Citation: *R.v. Ex-Private Carter,*2005CM21

Docket: S200521

STANDING COURT MARTIAL
CANADA
ALBERTA
1 GENERAL SUPPORT BATTALION EDMONTON

Date: 10 June 2005

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
EX-PRIVATE CARTER
(Accused)

SENTENCE
(Rendered orally)

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[1] Mr Carter, having accepted and recorded your pleas of guilty to charge number 1 and charge number 3, both charges of possession of child pornography, this court now finds you guilty of charges number 1 and 3 and directs a stay of proceedings with respect to charges number 2 and 4.

[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.

[4] 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. Previous

sentencing decisions of the Court Martial Appeal Court are binding upon this court and this court is duty-bound to follow the guidance of that court as precedent in matters of law, but in imposing sentence, the court takes account of the many factual matters 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.

[5] 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.

[6] 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.

[7] 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.

[8] 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.

[9] As I explained to you when you tendered your pleas of guilty to these two charges, section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at court martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment and may be 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.

[10] It is an important principle that the court should impose the least severe punishment that will maintain discipline.

[11] In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the findings of guilt and the sentence I am about to impose.

[12] Briefly, the facts of this case disclose that on 14 February 2004, National Investigation Service investigators executed a search warrant and seized a computer belonging to the offender from his military living quarters at Canadian Forces Base Edmonton, as well as a collage of printed images found in the offender's personal locker. Forensic examination of the computer hard drive disclosed a number of images and two movies that the offender downloaded from the Internet to his computer between 30 December 2003 and 13 February 2004.

[13] The offence came to light when the offender's roommate noticed the offender viewing this material on the computer and reported the matter to the authorities. At a later time, the offender was interviewed by the investigators and he cooperated fully with them. In the course of the interview, he disclosed that since the seizure of his computer, he had purchased another computer and downloaded child pornography onto the second computer. A second search warrant was obtained and the second computer was seized from the apartment residence of the offender in Edmonton. Forensic examination of the second computer disclosed a small number of images of child pornography.

[14] The images in evidence before me show nude and apparently pre-pubescent children of both sexes. Some images are simply of nude children; other images seem to have the sexual organs as the dominant characteristic; and still others show children engaged in explicit sexual activity with other children and, in some cases, with apparently adult persons. There is no doubt that the majority of these depictions are child pornography within the meaning of the *Criminal Code*.

[15] In this case, both counsel submit that the appropriate sentence is a term of imprisonment of seven to ten days. The sentence to be pronounced is, of course, a matter for the court, but where, as in this case, both parties agree on a recommended disposition, that recommendation carries substantial weight with the court . The Courts of Appeal across Canada, including the Court Martial Appeal Court, have held that the joint submission of counsel as to sentence should be accepted by the court unless the recommended sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[16] Objectively speaking, these are serious offences deserving of severe punishment. Some of these images depict a crime against a child actually in progress. All of these images involve children who are too young to make decisions about their own sexuality. Like all children, they are entitled to the protection of adults rather than being taken advantage of for the selfish and lustful purposes of adults.

[17] It is true that there is no suggestion that the offender was involved in the production or distribution of these materials. Those are themselves more serious offences with greater maximum penalties under the *Criminal Code*, but it is plain that if

persons such as the offender, in this case, were not willing to find and keep these images, there would be no market for them.

[18] Quite apart from purely financial motives, the purveyors of these materials often seek to send the message that the use of children for the sexual gratification of adults is a normal and acceptable behaviour. The criminal courts must discharge their proper role in condemning this perverted thinking. Thus the main concerns of a sentencing court, in this kind of case, should be the denunciation of this kind of crime and deterrence of others who might be tempted to commit it.

[19] In so doing, the court does not overlook the individual circumstances of the offender and his prospects for rehabilitation. He is a young man of 23 years of age with no record of previous convictions or disciplinary infractions. He has pleaded guilty to these offences. Since his release from the Canadian Forces in September of 2004, after three years of service, he lost his civilian employment when he informed his employer about these charges. He is presently unemployed and relying upon his parents for support. He appears to have recognized that he may have problems requiring professional assistance to deal with his attraction to the kinds of materials in evidence in this case. Unfortunately, he has taken very little initiative in this direction.

[20] Counsel have referred to the lack of some sentencing alternatives that are not available under the *National Defence Act* but that are regularly employed in cases, such as the present one, under the *Criminal Code.* Not only does this limit the options open to a sentencing court martial, it effectively puts an additional burden upon military offenders who are, of course, ultimately responsible for their own rehabilitation, but who are not given access to the kinds of community support; for example, probation services, that are available to their civilian counterparts.

[21] Taking account of all the circumstances, both of the offences and of the offender, I cannot say that the sentence recommended by counsel is either contrary to the public interest or would bring the administration of justice into disrepute, and accordingly, I accept the joint submission.

[22] The prosecution also seeks an order that the offender provides samples of his DNA. The defence is not opposed to such an order. The offence of possession of child pornography is a secondary designated offence under section 487.04 of the *Criminal Code* and section 196.11 of the *National Defence Act*.

[23] The making of such an order is in the discretion of the court provided that the court is satisfied that it is in the best interests of the administration of justice to make such an order. Having regard for the salutary effects for the administration of justice of the DNA scheme, the minimal infringement of the privacy interests of the offender occasioned by the giving of samples under proper terms and conditions and the

positions taken by both the prosecution and the defence, in my view, this is a proper case for the making of such an order.

[24] Stand up, Mr Carter.

[25] You are sentenced to imprisonment for a period of 10 days.

[26] The sentence is imposed at 1148 hours, 10 June 2005.

[27] Pursuant to section 196.14 of the *National Defence Act*, I make an order authorizing the taking of such DNA samples as may be required.

[28] I also order that Exhibit 7 in these proceedings, a binder of photographs, be destroyed within 30 days of the expiry of any time period within which any appeal may be brought or in the event of any such appeal being taken within 30 days of the final disposition of such appeal.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major B.J. Wakeham, Regional Military Prosecutions Western
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