Date: 19990224
Docket: CMAC-423

CORAM: **STRAYER C.J.**
HEWAK J.A.
MALONE J.A.

BETWEEN:

COMMANDER JOHN T. LEGAARDEN

Appellant,

--and--

HER MAJESTY THE QUEEN

Respondent

HEARD at Ottawa, Ontario on Wednesday, February 24, 1999

JUDGMENT delivered from the bench on Wednesday, February 24, 1999

REASONS FOR JUDGMENT BY: STRAYER C.J.

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REASONS FOR JUDGMENT
(Delivered from the Bench at Ottawa, Ontario
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STRAYER C.J.

[1] We are all of the view that the appeal against conviction must be dismissed.

[2] With respect to the appellant's argument that the learned President failed to consider the character evidence favourable to the appellant we are not persuaded that this was the case. The President referred to that evidence in passing and he also confirmed that he had reached a finding of guilt after "viewing the evidence as a whole". We see nothing in the substance of the decision to support the view that he rejected character evidence as irrelevant to the question of the appellant's intention to defraud. There was no jury involved here and a trial judge sitting alone

need not specifically refer to all the evidence he has considered in stating his conclusions of guilt or innocence.[1]

[3] Nor can we conclude from his reasons that the President imposed an improper standard in assessing the credibility of the appellant. The appellant's evidence was crucial, and perhaps the only direct evidence available, as to whether he had an intention to defraud when he falsified claims. He had the most direct interest in the outcome and it would be only reasonable to scrutinize his evidence with great care.

[4] Although it was argued that the President imposed a burden of proof on the appellant in remarking on the lack of any explanation from the appellant as to his reason for the admitted falsification of documents, we cannot characterize the President's remarks in this way. Once the appellant admitted that he had falsified documents it was, as a practical matter, open to the President to comment on the lack of any explanation which might have overcome the obvious inference otherwise open to him, namely that the falsification had been done for the purpose of defrauding the government of the money claimed in these documents.

[5] We therefore dismiss the appeal against conviction.

[6] We are agreed, however, that we should grant the application for leave to appeal sentence, and allow the appeal against sentence. We are well aware that we should not interfere with a

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[1] *R. v. Profit* (1993) 85 C.C.C. (3d) 232 at 247-8 (S.C.C.).

sentence unless it is "clearly unreasonable"[2]. It appears to us that the sentence here is unreasonable in at least three aspects.

[7] First, the President seems to have over-emphasized the offences as violations of a position of trust. While it is true the appellant had more discretion than many officers in matters of travel and entertainment, he was working within a system that required, or should have required, if administered properly, a regular and precise accounting for expenditures.

[8] Secondly, the President seems to have viewed it as axiomatic that, save in very special circumstances, anyone who steals from his employer must be imprisoned[3]. No compelling jurisprudence to this effect was mentioned by him or put before us. Indeed, this Court recently in the Vanier[4] case involving similar facts held that there is no such rule of law.

[9] Thirdly, the President seems to have given little weight to mitigating circumstances, in particular the fact that the appellant had completed 35 years of service without any record of misconduct or previous convictions. He also gave no weight to the small amount of money involved, some (U.S.) $2,400, nor that restitution would be made.

[10] We therefore conclude that the sentence of imprisonment of six months, for a first offence involving about (U.S.) $2,400, was clearly unreasonable.

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2 *R. v. Shropshire* (1995) 102 C.C.C. (3d) 193 at para. 47 (S.C.C.).

3 Record, page 179.

4 *R. v. Vanier*, February 17, 1999, CMAC-422, para. 7 of reasons.

[11] We will set aside the sentence, and substitute therefor a sentence of a $10,000 fine and a severe reprimand. We believe this is a reasonable penalty for what was a foolish and inexplicable course of conduct by a senior officer at the end of a long career in the Armed Forces. He will have no further opportunity to defraud this employer as he has now retired. We also believe that this will serve as an adequate general deterrent to this kind of action.

[12] The appeal against sentence will be allowed accordingly.

(s) "Barry L. Strayer"
Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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REASONS FOR JUDGMENT OF THE COURT: (Chief Justice, Hewak, Malone JJ.A.)

DELIVERED FROM THE BENCH BY: Chief Justice

APPEARANCES:

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Lt-Commander ® P. Lamont Major G.T. Rippon	for the Respondent

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