JUDGMENT NO. DF 1 of 86

6.

BEFORE THE DEFENCE FORCE

DISCIPLINE APPEAL TRIBUNAL

NO. 1 of 1985

IN THE MATTER of an Appeal against conviction by Court-Martial of IAN RAYMOND GULLIVER

JUDGMENT

Sydney 27 March 1986 at 2.00 p.m.

The Honourable Xavier Connor, A.O., Q.C., President

The Honourable Mr. Justice Murray, C.B.E., Deputy President

The Honourable Mr. Justice Gallop - Member

This is an appeal pursuant to s. 20(1) of the Defence Force Discipline Appeals Act 1955 against a conviction by general court-martial on 18 September 1985 at HMAS Penguin, Sydney. The appellant was convicted of an offence against s.19(1) of the Naval Discipline Act 1957 (UK) in its application to members of the Royal Australian Navy by virtue of s.34 of the Naval Defence Act 1910, which offence was tried as an "old system offence" under the Defence Force Discipline Act 1982.

On 31 May 1985 the appellant was the Commanding Officer of HMAS Wollongong, a Freemantle class Patrol Boat. The ship had left Eden with the intention of proceeding to Bass Strait in order to take up surveillance duties in relation to oil rigs. When some distance south of Malacoota the weather deteriorated and the ship began to pound. The appellant decided to seek shelter until the weather abated. He decided upon an anchorage outside Malacoota in respect of which the navigating officer prepared an anchorage plan. On reaching the position where it was intended to anchor, the appellant became apprehensive that the radar was not giving an accurate picture of the range offshore. He then decided to proceed to Gabo Island to take shelter. Gabo Island is a small island off the east coast of Victoria, a short distance north-east of Malacoota. There is a bay on the north-west of the island. The appellant at first intended to anchor at a position three cables (1800 feet) north of the southern headland of the bay and three cables west of the eastern edge of the bay. He subsequently decided to proceed further inshore and anchor in a position two cables from the headland and the shore. In the course of endeavouring to anchor in that position HMAS Wollongong stranded on an uncharted rocky ledge close to the western coastline of the island.

The terms of the charge were that at Gabo Island on 31 May 1985 the appellant did by negligence cause HMAS Wollongong to be stranded. Particulars of negligence were furnished by the prosecution in the following terms:

> 1. Did fail to exercise careful discretion before trying to make unlighted and dangerous land in darkness as required by R and I Article 3544 is that he:
>
> a. failed to take heed of the caution on Chart AUS 806;
>
> b. selected an anchorage on the north-west side of Gabo Island which was imprudent and hazardous having regard to the prevailing weather conditions and the scale of chart in use.

2. Did fail to ensure adequate planning had been conducted to enable the ship to be operated in restricted waters as required by AFGO Article 1837, in that he failed to ensure that the Navigating Officer had prepared a plan for the anchorage at Gabo Island.

3. Did fail to conduct blind pilotage in a safe and satisfactory manner and in accordance with the procedures laid down in BR45(IV) Chapter 4 Articles 0433-0435.

4. Did fail to adopt a blind pilotage organisation as required by Article 0318 of Fremantle Class Orders, and as detailed in Commanding Officers' Standing Orders and Annex V of HMAS WOLLONGONG'S Navigational Data Book, in that the Navigating Officer was not employed as a dedicated Blind Pilotage Officer.

5. Did fail to ensure the ship was not navigated closer to a danger, that cannot be seen, than one centimetre on the scale of chart in use as required by AF Personal Memorandum No. 1/83.

6. Did fail to ensure the ship's position was ascertained in good time and constantly fixed as required by R and I Article 3543.2.

7. Did fail to ensure the effects of the elements on the ship's progress were assessed.

Upon his conviction the court did not proceed to consider an alternative charge of negligent performance of duty contrary to s.7 of the Naval Discipline Act 1957 (UK) in its application to members of the Royal Australian Navy. The penalty imposed for the offence of by negligence causing HMAS Wollongong to be stranded was "forfeiture of 18 months seniority as a Lieutenant Commander in the Royal Australian Navy; new date of seniority is 16 May 1980".

