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Judgment: approved by the Court for handing down | *Delivered:* **12/09/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WILLIAM DAVID GEORGE GRAHAM

Before: Carswell LCJ, Nicholson LJ and Kerr J

CARSWELL LCJ

[1] This is an application for leave to appeal against a sentence of two years' imprisonment imposed by Higgins J on 10 January 2003 at Londonderry Crown Court. The applicant was convicted on 18 October 2002 after a trial by a jury on a single count of manslaughter of a fellow-soldier Corporal Anthony Green. He originally sought leave to appeal against conviction, but did not pursue this, and the matter proceeded as an application for leave to appeal against sentence. Leave was refused by the single judge.

[2] In January 2001 the applicant, then aged 22 years, was a soldier in the 1st Battalion Royal Scots regiment based at Shackleton Barracks, Ballykelly. He was a member of a special unit known as the Close Observation Platoon, which comprised some of the best soldiers in the regiment. All of the members of this unit underwent a lengthy assessment and training process and according to the unit commander Major Nicholas Haston, they were selected for their bravery, integrity, strength of character, reliability, weapons handling skills, diligence and trustworthiness. Major Haston described the applicant as one of his best privates, likely to be promoted.

[3] After acceptance for the Close Observation Platoon soldiers undergo further intensive training, including advance training in the use and handling of the army's standard weapon, the SA80 rifle. The members of the platoon differ from ordinary soldiers in that they patrol with their rifles in the "made-

ready" position, with the weapon cocked, a round in the breech and the safety catch applied. The applicant passed all the necessary courses (failure of any of which resulted in rejection) and undertook all the special training and was accepted into the platoon in Spring 2000, before it was posted to Northern Ireland. Training continued during the tour of duty with further weapons training and attendance twice weekly at the firing range. The two basic safety rules were: (1) on lifting a weapon always check that the safety catch is on; and (2) the trigger finger should be kept outside the trigger guard unless the weapon is going to be discharged.

[4] On 24 January 2001 the Close Observation Platoon was detailed to travel to Fermanagh for an operation scheduled to last several days. Corporal Anthony Green was assigned to accompany the platoon as cook. After lunch the applicant and another soldier, Lance Corporal Gregg, loaded a land rover which was parked outside the Platoon headquarters in a side road situated at right angles to the main road running through the camp. The land rover was positioned with its rear doors facing the main road, which was approximately 50 yards away. The applicant and Lance Corporal Gregg loaded their rifles in a loading bay, in the prescribed fashion. This included cocking the weapon and putting a round into the breech. Following standard procedure Gregg checked that the safety catch on the applicant's rifle was in the "on" position. On returning to the land rover the applicant placed his rifle, muzzle up, leaning against his day sack and then sat leaning against the sack with the rifle between his back and the sack.

[5] The applicant subsequently left the vehicle to fetch equipment and on return sat on the driver's side facing Gregg. He picked up his rifle and placed it across his thighs with the barrel pointing towards the open rear doors and down the side road in the direction of the main road. At this time Corporal Green, the cook, had just left the headquarters hut and walked to the main road and then to the applicant's right. Shortly after the applicant picked up his rifle it discharged and the bullet struck the right side of Corporal Green's head, tracking right to left and exiting the left side of the head. Severe damage was caused to his brain. The bullet struck a wall and was never recovered. Corporal Green fell on the spot and was attended to at the scene before being removed to Altnagelvin Hospital where he died.

[6] Lance Corporal Gregg told the applicant to place his rifle on the floor of the land rover. He noted that the safety catch was on. The applicant subsequently accepted that he had put it on after the discharge. He accepted that he must have pulled the trigger. In interview he suggested that the safety catch had been pushed off whilst he leaned against the rifle as it was resting against the day sack. He accepted that he had not checked that the safety catch was on when he picked the rifle up on his return to the land rover. He suggested that the weapon was so sensitive that it had been known for discharges to occur when it was set down without pressure on the trigger. In

the event, the case did not proceed on the basis that the weapon accidentally discharged itself or was accidentally discharged by a slight touch on the trigger. The weapon was examined and no defects were found.

[7] At trial it was not challenged that the SA80 rifle cannot be discharged without the safety catch being in the "off" position and a finger inserted inside the trigger guard and pressed sufficiently to discharge it. On lifting the weapon the applicant had failed to check that the safety catch was on and then went further to pull the trigger with the rifle pointed down the side road in what was effectively a built up area. Higgins J in his sentencing remarks described this a "grossly negligent act".

[8] The applicant has no previous convictions and has always led a proper and law-abiding life. His commanding officer sent a letter of reference to the judge, in which he stated:

> "Throughout this time Lance Corporal Graham was employed as a team technician specialising in surveillance. Unassuming, loyal, honest, Lance Corporal Graham developed into one of the best soldiers in the platoon. He was conscientious, diligent and thoughtful. As a practising Christian he displayed many qualities over and above those of an excellent soldier and these made him stand out from his peers. In short, he is every bit the high-grade dedicated soldier that the British Army strives to develop."

