Date: 20050208

Docket: CMAC-477

Citation: 2005 CMAC 2

CORAM: **LÉTOURNEAU J.A.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

PRIVATE DIXON, J.D.

Applicant / Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on January 26, 2005.

Judgment delivered at Ottawa, Ontario, on February 8, 2005.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal against conviction and an application for leave to appeal and an appeal against sentence. The appellant was tried by a standing court martial on one charge of possession of child pornography contrary to section 130 of the *National Defence Act*, R.S. 1985, c. N-5 (Act) and section 163.1(4) of the *Criminal Code* (Code). Under the Code, the offence is punishable either as an indictable offence carrying a maximum penalty of imprisonment not

exceeding ten years or as a summary conviction offence. In the latter case, the penalty is a fine of not more than $2,000 or imprisonment not exceeding 6 months or both (see section 787 of the Code).

[2] The appellant was found guilty of possession. He was sentenced to imprisonment for seven days, but the execution of that sentence was suspended. In addition, he was imposed a fine of $5,000 to be paid in monthly instalments of $150, starting January 2005. He appeals against both the legality of the finding of guilt and the severity of the sentence.

Appeal against the finding of guilt

[3] The appellant raised a single ground of appeal on the issue of guilt. He submits that the military judge erred in assessing the mental element for a finding of guilt when she concluded that the appellant had actual knowledge that certain files on the computer contained child pornography or was wilfully blind as to that fact. With respect, I do not think that the military judge can be faulted in that respect.

a) facts relevant to the finding of guilt

[4] It is not disputed that the appellant is the person who downloaded child pornographic material on the computer on which it was found. The downloading occurred in the following manner and circumstances.

[5] According to the evidence, between July 30 and August 6, 2002, the appellant created files, obtained through a Morpheus peer-sharing program, on a computer to which he had access in his apartment. Morpheus is a peer to peer file sharing program which allows one user to use the Internet to locate and download files located on another Morpheus user's computer. The files created by the appellant were found in three areas of the computer.

[6] The computer had high-speed Internet access. The evidence reveals that, while pornographic material was being downloaded through the Morpheus program, searches of the Internet for similar material were also taking place. During the time frame of July 30 to August 6, 2002, the appellant's activities resulted in the creation of some 78 link files. The military judge found that 26 of these link files had titles suggestive of child pornography. The content of files referenced by the link files could not be ascertained because they had been deleted, but a record of the links, titles and times at which the files were first and last opened remained: see Appeal Book, vol. III, pages 407 to 420 where, for example, a file named "14 yo little girl gets fucked... — porn porno sex" was first opened by the appellant on August 2, 2002 at 06:33:30 p.m. and last opened by him on August 2, 2002 at 11:45:15 p.m.

[7] The appellant was found in possession of files containing 7 pictures and three movies of child pornography. Six of the photos originated from the Morpheus program and one came from the Internet. The pictures did not depict explicit sexual activities although the videos did. Two of the videos were very short (10 to 15 seconds), and one ran for 21 minutes.

b) analysis of the judge's decision on the finding of guilt

[8] The learned military judge proceeded meticulously to an extensive review of the evidence. I agree with counsel for the respondent that there was ample evidence to support the judge's findings of fact relating to actual or imputed knowledge of the nature of the material downloaded on the computer:

1. there were seven discrete sessions of downloading and Internet surfing of sufficient length, as evidenced by the link files, to negative a defence of accidental or inadvertent downloading (for example one session was an eight-hour session, another lasted five hours);

2. the files that were created in the computer and downloaded through the Morpheus program contained child pornography; and

3. the titles of the Morpheus files that the appellant downloaded, as evidenced by the link files created as a result of his activity, would indicate to any reasonable person that, in all likelihood, the material contained in these files referred in whole or in part to child pornography (for example, "11 year young Lolita riding dad", "Collection 13 - Real Child Porn!!!", "She is 12 yr old and her little sister is 8 yr old public nude tits nipples hairy pussy lolita qwert").

[9] At the very least, the judge could, in the circumstances, properly rely upon the doctrine of wilful blindness to establish the appellant's knowledge of the child pornographic nature of the material that he downloaded on the computer and that he searched for on the Internet. I would dismiss the appeal against the finding of guilt.

Appeal against the severity of the sentence

a) facts relevant to the sentence

[10] A summary of the relevant facts is necessary in order to assess the fitness of the sentence imposed upon the appellant.

[11] At the time of the commission of the offence, the appellant was a Private in the military. He was released from the Canadian Armed Forces (C.A.F.) in November 2004 after all his levels of appeal against the administrative decision to release him had been exhausted. I shall return to this administrative decision to release him from the C.A.F.

