Citation: *R. v. Master Corporal Winstanley,* 2006 CM 08

Docket: S200608

STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
CANADIAN FORCES SCHOOL OF MILITARY ENGINEERING

Date: 15 March 2006

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

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL WINSTANLEY
(Accused)

SENTENCE
(Rendered orally)

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[1] Master Corporal Winstanley, having accepted and recorded your plea of guilty to the first charge, a charge of accessing child pornography, this court finds you guilty of the first charge and directs a stay of proceedings with respect to the second 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.

[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. 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.

[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 plea of guilty, 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 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.

[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 finding of guilt and the sentence I am about to impose.

[12] The facts of the offence are set out in detail in Exhibit 6, the Statement of Circumstances. Briefly put, the offender used a Department of National Defence computer to which he had access in the course of his employment as an instructor at the

Canadian Forces School of Military Engineering to surf the Internet for child pornography over a period of about two and a half hours between 21 October and 26 October 2004. His method was to enter search terms suggestive of child pornography sites into a search engine. Forensic examination disclosed that the searches indeed produced images of what is admitted to be child pornography, but there is no evidence before me describing the material accessed by the offender in any detail, nor have I been shown any of the images.

[13] Counsel before me are agreed that a fit disposition in this case is a period of 10 days' imprisonment to be suspended and a fine in the amount of $2500. 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.

[14] The offender is 36 years of age with nine years of unblemished service in the Canadian Forces to his credit. He cooperated with the police investigation of the charge, apologized to them for his actions, and has pleaded guilty to the offence at the first reasonable opportunity. I consider that he has demonstrated real remorse for his conduct.

[15] I agree with defence counsel that the letters of support, filed with the court, show that the offender is very highly regarded by his military peers and superiors, including his commanding officer. Their continued support for him, since the offence came to light, demonstrates to me that his conduct on the occasion in question was very much out of character, and therefore, very unlikely to be repeated. Specific deterrence of this offender is not an overriding concern of the court.

[16] But as I stated in the case of *Ex-Private Carter* on 10 June 2005, in Edmonton, and I quote:

> ... 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.

In that case, the offender was in possession of child pornography on his own personal computer on two occasions. In the present case, the offender accessed child pornography for a total period measured in hours, but obtained access by means of a DND computer. Misuse of public property in this way may be a service offence in itself, even if the material accessed were not of a criminal nature.

[17] 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.

[18] In this case, as I stated, the material viewed by the offender is not before the court. For sentencing purposes, therefore, I consider that I cannot and will not draw any inferences adverse to the offender as to the specific nature of the depictions he viewed or where they might fall in the continuum of seriousness other than to consider that, of course, the depictions were child pornography as defined by the *Criminal Code*.

[19] In my view, the interests of denunciation and general deterrence may be met by the sentence that is jointly recommended by counsel. Taking account of all the circumstances both of the offence 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.

[20] I have considered making an order for the provision of DNA samples pursuant to section 196.14(1)(*b*) of the *National Defence Act*. In the absence of an application by the prosecution, I decline to make such an order.

[21] Stand up, Master Corporal Winstanley.

[22] You are sentenced to imprisonment for a period of 10 days and a fine in the amount of $2500. Pursuant to section 215 of the *National Defence Act*, the carrying into effect of the punishment of imprisonment is hereby suspended. The fine is to be paid at a rate of $200 per month, commencing 15 April 2006 and continuing for the following 11 months, with the amount of a further $100 to be paid 15 April 2007. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding amount is due and payable the day prior to your release.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major J.J.L.J. Caron, Regional Military Prosecutions Eastern
Counsel for Her Majesty The Queen
Mr Patrick E. Hurley, QC, Allen Dixon Smith, 77 Westmorland St, Fredericton, NB
Counsel for Master Corporal Winstanley