Following his conviction he would be discharged from the Army, but he has expressed the intention of applying for discharge in any event. He has not handled a weapon since and has declared that he never will do so again.

[9] The applicant is married and his first child was expected in March 2003. He expressed strong remorse to the probation officer who prepared the pre-sentence report:

> "In interview Mr Graham was visibly still distressed at the consequences which his negligent actions have incurred. He acknowledged that he can never make reparation for his actions and whilst he is unaware of the attitude of his victim's family he stated that he would not blame them for wanting him severely punished. In interview I found him genuinely remorseful for the death which he has caused and the grief which this has brought to others. He was not focused on the

> consequences for himself and was fully acceptant that he is deserving of a custodial sentence."

The probation officer considered it very unlikely that the applicant would reoffend or cause harm to others in the future. She did not think that he would require or benefit from the assistance of the Probation Service.

[10] Several members of Corporal Green's family sent letters to the judge following the applicant's conviction, testifying to the effect upon his family of his death. They are all temperate in tone, but make it clear how distressed they are and express a desire to see a proper sentence imposed in the interests of justice and as a warning to other soldiers to take sufficient care in the handling of weapons.

[11] The judge, in his full and carefully constructed sentencing remarks, set out the facts in detail and continued:

> "… the only explanations for what happened on this day were the few remarks made by the defendant after his rifle was discharged, what he told the interviewing detectives, and the evidence of Lance Corporal Gregg about what happened in the rear of the Land Rover. How the safety catch came to be in the "off" position, how the weapon was discharged, how the weapon was pointing at Corporal Green's head have never been satisfactorily explained, nor the combination of or conjunction of those events.
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> What is clear is that the SA80 rifle cannot be discharged without the safety catch being moved to the "off" position and a finger inserted inside the trigger guard and the trigger pressed sufficiently to discharge the weapon. All of those matters were contrary to what every soldier is taught in training on the handling of weapons. The reason soldiers are trained and retrained constantly and periodically in the handling of weapons is obvious – because rifles are very dangerous objects unless handled with care. When a soldier draws a weapon from his armoury, he owes a duty of care to everyone in the vicinity of him to handle that weapon with extreme care. The defendant did not do that on this occasion. On lifting his rifle he failed to check the safety catch; indeed, he went further and pulled the

> trigger, a grossly negligent act when he had failed to check and know the position of his safety catch.
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> All of this was done when the rifle was pointing down the avenue between the huts and towards the main road and other buildings and accommodation where other soldiers and civilians were likely to be. It was, in effect, a built-up area. It is not suggested that he pointed that weapon deliberately, but it is accepted that it was across his knees in the manner in which I have indicated."

The judge went on to say that he took into account the applicant's remorse for the consequences of his act, but pointed out that he contested the charge, while a plea of guilty would have enabled the court to give credit for his remorse. He concluded that the offence was so serious that only a custodial sentence would be justified and imposed a sentence of two years' imprisonment.

[12] Mr Adair QC for the applicant submitted that his culpability was at the lowest end of the scale. He had not committed a deliberate or wanton act in a reckless fashion or taken an obvious risk, and had not been indulging in horseplay. He was in the wrong in failing to check that the safety catch was on when he lifted the weapon and in playing with the trigger while thinking that it was on. These actions, though found by the jury to have been gross negligence, fell short of the reckless behaviour found in reports of cases of defendants sentenced to comparable terms. He referred us to *R v Palmer* (1996, unreported) and *R v Wesson* (1989) 11 Cr App R (S) 161, both of which were considered by the judge.

[13] In *R v Palmer,* a decision of this court, we reviewed a number of decisions in cases of accidental shootings. We considered several involving negligent discharges by soldiers on duty in sangars, who had generally omitted to clear their weapons properly or follow standard procedure in handling them. In these cases the court suspended the sentence, the common factor in them appearing to be the effects of prolonged duty in sangars. At the other end of the scale was a decision in 1993 in *R v Lappin,* where the judge sentenced the defendant to four years when he had fatally injured a friend after an extended bout of dangerous horseplay with a shotgun. In *R v Wesson* the appellant waved his shotgun about and pointed it at his wife and son while he cleaned it, saying that it was unloaded. The wife was fatally injured by a discharge and the defendant was originally charged with murder, but was found guilty of manslaughter. His sentence of seven years was reduced to two years on appeal.

[14] Mr Adair submitted that the applicant in the present case was materially less culpable than the appellant in *R v Wesson,* and that the case was comparable with the sangar discharges. We have considered his submissions with care, but cannot escape the conclusion that this was an inexcusably dangerous act, wholly contrary to all the applicant's training. In our judgment it was one which required a sentence of immediate custody and a suspended sentence would not sufficiently recognise the seriousness of the applicant's acts and omissions. We consider that the sentence imposed by the judge fell within the proper range applicable to such cases, and that it could not be said to have been manifestly excessive. We accordingly must dismiss the application for leave to appeal.