[12] When the offence was committed, the appellant was married and had a young daughter who will be turning four in March. His wife is expecting a second child in February. He was a first-time offender. His record in the C.A.F. at all times, that is to say prior to and after the charge, was one of good behaviour. From January 11, 2002 to July of that same year, he took a tour of duty in Kabul, Afghanistan.

[13] As previously indicated, the appellant was found in possession of seven pictures and three movies, all depicting child pornography. The computer on which the material was found belonged to a Mr. Bellegarde who, with three others, lived in the appellant's apartment while he was in Afghanistan. Upon his return, they were to continue to live with him until his wife (who, it seems, is an American citizen) moved into the apartment with their baby. The pornographic material was put on the computer by the appellant after his return from Afghanistan.

[14] All persons residing in the apartment could use Mr. Bellegarde's computer. The appellant's pornographic material on the computer required a password code to be accessed. Because he was the administrator of the computer, Mr. Bellegarde could access all files (see his testimony, Appeal Book, vol. 1, page 27). He became curious since the space on the computer's hard drive was filling up and the computer was slowing down. He started looking for the cause. That is how and why he discovered the pornographic material downloaded and stored on his computer. The discovery was reported to the military police and the material was seized.

[15] The offence was committed in the appellant's private residence. The evidence reveals that the appellant was greatly disturbed by the events and the prosecution that followed. He had to take medication for many months because of the resulting stress. His conviction will also jeopardize the possibility of visiting his wife's relatives in the U.S. and his ability to secure full-time landed status for her.

[16] It is admitted that there is no evidence of any form of paedophilia and that the appellant poses no danger of recidivism in the near or distant future. Without in any way understating the

gravity of the offence, it is not disputed that the facts and circumstances surrounding the commission of the offence place it towards the lower end of the spectrum of child pornography offences. The quantity of material was small. The pictures did not depict explicit sexual activities although the videos did. There was no creation, distribution, circulation or commercialization of the material. It was simple possession although, when I say that, I am mindful of the statement of McLachlin C.J. in *R. v. Sharpe*, [2001] 1 S.C.R. 45, at page 73, that possession contributes to the market for child pornography, incites production involving the exploitation of children, incites potential offences and may facilitate the seduction and grooming of victims.

[17] The appellant was relieved from the performance of military duty for three and a half months while the proceedings lasted. The relief was requested by the appellant's Commanding Officer out of concern for the morale of the unit as well as for a possible physical retribution by members of the unit who might become aware of the charges: see Appeal Book, vol. II, at page 322 and vol. IV, at page 613.

b) the standard of review on appeals against the severity of sentences

[18] This Court in *R. v. St-Jean*, [2000] C.M.A.J. No. 2, and more recently in *R. v. Forsyth*, [2003] C.M.A.J. No. 9, reasserted the principle enunciated by Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 that a court of appeal should only intervene if the sentence is illegal or demonstrably unfit. At page 565, the learned Chief Justice wrote:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[19] This is the principle applicable to a review of sentences imposed by military courts, subject to any express provisions in the Act: see *R. v. Forsyth*, *supra*, at paragraph 27.

c) application of this standard of review to the decision under appeal

[20] The evidence before the military judge was that the range of sentences in cases of child pornography varies from a large fine (see *R. v. Woroby*, 2003 MBCA 41 (Man. C.A.)), conditional sentences with extensive probation (see *R. v. North*, [2002] A.J. No. 696 (Alta. C.A.); *R. v. Schan*, [2002] O.J. No. 600 (Ont. C.A.)), absolute or conditional discharge (*R. v. Logan*, [1996] B.C.J. No. 352 (B.C. Prov. Ct); *R. v. B.E.H.*, [1997] B.C.J. No. 3120 (B.C. Prov. Ct.)) to custodial sentences served in prison or served in the community with, in this last instance, conditions of a conditional sentence order pursuant to section 742.3 of the Code (*R. v. Stroempl* (1995), 85 O.A.C. 225 (Ont. C.A.); *R. v. Lisk*, [1998] O.J. No. 1456 (Ont. C.A.); *R. v. Jordan*, [2002] A.J. No. 1096 (Alta. Prov. Ct.)). Some of the conditions of this conditional sentence order included the obligation to perform hours of community service, attendance at a psychological assessment, counselling and treatment, interdiction to possess or use a computer or any account with an Internet provider (see *R. v. Jordan*, *supra*).