Following his conviction the appellant lodged with the reviewing authority a petition for review of the court-martial proceedings pursuant to s.153(1) of the Defence Force Discipline Act 1982. By letter dated 18 October 1985 the reviewing authority informed the appellant that he had decided to take no action in relation to the conviction or the punishment imposed. The appeal to this Tribunal was lodged by Notice of Appeal on 14 November 1985 and it was common ground on the hearing of the appeal that the appeal was properly instituted.

Before commencing to argue the appeal, counsel for the appellant sought leave to call Captain Doyle, the Navy hydrographer, to give evidence before the Tribunal. The nature of the evidence was that Captain Doyle, in his official capacity, had decided to seek an amendment of a publication called the Australian Pilot to include in the material concerning Gabo Island information concerning the uncharted rocky ledge on which HMAS

Wollongong became stranded. The Australian Pilot was part of the navigational material available on the ship. It was put that such evidence would constitute a clear admission on the part of the Chief of Naval Staff that the information provided to the appellant at the time that he decided to seek an anchorage at Gabo Island was inadequate and misleading and pointed to an absence of negligence on the part of the appellant.

Lieutenant Commander Whitehouse, the Fleet Navigator, gave evidence at the court-martial. He conceded that, in the light of the knowledge which had emerged about the rocky ledge since the stranding, it would be his expectation that appropriate amendments would be made to the Australian Pilot.

We refused the application to call Captain Doyle on the ground that the appellant would not gain any further advantage from his evidence over and above what he had obtained from the concession made by Lieutenant Commander Whitehouse. As the application was made at the very outset of the hearing before us, we gave the appellant leave to renew it after we had heard argument on the question of negligence. The appellant did not subsequently seek to renew the application.

The Notice of Appeal set out various grounds of appeal. We deal with them in the order in which counsel for the appellant argued them. Certain grounds of appeal were not argued.

The first ground of appeal related to the objection made pursuant to s.141(2) of the Defence Force Discipline Act 1982 which provides that at any time before a court-martial is sworn or affirmed the accused person may enter an objection to any member or reserve member of the court-martial on the ground that the member (a) is ineligible; (b) is, or is likely to be, biased; or (c) is likely to be thought, on reasonable grounds, to be biased.

The objection lodged by the appellant related to all members of the court-martial whose names were included in the convening order dated 14 August 1985 on the grounds that they were likely to be biased or were likely to be thought on reasonable grounds to be biased. The factual basis for the objection consisted of a news release by the Chief of Naval Staff dated 14 June 1985, a report in "Navy News" of 28 June 1985 and various reports in the press and television news coverage following the news release of 14 June 1985.

It is necessary to relate the chronology of events giving rise to the news release and the subsequent reports in the media. The incident involving HMAS Wollongong at Gabo Island occurred on 31 May 1985. The board of inquiry made its report to the Fleet Commander on 11 June 1985 and the news release by the Chief of Naval Staff issued on 14 June 1985. The full text of that news release is as follows:

"FRIDAY 14 JUNE 1985 NO 93/85

TWO OFFICERS TO FACE LEGAL PROCEEDINGS

Two officers from the Fremantle-class patrol boat HMAS WOLLONGONG, which grounded off Gabo Island off the north-eastern coast of Victoria on May 31, 1985, are to face legal proceedings.

Announcing this today the Chief of Naval Staff, Vice Admiral M.W. Hudson said that the formal report of the Naval Board of Inquiry, which he had just received, had made certain recommendations concerning disciplinary action. These were sub judice, but the Fleet Commander, Rear Admiral I.W. Knox, had decided that legal proceedings should be instituted against the ship's Commanding Officer and the Navigating Officer.

