useful, but it is not essential to the offender's rehabilitation since the ultimate goal deals with the change of behaviour. In conclusion, he stated that Ordinary Seaman Cawthorne responds very well to the treatment programme in place and he is confident that Ordinary Seaman Cawthorne will continue his progress, acknowledging, of course, that the offender will need treatment for an extensive period.

[7] The prosecution submits that a fit sentence in this case is imprisonment for a period of 90 days. In addition, the prosecution seeks the following orders: a prohibition order under section 161 of the *Criminal Code*; an order authorizing the taking of bodily substances for forensic DNA analysis under section 196.14 of the *National Defence Act*; a forfeiture order under section 164.2 of the *Criminal Code*; and, an order that applies for life to comply with the *Sex Offender Information Registration Act* under section 227.01 of the *National Defence Act*.

[8] The prosecution submits that the sentence to be imposed on Ordinary Seaman Cawthorne must emphasize the principles of denunciation, general deterrence, specific deterrence and it was submitted also that the court should consider the objective seriousness for these types of offences in light of the newly increased mandatory

minimum punishments, which came into force shortly after the commission of these offences by Ordinary Seaman Cawthorne. The minimum punishments were increased from a period of 14 days' imprisonment to a period of 90 days of imprisonment for offences punishable on summary conviction; whereas a person convicted of an indictable offence now faces a minimum punishment of imprisonment for a term of six months, from the previous minimum punishment of imprisonment for a term of 45 days.

[9] Counsel for the defence recommends that the court impose the punishment of imprisonment for a period of 14 days. Firstly, it relies on the overall circumstances of the case and the fact that the images found on Ordinary Seaman Cawthorne's phone were of lesser amount and degree to that of most cases relied on by the prosecution. Secondly and most importantly, the defence relies on the testimony of Dr Robinow with regard to the treatment programme undertaken by the offender and the progress he has made so far.

[10] I must now determine what shall be an appropriate, fair and just sentence. As we know, in the context of sentencing an offender under the Code of Service Discipline, the Court Martial Appeal Court has expressly stated that a court martial should guide itself with the appropriate sentencing purposes, principles and objectives, including those enunciated in sections 718.1 and 718.2 of the *Criminal Code*. The fundamental purpose of sentencing at a court martial is to ensure or to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following objectives:

- (a) to denounce the unlawful conduct;
- (b) to deter the offender, but also others who might be tempted to commit such offences;
- (c) to separate offenders from society, where necessary;
- (d) to provide reparations for the harm done to the victims or to the community;
- (e) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community; and, finally,
- (f) the reformation and rehabilitation of the offender.

[11] The sentence must also take into consideration the following principles:

- (a) the sentence must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility;
- (b) it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

- (c) a court must also respect the principle that an offender should not be deprived of liberty if there is a less restrictive punishment that may be appropriate in the circumstances; and
- (d) finally, the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, the court must act with restraint in determining sentence and by imposing such punishment that should only be the minimum necessary intervention to maintain discipline.

[12] I agree with counsel for the prosecution that a fit and just sentence in this case shall emphasize the principles of general deterrence and denunciation. The said principles cannot, however, be applied in a factual vacuum or in using an improper rationale. For example, it would be an error in law to consider that the principle of general deterrence can only be achieved by imposing a lengthy period of incarceration. In addition, the court must assess whether any adverse effect that a denunciatory sentence would have on the rehabilitation or deterrence of the offender (*Ruby, Sentencing*, 8<sup>th</sup> edition, at section 1.20). In these circumstances, the court finds that the sentence imposed should not unduly impair Ordinary Seaman Cawthorne's rehabilitation in light of the ongoing and positive medical treatment for diagnosed male paraphilia and personality problems.

[13] Ordinary Seaman Cawthorne has been convicted of two offences punishable under section 130 of the *National Defence Act* for offences of possession and accessing child pornography, contrary to subsections 163.1(4) and (4.1) of the *Criminal Code*. These offences prescribe mandatory minimum periods of imprisonment. However, the court cannot impose the minimum punishments that are currently applicable for these offences, as the accused is entitled to face the punishments that were applicable at the time he committed the offences. Imposing the current minimum punishments would only be possible in this case should the court conclude that they represent the fit and proper sentence in all the circumstances of this case.

[14] A person who possessed or accessed child pornography under sections 163.1(4) and (4.1) of the *Criminal Code*, at the time where the offences were committed, was liable to a term of imprisonment of not more than five years and to a minimum punishment of imprisonment for a term of 45 days for an indictable offence; whereas that person was liable, on summary conviction, to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 14 days. Parliament increased the minimum punishments in August 2012, which is very shortly after the commission of the offences by Ordinary Seaman Cawthorne. These minimums have been raised to six months for an indictable offence and to 90 days on summary conviction.

[15] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, the Supreme Court of Canada had already expressed the primary goal of child pornography laws. McLachlin CJC, for the majority, stated the following, at paragraph 28:

Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences.

[16] There is no doubt that these offences are considered objectively serious in Canada. In *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80, the Chief Justice, made the following remarks at paragraph 109:

According to contemporary Canadian social morality, acts such as child pornography, incest, polygamy and bestiality are unacceptable regardless of whether or not they cause social harm. The community considers these acts to be harmful in themselves. Parliament enforces this social morality by enacting statutory norms in legislation such as the *Criminal Code*.

[17] In the last 10 years, Parliament has continued to send a clear message that these offences deserve an unequivocal repudiation. The increase of mandatory minimal punishments for those found guilty of possession and accessing child pornography are self-explanatory.

