

**Date: 20050128**

**Docket: CMAC - 480**

**Citation: 2005 CMAC 1**

**CORAM: EWASCHUK J.A.  
MOSLEY J.A.  
PHELAN J.A.**

**BETWEEN:**

**OFFICER CADET JULIAN A. McNULTY**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on January 28, 2005.

Judgment delivered at Toronto, Ontario, on January 28, 2005.

**REASONS FOR JUDGMENT BY:**

**EWASCHUK J.A.**

**CONCURRED IN BY:**

**MOSLEY JA.  
PHELAN J.A.**

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**BETWEEN:**

**OFFICER CADET JULIAN A. McNULTY**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**REASONS FOR JUDGMENT**

**EWASCHUK J.A.**

[1] The appellant Officer Cadet Julian A. McNulty appeals his conviction for occasioning a false alarm, contrary to s.75 (g) of the *National Defence Act*. The appellant McNulty also appeals his sentence of a severe reprimand and a fine of \$10,000.

[2] The principal ground of appeal against conviction is the denial of effective counsel. In other words, the appellant alleges that his representation by defence counsel resulted in a

miscarriage of justice. In particular, the appellant alleges that cross-examination of the two Crown witnesses present at the time of the phone call occasioning the false alarm fell below the standard of reasonable competence expected of defence counsel. The appellant contends that defence counsel failed to develop a line of cross-examination of the two Crown witnesses, to show bias on their part against the appellant, which would have impugned their general credibility.

[3] I note that the appellant failed to testify at trial. Furthermore, the appellant has neither filed his affidavit indicating that he has a defence nor that of defence counsel admitting that his representation was deficient.

[4] In order for the appellant to succeed on the ground of denial of effective representation, the appellant must first establish that defence counsel's acts or omissions constituted incompetence and second that a miscarriage of justice resulted. See *R. v. G.D.B.* (2001), 1 S.C.R. 520.

[5] I assume that defence counsel, as required, had received instruction from the appellant that the latter would not be testifying at trial. Assuming that to be so, I would not second-guess the form of cross-examination developed by defence counsel at trial. In the end, the appellant has failed to displace the strong presumption that defence counsel's conduct fell within the wide range of reasonable professional assistance. The appellant has failed to discharge his onus of establishing denial of effective representation.

[6] Finally, the appellant has applied to tender as fresh evidence the investigative report of the military investigator in this case. That application is rejected on the basis that the fresh evidence in order to be received must be admissible evidence. The investigative report, at best, constitutes inadmissible hearsay evidence. See s. 30(10)(a)(i) of the *Canada Evidence Act*.

[7] As for the appeal against sentence, I would grant the appellant leave to appeal sentence. In this case, the appellant was given a severe reprimand and a \$10,000 fine. The appellant must establish that the sentence imposed is either unreasonable or constitutes an error in principle. See *R. v. Shropshire* (1995), 102 C.C.C.C. (3d) 193 (S.C.C.).

[8] In my opinion, the appeal against sentence also fails in as much as the sentence is fit and falls within the acceptable range for the offence. The sentence was neither unreasonable nor did it constitute an error in principle.

[9] In the result, the appeals against conviction and sentence will both be dismissed.

\_\_\_\_\_  
“E. G. Ewaschuk”  
J.A.

“I agree  
\_\_\_\_\_  
Richard G. Mosley”  
J.A.

“I agree  
\_\_\_\_\_  
Michael L. Phelan”  
J.A.

**COURT MARTIAL APPEAL COURT OF CANADA**

**Names of Counsel and Solicitors of Record**

<b>DOCKET:</b>	CMAC-480	
<b>STYLE OF CAUSE:</b>	OFFICER CADET JULIAN A. McNULTY	Appellant
	and	
	HER MAJESTY THE QUEEN	Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 28, 2005

**REASONS FOR JUDGMENT:** EWASCHUK J.A.

**CONCURRED IN BY:** MOSLEY J.A.  
PHELAN J.A.

**DATED:** JANUARY 28, 2005

**APPEARANCES BY:**

Mr. Joshua J. Gleiberman  
FOR THE APPELLANT

Lieutenant-Commander C.J. Desch<sub>nes</sub>  
FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

The Law Offices of William Foden  
Barristers and Solicitors  
Ajax, Ontario  
FOR THE APPELLANT

Directorate of Military Prosecutions  
Office of the Judge Advocate General  
FOR THE RESPONDENT