Vice Admiral Hudson said that the principal findings contained in the report were:-

* HMAS WOLLONGONG grounded 210 metres out from the High Water Line on the western shore of Gabo Island;

* No material or machinery defect or failure contributed to the grounding;

* The grounding was a result of navigational error;

* After grounding the ship was carried by the action of wind and waves up to 50 metres inshore to the position in which she finally settled;

* After the grounding, the actions of all members of ship's company to contain damage and preserve the ship were of a high order;

* Adequate precautions were taken to preserve the lives of the ship's company, and to securely stow classified material;

* Reasonable precautions were taken to secure the ship prior to her abandonment.

Vice Admiral Hudson said that in addition to the above findings, the Board of Inquiry had determined that all members of the ship's company were capable of performing their duties in a normal manner. No alcohol had been consumed by any member of the crew after they returned on board some 24 hours before the grounding.

The report had also stated that the officers principally concerned with the safe handling of the ship were adequately trained and experienced, and that the state of readiness and the damage control condition of the ship were appropriate.

The Board also determined that massive damage was caused to the ship in the first two minutes after grounding, and the situation then became irretrievable.

Vice Admiral Hudson said that in respect of legal proceedings, action would not be started until at least July 3, 1985 because of various technical complexities associated with the advent of the new Defence Force Discipline Act. Proceedings would entail a formal disciplinary hearing, after which it would be decided whether the matter should go to trial by court martial.

He stressed that as legal proceedings were to be instituted the matter was strictly sub judice and there could be no speculation as to the possible outcome nor whether negligence had occurred.

Referring to the ship, he said that HMAS WOLLONGONG was still on the slip at Eden in southern New South Wales where her condition was being assessed and temporary repairs effected. The damage was considerable but he emphasised that it was repairable.

A decision as to the future of HMAS WOLLONGONG would be made shortly when the technical and financial examination had been completed. Present planning was for the ship to be decommissioned and towed to North Queensland Engineers and Agents (NQEA) in Cairns, which was the company which had built her. Repairs were estimated to take several months."

On 11 July 1985 the appellant was charged with disciplinary offences and following a summary hearing commencing on 22 July 1985 and concluding on 30 July 1985, the court-martial was convened on 14 August 1985. It is to be noted that at the date of the news release the appellant had not been charged with any offence. Indeed the court martial did not commence until 2 September 1985, i.e. more than two months later. Having considered all the evidence and submissions in support of the objection the learned Judge Advocate dismissed the objection. Counsel for the appellant has argued that the learned Judge Advocate was wrong in deciding not to uphold the objection. He submitted that the real vice of the news release by the Chief of Naval Staff, which was picked up and reported in the media, was the promulgation of the principal findings of the board of inquiry, in particular the finding that the grounding was as a result of navigational error, and statements that legal proceedings would follow, that those proceedings would entail a formal disciplinary hearing and that thereafter it would be decided whether the matter should go to trial by court-martial. The overall force of the news release, so it was submitted, was that the stranding was due to negligence and that legal proceedings would be instituted against the appellant as the ship's commanding officer and the navigating officer.

It was submitted that, because of the unique position of the Chief of Naval Staff in relation to officers of the Navy generally, those officers required to serve on a court-martial could not fail to be influenced by the terms of the news release and accordingly were likely to be biased or likely to be thought on reasonable grounds to be biased within the meaning of s.141(2) of the Defence Force Discipline Act 1982. In taking the objection at the commencement of the trial counsel for the appellant conceded that there was no actual bias on the part of any members or reserve members of the court, but that they were likely to be biased or that they were likely to be thought on reasonable grounds to be biased. The same objection was maintained in that form as the first ground of appeal argued before this Tribunal.

In our view there is an inconsistency between a concession that no member of the court was actually biased and an allegation that the members of the court were likely to be biased. Section 141(2)(b) is directed to two different sets of circumstances, first where any member or reserve member of the court is alleged to be biased in fact, and secondly, where the member or reserve member of the court is likely, by reason of the circumstances, to be biased. Under the first hypothesis the stark allegation of bias is raised. Under the second the same allegation is raised but without the same degree of certainty or conviction of the fact of bias.