[18] I now turn to the specific aggravating and mitigating circumstances of this case beyond the elements that are generally related to the gravity of the offences and the moral blameworthiness of the offender. The court considers the following elements to be aggravating factors in the circumstances of this case:

- (a) The quantity and the nature of the material found and accessed by Ordinary Seaman Cawthorne: Although the material found on the offender's iPhone is not as significant as some of the cases found in the prosecution's book of authorities for similar offences tried at courts martial between 2006 and 2010, such as *Petten*, *Saint-Jacques* and *Chiasson*, several images involved very young children engaged in or depicted as engaged in explicit sexual activity.
- (b) The offender was participating in an international exercise outside Canada: The fact that most of the events that led to the charges took place while he was off-duty in Pearl Harbour does not diminish his responsibility. Committing service offences outside Canada inherently causes significant disturbances for the chain of command whether or not foreign authorities are involved in the investigation process or made aware of an incident. In this case, the chain of command chose to repatriate the offender to Canada as quickly as possible. The

commission of criminal or disciplinary offences by service persons in operational settings outside Canada will inevitably occur on occasion, but they contribute to erode the state of readiness and discipline. The facts of this case indicate that some of the offender's brothers-in-arms were very troubled by the discovery of child pornography material found on his iPhone, and that has an impact on morale and discipline.

[19] The court considers the following elements to be mitigating factors in the circumstances:

- (a) Ordinary Seaman Cawthorne's medical condition: Ordinary Seaman Cawthorne was, himself, the victim of child abuse for a significant period of time at a young age. He suffers from male paraphilia and personality problems. Not only has he sought medical help to deal with his mental health issues immediately after the commission of the offences, his condition continues to improve and his treating psychiatrist talked positively about his ongoing and well engaged rehabilitation.
- (b) The age of the offender: Ordinary Seaman Cawthorne is currently 22 years of age. When he committed the offences for which he was charged, he was merely 20 years old. He was very young. He has no criminal record and only a very minor entry on his conduct sheet for an incident that occurred about a year ago. This is a very young man who needs help to assist him to cope with a situation that was, at least in part, caused by the abuse of his own surroundings as a child. In these circumstances, the court gives significant weight to the opinion expressed by his treating psychiatrist. The sentence to be imposed should interfere as least as possible with his rehabilitation. As stated in Ruby, *Sentencing*, (8th edition) at section 5.275 and further:

Increasingly, however, courts recognize that mental illness may be a mitigating actor even where it is not causally linked to the offence. Courts have taken the mental condition of the accused into consideration not only where it contributed to the commission of the offence, but also where it would render imprisonment a more severe penalty for the accused than for a person who does not suffer from the same condition.

...

It is clear, therefore, that sentence can be reduced on psychiatric grounds in two instances: (1) when the mental illness has contributed to or caused the commission of the offence; or (2) when the effect of imprisonment would be disproportionately severe because of the offender's mental illness. In some cases, both factors are relevant.

[20] The court considers that a short period of imprisonment should promote the principles of deterrence and denunciation sought by the prosecution. However, I do not consider that the period of incarceration proposed by the prosecution is the necessary minimum intervention in the circumstances. There is nothing before the court to suggest that this case would have been prosecuted as indictable offences in the

circumstances, which required a minimum period of 45 days imprisonment at the relevant times. The court considers that a fit and fair sentence could consist of a period of imprisonment of 30 days.

[21] The court will also make the mandatory following orders as requested by counsel for the prosecution; namely: an order authorizing the taking of bodily substances for forensic DNA analysis under section 196.14 of the *National Defence Act*; and an order that applies for life to comply with the *Sex Offender Information Registration Act* under section 227.01 of the *National Defence Act*. However, the court will not issue the orders sought by the prosecution under sections 161 and 164.2 of the *Criminal Code*. I have seriously considered making an order under section 161.(1), but the expert opinion provided by Ordinary Seaman Cawthorne's psychiatrist has satisfied the court that such an order would not be necessary in the circumstances to ensure the protection of the public, including young children. With regard to the order sought by the prosecution causing the forfeiture of the offender's iPhone under section 164.2 of the *Criminal Code*, it can only be issued when specific conditions are met, and section 164.2 (1) of the *Code* provides:

164.2 (1) Forfeiture after conviction - On application of the Attorney General, a court that convicts a person of an offence under section 163.1, 172.1 or 172.2, in addition to any other punishment that it may impose, may order that anything — other than real property — be forfeited to Her Majesty and disposed of as the Attorney General directs if it is satisfied, on a balance of probabilities, that the thing

- (a) was used in the commission of the offence; and
- (b) is the property of
  - (i) the convicted person or another person who was a party to the offence, or
  - (ii) a person who acquired the thing from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

[22] Counsel for the prosecution is acting under the authority of the Director of Military Prosecutions in performing his duties and functions under section 165.11 of the *National Defence Act*, which includes the conduct of all prosecutions at courts martial. The Director of Military Prosecutions or his representative does not act or pretend to act on behalf of the Attorney General. Section 2 of the *Criminal Code* provides the definition of "Attorney General". A plain reading of that section does not allow this court to accept that a military prosecutor at a court martial falls within the ambit of the definition of "Attorney General" or that it should be read to include a person acting on behalf of the Director of Military Prosecutions by necessary implication. Thus, counsel for the prosecution is not competent to seek the forfeiture order contemplated by section 164.2 of the *Criminal Code*.

**FOR THESE REASONS, THE COURT:**



[23] **SENTENCES** the offender, Ordinary Seaman Cawthorne, to imprisonment for a period of 30 days.

[24] **MAKES** the order under section 196.14 of the *National Defence Act* for the taking of samples of bodily substances for the purpose of forensic DNA analysis.

[25] **MAKES** the order under section 227.01 of the *National Defence Act* to comply with the *Sex Offender Information Registration Act* for life.

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**Counsel:**

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Counsel for Her Majesty the Queen

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