Date: 20021119

Docket: CMAC- 460

Neutral citation: 2002 CMAC 11

CORAM: **STRAYER C.J.C.M.A.C.**
WEILER J.A.
KELEN J.A.

B E T W E E N :

SERGEANT B.K. JONES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

BY THE COURT:

[1] The appellant was charged under s. 129(1) of the *National Defence Act of Canada* which creates the military offence of "conduct … to the prejudice of good order and discipline". He testified that he said to Sgt. MacKinnon about his superior officer, "Petty Officer 1st Class Bourgeois is inexperienced and when I get off the phone I will go into his office and sort it out." The military judge accepted the appellant's testimony as to what he said but convicted him. He was fined $400. This is an appeal as to conviction only.

[2] We would not give effect to the grounds of appeal raised by the appellant save one. It is

whether the military judge erred in concluding that the offence was made out on the basis that prejudice "*may have or could have*" resulted to good order and discipline or that the appellant's conduct was such as to "*bring into danger the concepts of good order and discipline*."

[3] Section 129 provides as follows:

> 129. (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
>
> 129(2) An act or omission constituting an offence under section 72 or a contravention by any person of
>
> …
>
> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, …
>
> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[4] One of the regulations relating to improper comments respecting a superior officer reads as follows:

> **19.14 – IMPROPER COMMENTS**
>
> (1) No officer or non-commissioned member shall make remarks or pass criticism tending to bring a superior into contempt, except as may be necessary for the proper presentation of a grievance under Chapter 7 (*Grievances*). **(15 June 2000)**
>
> (2) No officer or non-commissioned member shall do or say anything that:
>
> (*a*) if seen or heard by any member of the public, might reflect discredit on the Canadian Forces or on any of its members;
> (*b*) if seen by, heard by or reported to those under him, might discourage them or render them dissatisfied with their condition or the duties on which they are employed. **(29 May 2000 effective 15 June 2000)**

[5] In this case, the appellant was not charged with contravening a regulation under s. 129(2). As a result, the deeming provision does not apply. In *R. v. Latouche* (2000), 147 C.C.C. (3d) 420 (C.M.A.C.), Ewaschuk J. discussed s. 129 and stated at para. 32:

> … the offence of "conduct to the prejudice of good order and discipline" would, normally be characterized as a "result crime" inasmuch as the accused's underlying conduct must be prejudicial to good order and discipline. However, s. 129 of the *National Defence Act* deems the accused's underlying conduct to be prejudicial to good order and discipline, so long as the accused's underlying act or omission contravenes a regulation, order or instruction.

[6] We understand Ewaschuk J. to be saying that for a charge under subs. 129(1) to be made out, there must be proof of prejudice to good order and discipline since the subsection prohibits "conduct to" such prejudice. Admittedly, this statement was *obiter dicta* as the charge in *Latouche* was laid under s. 129(2)(b) for breach of a regulation and prejudice would be deemed to have occurred.

[7] Proof of prejudice can, of course, be inferred from the circumsances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is, however, proof beyond a reasonable doubt.

[8] At the commencement of his reasons, the trial judge stated one of the essential elements the prosecution had to prove beyond a reasonable doubt under s.129 was "prejudice to good order and discipline resulting from the [accused's] conduct."

[9] At the conclusion of his reasons, the trial judge held, however:

> In the way in which it [prejudice] is used in this charge, it [prejudice] means an injury that results or *may result* to good order and discipline. In other words for the prosecution to prove prejudice to good order and discipline it does not have to prove actual injury to good order and discipline has occurred but only that such an injury *may have or could have resulted* from what the accused did. It is my decision that the conduct of the accused, as established by the evidence was such as to cause damage to or adversely affect or *bring into danger* the concepts of both good order and discipline.

[10] The military judge's conclusion is problematic. The military judge did not make a clear and unambiguous finding that the appellant's conduct was prejudicial to good order and discipline. To convict the appellant on the basis that he *may have* or *could have* occasioned injury or prejudice is to convict him on the basis of a standard of proof that is less than a balance of probabilities and to engage in conjecture. As the trial judge himself noted at the beginning of his reasons, the standard of proof beyond a reasonable doubt is required. In using the words he did, the military judge improperly enlarged the area of risk encompassed by the offence.

[11] The trial judge also erred when he took judicial notice that "failing to show proper respect to a superior in front of military members may prejudice good order and discipline." The issue was whether, in the circumstances of this particular case, the appellant's conduct *did* prejudice good order and discipline in that the remarks tended to bring a superior into contempt.

[12] The related argument raised by the appellant concerning the constitutional effect of the trial judge's interpretation of s. 129 also deserves brief comment. In *R. v. Lunn* (1993), 5

C.MA.C., this court held that s. 129(1) is not so vague as to be unconstitutional when particulars are provided. The appellant submits, however, that applying the section as the trial judge did would result in the section being unconstitutionally vague because it would then be impossible to frame legal debate in any meaningful manner. We would agree.

[13] For the reasons given, we would allow the appeal and order a new trial.

(s) "B.L. Strayer"
C.J.C.M.A.C.

(s) "Karen M. Weiler"
J.A.

(s) "Michael A. Kelen"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET: CMAC-460

STYLE OF CAUSE: Sergeant B.K. Jones v. The Queen

PLACE OF HEARING: Ottawa, Ontario

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REASONS FOR JUDGMENT OF THE COURT Strayer, C.J., Weiler & Kelen JJ.A.

DATED: November 19, 2002

APPEARANCES:

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Major Kenneth Lindstein Lieutenant-Commander Martin Pelletier	FOR THE RESPONDENT

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