Section 141(2)(c) is directed to yet a third situation, namely where the member or reserve member is likely to be thought on reasonable grounds to be biased. Having regard to what we have said about inconsistency between conceding that no member of the court was actually biased and an allegation that members of the court were likely to be biased, we propose to treat this ground of appeal as an assertion of the third alternative set of facts, namely that the members and reserve members of the court were likely to be thought on reasonable grounds to be biased. In our view this is the way in which the ground of appeal is to be properly understood.

In the well known case of The Queen v. Watson; ex parte Armstrong (1976) 136 CLR 248, the High Court stated the principles which the legislature has apparently endeavoured to incorporate in s.141 (2) (c) of the Defence Force Discipline Act 1982.

After reviewing the earlier English and Australian authorities including Reg. v. Conciliation and Arbitration Commission; ex parte Angliss Group (1969) 122 CLR 546, the High Court said at p.262:

> "The view that a judge should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not unprejudiced and impartial, and that if a judge does sit in those circumstances prohibition will lie, is not only supported by the balance of authority as it now stands but is correct in principle. It would be wrong to regard the observations of Lord Hewart C.J. in R. v. Sussex Justices; Ex parte McCarthy [1924] 1 K.B. at p.259 as meaning that the appearance of justice is of more importance than the attainment of justice itself; c.f. Reg. v. Camborne Justices; Ex parte Pearce [1955] 1 Q.B. at p. 52. . . .It is of fundamental importance that the public should have confidence in the administration of justice. If fair-minded people reasonably apprehend or suspect that the Tribunal has prejudged the case, they cannot have confidence in the decision. To repeat the words of Lord Denning M.R. which have already been cited, 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'".

And later at p.264:

> "The question is whether it has been established that it might reasonably be suspected by fair-minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind."

We add for the sake of completeness a reference to the decision of the Courts-Martial Appeal Tribunal in Re Feiss's Appeal (1959) 8 FLR 336. In that case the President of the Court-Martial had, prior to its opening, been instructed by his superior officers that the Court-Martial concerned the loss of certain secret documents and was advised on measures to be taken by him, as President, to safeguard Commonwealth security. At the opening of the Court-Martial the President made an address referring to such matters. In upholding an appeal against conviction on the grounds, inter alia, of bias, the Tribunal referred to the appropriate authorities and to the dicta of the High Court in The Queen v. Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co. Pty. Ltd. (1953) 88 CLR 100 at 116, where the High Court said:

> "But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result

> that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'pre-conceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded."

The allegation of bias in the present case would embrace all officers of the Royal Australian Navy. If the submission were upheld it would follow that no such officer would be qualified to serve as a member or reserve member of the court.

Counsel for the appellant acknowledged that such consequences would flow but submitted that in those circumstances the Court-Martial could have been constituted by army or air force officers. This is at least arguable.

Eligibility to be a member or reserve member of a Court-Martial is prescribed by s.116 of the Defence Force Discipline Act 1982 which reads:

> "116.(1) For the purposes of this Act, a person is eligible to be a member, or a reserve member, of a court martial if, and only if -
>
> (a) he is an officer;
>
> (b) he has been an officer for a continuous period of not less than 3 years or for periods amounting in the aggregate to not less than 3 years; and
>
> (c) he holds a rank that is not lower than the rank held by the accused person (being a member of the Defence Force) or by any of the accused persons (being members of the Defence Force).
>
> (2) For the purposes of this Act, an officer is eligible to be President of a court martial if, and only if, he holds a rank that is not lower than -
>
> (a) in the case of a general court martial - the naval rank of captain or the rank of colonel or group captain; or
>
> (b) in the case of a restricted court martial - the rank of commander, lieutenant-colonel or wing commander.
>
> (2A) . . .
>
> (3) The requirements set out in paragraph (1)(c) and sub-section (2) apply only if, and to the extent that, the exigencies of service permit."