[21] Of course, many of these sentences imposed by civilian courts are not available to military judges. The range of sentences authorized by section 139 of the Act does not include absolute or conditional discharge, conditional sentences, suspended sentence, imprisonment served in the community or probation. I should note that a suspended sentence is a concept whereby the passing of the sentence is suspended for a period of time and the offender is released on the conditions prescribed in a probation order (section 731 of the Code). It is, of course, different from a sentence of imprisonment that is imposed, as in the present instance, but whose execution is suspended for a period of time at the end of which, if the offender is of good behaviour, the imprisonment imposed is not served (sections 215 and 217 of the Act). The choice given to a military judge is between one or a combination of the following measures:

139. (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:	**139.** (1) Les infractions d'ordre militaire sont passibles des peines suivantes, énumérées dans l'ordre décroissant de gravité :
(*a*) imprisonment for life;	*a*) emprisonnement à perpétuité;
(*b*) imprisonment for two years or more;	*b*) emprisonnement de deux ans ou plus;
(*c*) dismissal with disgrace from Her Majesty's service;	*c*) destitution ignominieuse du service de Sa Majesté;
(*d*) imprisonment for less than two years;	*d*) emprisonnement de moins de deux ans;
(*e*) dismissal from Her Majesty's service;	*e*) destitution du service de Sa Majesté;
(*f*) detention;	*f*) détention;
(*g*) reduction in rank;	*g*) rétrogradation;
(*h*) forfeiture of seniority;	*h*) perte de l'ancienneté;
(*i*) severe reprimand;	*i*) blâme;
(*j*) reprimand;	*j*) réprimande;

(*k*) fine; and	*k*) amende;
(*l*) minor punishments.	*l*) peines mineures.
(2) Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression "less punishment" means any one or more of the punishments lower in the scale of punishments than the specified punishment	(2) Lorsque le code de discipline militaire prévoit que l'auteur d'une infraction, sur déclaration de culpabilité, encourt comme peine maximale une peine donnée, l'autorité compétente peut lui imposer, au lieu de celle-ci, toute autre peine qui la suit dans l'échelle des peines

[22] As a matter of fact, former Chief Justice Lamer, who conducted the first independent review of the functioning of Bill C-25 that amended the *National Defence Act*, recommended that a more flexible range of punishments and sanctions be made available to military courts as is available under the civilian criminal justice system: see *The First Independent Review of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts*, September 3, 2003, pages 65 and 66.

[23] Another disparity of treatment between a civilian and a member of the C.A.F. for a *Criminal Code* offence committed in civilian-like circumstances originates from the fact that possession of child pornography, like all offences contained in the Code, is treated and charged as a breach of the *Code of Service Discipline*. This means that, in the military context, this *Criminal Code* offence loses its hybrid character and cannot be prosecuted according to the *Criminal Code* procedures applicable to summary conviction offences.

[24] In enacting the prohibition against child pornography, Parliament recognized that there may be instances where the behaviour, although in breach of the prohibition, is relatively minor and does not require the full force of a prosecution by indictment. That is why it made the offence a hybrid one which can be summarily prosecuted with a lesser penalty and a limit of $2,000 on the fine that can be imposed. The case of *R. v. Turcotte*, [2001] A.J. No. 202 (Alta. Q.B.) is an example of a summary prosecution for possession of child pornographic material. However, many cases have been prosecuted by way of indictment because of the need to denounce this kind of behaviour and the subjective gravity of the offence in terms of the large quantity possessed, the hard core nature of the material or the criminal record of the offender.

[25] Counsel for the appellant submits that, looking at both the objective and subjective gravity of the offence, the sentence of 7 days' imprisonment (suspended) and a fine of $5,000 is an unfit sentence to be imposed on a Private, who is a first-time offender, married with a child and a modest gross income of $39,000 (at the time of sentencing), for simple possession at home of a very small quantity of child pornography.

[26] There is no doubt that the sentence is severe. Severe as it is, I would not have interfered with it but for the following two reasons.

[27] At the hearing on sentencing, representations were made to the sentencing judge that the appellant would likely not be released from the C.A.F. since the commander of the unit was willing to take a chance on him. This greatly influenced the judge in determining the sentence and fixing a heavy fine.

[28] The learned judge wrote at pages 332 and 333 of Appeal Book, vol. II:

> The court has also taken into account and considered significant that it has been indicated by the prosecution that your unit is considering taking a chance on you ...
>
> [Y]our commanding officer is willing to take you back and give you an opportunity to win back the respect of your colleagues and to serve usefully.

(emphasis added)

The appellant was given 33 months to pay the fine by monthly instalments of $150 taken out of his pay.

