Date: 20030314

Docket: CMAC-466

Neutral citation: 2003 CMAC 3

CORAM: **EWASCHUK J.A.**
DAWSON J.A.
MALONE J.A.

BETWEEN:

ABLE SEAMAN G.G. BERNIER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, March 14, 2003

JUDGMENT rendered on the Bench at Vancouver, British Columbia, March 14, 2003.

REASONS FOR JUDGMENT OF THE COURT: **EWASCHUK J.A.**

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia
on March 14, 2003)

EWASCHUK J.A.

[1] The appellant G.G. Bernier appeals his corrections for two counts of assault and one count of conduct, involving sexual harassment, to the prejudice of good order and discipline. He also appeals his sentence in respect of the three convictions. In that regard, leave to appeal sentence was granted at the start of the hearing of the appeals.

[2] The first ground of appeal against the convictions alleges that the Trial Judge did not give sufficient reasons for judgment. See: *R. v. Sheppard*, [2002] S.C.C. 26.

[3] This case involved the complainant testifying that the appellant touched her twice in sexually suggestive circumstances and that he repeatedly made sexual overtures to her, which she repeatedly rebuffed. The complainant was supported by an independent witness as to two of the sexual comments. The appellant denied the touchings and denied making the sexual overtures.

[4] The Trial Judge delivered only two pages of reasons for convicting the appellant. However, it must be kept in mind that only 3 witnesses testified during this brief trial.

[5] In the end, I am satisfied that the Trial Judge met the functional test required by *R. v. Sheppard*, *supra*. The accused was not left in doubt as to why he was convicted and the Trial Judge's reasons were sufficient to permit our review of their adequacy.

[6] The next ground of appeal involves the failure of the Trial Judge to have referred to a material omission by the complainant in her first statement. While it would have been preferable for the Trial Judge to have expressly stated that he accepted the complainant's explanation for the omission, I am satisfied that he implicitly accepted her explanation.

[7] The following ground of appeal involves the Trial Judge's finding an alleged inconsistency in the appellant's testimony as to whether or not he recommended people for a

particular job. I am satisfied that it was open for the Trial Judge to find that the appellant's testimony on the matter was, in fact, inconsistent.

[8] The appellant alleges that the Trial Judge next erred in finding that the independent witness' explanation was corroborative. I agree. However, corroboration is no longer necessary in law and the witness' explanation was confirmatory on significant items of the complainant's evidence. See: *R. v. Vetrovec,* [1982] 1 S.C.R. 811.

[9] The appellant also alleges the Trial Judge erred in not following the three-step approach to the assessment of credibility as enunciated in *R. v. D.W.*, [1991] 1 S.C.R. 742. While it could have been preferable to have followed the three-step approach, a Trial Judge sitting without a jury is not required to do so. The three-step approach is merely a manner of assessing the standard of proof beyond a reasonable doubt. I am satisfied that the Trial Judge was satisfied beyond a reasonable doubt, in assessing the evidence as a whole, that the complainant and the independent witness were telling the truth. I am also satisfied that he rejected the appellant's testimony because he was satisfied beyond a reasonable doubt that, on the whole of the evidence, the appellant was not telling the truth.

[10] The appellant also alleges that the Trial Judge erred by admitting the contents of two complaints, contrary to Rule 31 of the *Military Rules of Evidence*. While the appellant is correct that the contents of the complaints were related to the Trial Court, I am satisfied that they were

admitted only as to narrative. The Trial Judge did not impermissibly use them for a truth or substantive purpose. Rule 6 of the *Military Rules of Evidence* is applied to cure that error.

[11] Finally, the appellant alleges that the Trial Judge erred in making special findings, pursuant to s. 138 of the *National Defence Act*, as to the times of the offences. In the circumstances, the special findings were unnecessary because s. 601(4.1) of the *Criminal Code* applies. It provides that a variance between the charges and the evidence as to time is not material. Accordingly, the appeal against convictions will be dismissed.

[12] As to the appeal against sentence, the appellant cannot succeed unless he establishes that the sentence was unreasonable in the sense that it was outside the normal range or unless the Trial Judge applied a wrong principle of law or failed to apply an appropriate principle of law. See *R. v. Shropshire*, [1995] 4 S.C.R. 227.

[13] In this case, I find that the Trial Judge erred in law by not considering the appropriateness of a severe reprimand coupled with a fine. In the circumstances, I am satisfied that the appropriate sentence for the non-violent assaults and sexual harassment will be a severe reprimand and a $5,000.00 fine. Accordingly, the appeal against sentence will be allowed.

(Sgd.) “E.G. Ewaschuk”

J.A.