It could be argued that only a member of the same service as the accused holding a rank not lower than the rank held by the accused would be eligible to be a member or a reserve member of a court martial. However, reg.8 of the Defence Force Regulations provides a comparative table of the ranks of the three services of the Defence Force and by the use of that scale an officer of either the army or the air force

could be recognised as holding a rank not lower than the rank of an accused person in the navy. Because of the conclusion we have reached that the members or reserve members of the court martial were not likely to be thought on reasonable grounds to be biased, it is unnecessary to decide upon the construction of s.116 and reg.8 of the Defence Force Regulations.

We think that there is much force in the respondent's submission that, if the objection on the ground of bias were upheld, there would be a real risk that justice would be defeated. If the disqualification were to be upheld it would apply certainly to all naval officers and, in so far as it was relevant, to all members of the Defence Force who may have read the news release, the publication of Navy News or any of the reports in the media. We are not satisfied that any likelihood of bias in the relevant sense has been shown, but in any event necessity allows, and indeed would compel, the members of the court to adjudicate despite any such appearance of bias - see Willing v. Hollobone (No. 2) (1975) 11 SASR 118 and Judicial Review of Administrative Action, De Smith, 4th Ed., J.M.Evans at p.277.

We take the opportunity to offer some guidance about the release of the results of an investigation into the circumstances of some incident which could be the subject of disciplinary proceedings. It is notorious that there is legitimate public interest in Defence affairs. Having regard to that interest senior officers may well judge it desirable to keep the public informed of the results of investigations into Service affairs. If they declined to do so it could set off a chain of speculation in relation to the true facts and give rise to allegations of covering up those facts. However it is not only desirable but essential to the administration of justice that in any public pronouncements nothing is released which is likely to suggest some prejudgment of the criminal responsibility of the persons involved. We do not think those guidelines were transgressed in this case.

The next ground of appeal was that the Judge Advocate erred in law in admitting into evidence two photographs of Gabo Island over objection on behalf of the accused. The two photographs were formally proved in evidence and depicted Gabo Island in daylight. They give a good photographic representation of the shoreline of the island

and the bay where the incident occurred. One of the photographs (Exhibit N) depicts HMAS Wollongong and another vessel in the bay after the incident occurred.

It was submitted on behalf of the appellant that as the incident happened at night the photographs did not tend to prove anything and that they could give rise to wrong inferences, for instance that the ship as depicted in Exhibit N struck the reef in that position, ended up in that position some time after the reef was struck, or that the photograph was intended to depict the rocky shelf which the ship struck.

In our view the photographs were admissible and of probative value as they depict in photographic form the general contours of the island, the shoreline, the general area where the incident occurred and the sheltered nature of the bay in particular. Moreover we do not think that either photograph was in any way prejudicial to the appellant. Indeed, in depicting the bay so clearly, they could well have assisted the defence.

The next ground of appeal also related to the admission of evidence and was directed to the "reconstruction" of the ship's track on Chart AUS 806 prepared by Lieutenant Commander Whitehouse. The admissibility of the reconstruction was objected to at the trial. The Judge Advocate ruled that the reconstruction of the voyage from Malacoota to Gabo Island was relevant. Subject to certain technical defects which were later cured, the reconstruction was admitted into evidence. In arguing this ground of appeal counsel for the appellant submitted that the reconstruction was of no probative value and that it did not prove where the ship was in relation to any danger, or any breach of AF Personal Memorandum No. 1/83 as particularised in Particular 5 set out above.

It was common ground on the hearing of the appeal that it is accepted practice in courts-martial, where there is a navigational issue, for a reconstruction of the ship's course to be tendered in evidence. The reconstruction tendered in this case was compiled from the ship's navigation records and, as it happens, the reconstruction accords generally with the ship's course as plotted on its navigational chart. We can see no objection to the admission into evidence of the navigational reconstruction and certainly no substantial miscarriage of justice by reason of it.

