Date: 20030828

Docket: CMAC-470

Citation: 2003 CMAC 8

CORAM: **EWASCHUK J.A.**
VEIT J.A.
RUSSELL J.A.

BETWEEN:

PRIVATE D.A. JACKSON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT
(Delivered from the Bench at Ottawa, Ontario
on Thursday, July 24, 2003)

EWASCHUK J.A.

[1] The appellant, Private Jackson, appeals both his conviction and sentence for pointing a firearm at a subordinate. The appellant was sentenced to a reduction in rank and a 3-year-weapons prohibition.

[2] As for the conviction, the appellant maintains that the trial judge erred in his assessment of the appellant's credibility, particularly by applying a different standard of assessment to the appellant's testimony than to the testimony of other witnesses.

[3] We find that the trial Judge properly applied the correct standard and jurisprudence in assessing the appellant's credibility. See R. v. D.(W). *(1991), 63 C.C.C. (3rd) (S.C.C.)397* and R. v. Starr*, [2000] 2 S.C.R. 144.*

[4] As for sentence, the appellant maintains that the trial judge erred in two aspects. First, the trial judge erred in imposing too severe a sentence. Second, the trial judge also erred in imposing a 3-year-weapons prohibition on the trial judge's own motion and without giving the appellant an opportunity to address the propriety of the weapons prohibition, at least, in respect of its application to appellant's duties as a member of the Canadian Forces. See *National Defence Act R.S.C. 1985, c. N–5, s. 147.1(3)* .

[5] As to fitness of sentence, this court cannot reverse the sentence unless the trial judge erred in principle or erred by imposing an unreasonable sentence. See R. v. Shropshire (1995), 102 C.C.C. (3rd) 193 (S.C.C.).

[6] The pointing of a firearm at another person is a serious offence, particularly when a military person points a firearm at a subordinate. However, the reality is that the appellant had verified that

the firearm was unloaded, although there always remained a remote possibility that a live round could have been in the chambers. The particular fact-situation, in our view, does not constitute a worse offence. Even though the offence constituted horse play in the appellant's view, this court does not wish to minimize the dangers involved in the use of firearms. However, the reality remains that the firearm was unloaded .

[7] Consequently, we find the sentence imposed was unreasonable and overly severe. A reduction in rank would inflict a monetary penalty of thousands of dollars per year and drastic financial consequences as to the appellant's pension. In place of a reduction in rank, we would impose a severe reprimand and a fine of $5,000.

[8] As for the prohibition order, we find that its imposition was proper except as it applies to the appellant's duties as a member of the Canadian Forces. As for the extension of the prohibition order to the appellant's duties as a member of the Canadian Forces, the prosecution informed the trial judge that the order need not extend to the appellant's military duties. Without notifying defence counsel that he might extend the order to the appellant's duties as a member of the Canadian Forces, the trial judge extended the prohibition order to the appellant's military duties. In doing so, the trial judge fatally erred in denying the appellant the opportunity to present evidence and make submissions on this important element of sentence. Because of the denial of procedural fairness, it is necessary to vary the prohibition order to delete its application to the appellant's duties as a member of the Canadian Forces.

Result

[9] The appeal against conviction will be dismissed. The appeal against sentence will be allowed. The sentence will be varied to a severe reprimand and a fine of $5000.00. The three-year-prohibition order will apply generally but not to the appellant's duties as a member of the Canadian Forces.

(s) "E.G. Ewaschuk"
J.A.