[29] Yet, shortly after the conviction and the sentence were entered, the commanding officer recommended that the appellant be dismissed from the C.A.F. as an administrative sanction. The recommendation was made to a Career Review Board, established to review cases of sexual misconduct according to C.A.F. Administrative Orders 19-36 on Sexual Misconduct. The Board took the decision, on September 23, 2004, to release the appellant within 30 days: see affidavit of Major Barlow, dated September 23, 2004, at paragraph 6.

[30] I am convinced that the judge would have imposed a smaller fine if she had known that the appellant would be released from the C.A.F. and would become unemployed, with a wife and a young child to support. Experienced as she is, she would have looked at the appellant's capacity to pay in a totally different light.

[31] I am supported in my view by the decision of the Manitoba Court of Appeal in *R. v. Woroby*, *supra*. Before I consider this decision, I should mention that this case was brought to

our attention by Lt. Col. Fullerton, counsel for the respondent. This gesture reveals proper understanding on his part of his role as a prosecutor and an officer of the Court. He ought to be commended for his sense of duty.

[32] In *Woroby*, the accused was 55 years old. He was found to be in possession of some 258 images of child pornography as opposed, in our case, to 7 images and excerpts of three movies, two lasting only 10 and 15 seconds and one, 21 minutes. Mr. Woroby's income was $35,000 per year compared to $39,000 in our case. He was sentenced to a fine of $10,000. The appellant in this instance, as I have already mentioned, received a suspended imprisonment sentence and a fine of $5,000. He is young, building a family, newly unemployed as a result of his release from the C.A.F., and has debts with an outstanding balance of $15,085: see his affidavit at paragraphs 12, 13 and 15.

[33] In the *Woroby* case, the court had chosen to resort to the imposition of a heavy fine, among the arsenal of sentencing measures, as a means of denouncing and deterring this kind of behaviour. On appeal, the Bench of the Manitoba Court of Appeal, composed of experienced judges, reviewed the sentencing principles applicable to the determination of an appropriate fine for this kind of offence where fines are imposed. It reiterated that, as requested by section 718.1 of the Code, a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". It then quoted paragraph 718.2(*b*) which requires that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". In other words, it reasserted the principle of parity, equal and

fundamental justice in sentencing. I hasten to add that the military context may, in appropriate circumstances, justify and, at times, require a sentence which will promote military objectives.

[34] The Manitoba Court of Appeal went on to emphasize Parliament's intent, found in section 736 of the Code, that a court impose a fine which it is satisfied that the offender is able to pay. Bearing in mind this principle which aims at preventing undue hardship, the principles of parity and equal and fundamental justice, the degree of responsibility of the offender and the gravity of the offence, it reduced the fine to $3,500 and varied the conditions of probation.

[35] The Manitoba Court of Appeal, like most other courts, asserted that denunciation and general and specific deterrence are of prime importance for the offence of possession of child pornography. In our case, counsel for the prosecution rightly conceded that this objective was attained by the sentence of imprisonment, even if its execution was suspended. The fact is that such a sentence is a benchmark that will be looked upon in case of recidivism. A repetition of the same or a similar offence would indicate that the offender had not taken seriously society's repulsion and denunciation of such behaviour. In all likelihood, it would draw a stiffer penalty.

[36] The learned sentencing judge was of the view that the imposition of a fine in addition to incarceration was a necessary deterrent. She wrote at page 333 of the Appeal Book, vol. II:

> Possession of child pornography is serious and the court believes it warrants incarceration. At the same time, the court accepts that fines can be deterrent.

[37] I do not quarrel with the need for general deterrence that she expressed. The offence is of such a nature that it is likely to be resented in the military context where self-discipline and *esprit de corps* are fundamental prerequisites to an efficient C.A.F. In *St-Jean v. Her Majesty the Queen*, *supra*, at paragraph 38, this Court wrote:

> The chief purpose of military discipline is the harnessing of the capacity of the individual to the needs of the group. I have no doubt that Lamer C.J., when he referred to breaches of military discipline, contemplated breaches of the imposed discipline which is necessary to build up a sense of cooperation and forgo one's self-interest. He would also have contemplated a breach of self-discipline in the context of a military operation or one which affects the efficiency, the operational readiness, the cohesiveness and, to some extent, the morale of the Armed Forces.

[38] However, in view of the misleading representations made to the judge at the sentencing hearing, the appellant's limited capacity to pay and the principle of parity in sentencing, I would grant leave to appeal against the severity of the sentence and allow in part the appeal against sentence. I would reduce the fine to $2,000.

[39] The authorities retained the balance of the fine due out of the appellant's entitlements upon release. I would direct that the sum of $3,000 be reimbursed to the appellant.

"Gilles Létourneau"
J.A.

"I agree
K. Sharlow J.A."

"I agree
J.D.Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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