We turn to the next ground of appeal, namely that the Judge Advocate wrongly decided at the close of the prosecution case that there was sufficient evidence to support the charges. A submission of no case to answer had been made at the close of the case for the prosecution pursuant to s.132(1)(c) of the Defence Force Discipline Act 1982 and rule 44 of the Defence Force Discipline Rules made pursuant to that Act. The Judge Advocate rejected a submission that there was no evidence of the appellant's seniority and consequently that there was insufficient evidence to apply the test of negligence laid down by the Federal Court in the appeal of Lamperd (1983) 46 ALR 371. The Judge Advocate held that the fact that there was evidence that the accused was a lieutenant commander in the Royal Australian Navy and was at all relevant times the commanding officer of a patrol boat enabled certain inferences to be drawn about his experience and that the evidence was sufficient for the purposes of the application of the test laid down in Lamperd's case.

The test as laid down by the Federal Court in Lamperd's Case concerning the standard of negligence in a service context prior to the commencement of the Defence Force Discipline Act 1982 is:

> "That degree of negligence which can be described as doing something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the service would not have done or alternatively omitting to do something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the service would have done."

That standard is the appropriate standard in the present case as the appellant was charged and convicted of an offence against s.19(1) of the Naval Discipline Act 1957 (U.K.) which offence was tried as an "old system offence" under the Defence Force Discipline Act 1982.

It was submitted on behalf of the appellant on the hearing of the appeal to this Tribunal that the test was incapable of application because of the insufficiency of evidence of the appellant's seniority and experience.

At the end of the prosecution case there was evidence that the appellant was a Lieutenant Commander in the Royal Australian Navy, that he was in command of HMAS Wollongong from at least 5 November 1984, and that he was in command of the ship on the night of the incident at Gabo Island.

It was conceded before this Tribunal that any deficiencies in the evidence in those respects were cured by the appellant's own evidence at the trial, but it was contended that this Tribunal was not bound to look at the whole of the evidence and should ignore the evidence of the appellant on his trial.

The question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply a question of law whether the defendant could lawfully be convicted on the evidence as it stands - whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred (Zanetti v. Hill (1962) 108 CLR 433 per Kitto J. at p.442).

It is now well established that if in a criminal trial the defence elects to adduce and does adduce evidentiary material additional to that adduced by the prosecution, an appellate court may have regard to that additional evidence in considering the validity of a verdict and if the verdict is sustainable on the whole of the evidence the appellate court may refuse to set it aside. For a discussion of the cases see R. v. Wood (1974) VR 117.

When one looks at the evidence as a whole there was an abundance of evidence to prove the appellant's seniority and experience. Those matters include his rank of Lieutenant-Commander, his general service knowledge, the training he would have undertaken to earn promotion to that rank, his years of experience in operations rooms, his use of navigation charts, his service as a seaman officer on a number of ships and as a navigating officer on one ship, his attendance at navigation courses throughout 20 years service, the most recent being in 1984, and general matters such as his age, length of tenure of his rank and general service.

The next ground of appeal was that the Judge Advocate wrongly decided that the prosecution was not required as a matter of law to prove each and all of the particulars of negligence on which it relied. In support of this submission counsel for the appellant relied upon the wording of rules 9 and 10 of the Defence Force Discipline Rules. Rule 9(2) states that a charge shall consist of two parts, namely:

(a) a statement of the offence which the accused person is alleged to have committed; and

(b) particulars of the act or omission constituting the offence.

Rule 10 provides that the statement of an offence and particulars of that offence in a charge shall be read and construed together.

It was submitted that in construing rules 9 and 10 the particulars are part of the offence charged and accordingly a conviction cannot be recorded unless all the particulars are proved. In our view this submission is fundamentally wrong.

As the Courts-Martial Appeal Tribunal said in the matter of Paul Lashko, unreported decision, No.2 of 1981, delivered 12 September 1983, the function of particulars is to appraise the accused of "the particular act; matter or thing alleged as the foundation of the charge" (Johnson v. Miller (1937) 59 CLR 467 per Dixon J. as he then was at p.489). Furthermore, the function of particulars is to limit the issue of fact to be investigated. Where the substance of an allegation is that the accused was guilty of negligence the particular duty, a breach of which is relied upon to establish that negligence, may be alleged to have been transgressed in a variety of ways. (For observations relating to civil negligence see Mummery v. Irvings Pty. Ltd. (1956) 96 CLR 99 and Dare v. Pulham (1982) 148 CLR 658 at 664.)

For the purposes of the present appeal it would have been sufficient to support a conviction if the court was satisfied that the appellant was negligent as alleged in any particular of negligence and that such negligence was a cause of the stranding; see generally Lashko, supra.

We turn to the next ground of appeal that the conviction should be quashed pursuant to s.23(1)(c) of the Defence Force Discipline Appeals Act 1955 by reason of material irregularities in the course of the proceedings before the court-martial and that a substantial miscarriage of justice occurred. The respects in which it is alleged material irregularities occurred are the failure of the convening authority to take the necessary steps to secure the appearance of the Chief of Naval Staff pursuant to rule 14 of the Defence Force Discipline Rules, and the failure of the convening authority properly or at all to provide the appellant with his reasons for deciding not to secure the attendance of the Chief of Naval Staff. By letter dated 27 August 1985 counsel for the appellant requested the convening authority to secure the attendance at the trial of the Chief of Naval Staff to give evidence. The convening authority replied by letter of 27 August 1985 requiring the appellant to inform him of the grounds on which the Chief of Naval Staff was required before initiating action to secure his attendance. The accused's counsel replied by letter of 28 August 1985 setting out the nature of the evidence which the Chief of Naval Staff would be expected to give and by letter of 29 August 1985 the convening authority informed the appellant's counsel that he did not propose to take steps to secure the appearance of the witness because no ground had been established that the appearance of the witness was reasonably necessary.

At the trial it was open to the accused to apply to the Judge Advocate to secure the attendance of witnesses or additional witnesses on his behalf (s.141(1)(a)(ii)). If such an application had been made the Judge Advocate had power to grant the application (s.141(5)(b)). No such application was made at the trial on behalf of the accused. In our view it is not open to the appellant now to complain of a material irregularity in the course of the trial in the absence of the appropriate application having been made.

We turn now to consider Grounds 3 and 6 of the Notice of Appeal. Ground 3 reads:

> 'The conviction should be quashed on the ground that it is unreasonable or cannot be supported having regard to the evidence.'

Ground 6 reads:

> 'In all the circumstances of the case the conviction is unsafe and/or unsatisfactory.'

Mr. Ryan, who appeared with Mr. Levine for the appellant, addressed us on these two grounds and in considerable detail examined the evidence relating to each of the seven particulars of negligence which were furnished by the prosecution in support of the first charge. No doubt Mr. Ryan dealt with each of the particulars of negligence because of his leader's submission that it was necessary for the prosecution to establish each one of the particulars in order to sustain a conviction. On such a footing failure to establish any one particular would have been fatal to the prosecution. We have, however, already dealt with that submission and ruled that it is not incumbent upon the prosecution to establish each and every one of the particulars of negligence. Upon this basis it is necessary to consider Grounds 3 and 6 of the Notice of Appeal to ascertain whether there was evidence before the court which, if accepted by the court, could justify a verdict of guilty and further, if there was such evidence, whether it was of such a nature as to render a verdict of guilty unsafe or unsatisfactory. Looked at in this light we are clearly of the conclusion that there was abundant evidence which, if the court chose to accept it, would amply justify the court's verdict.

The prosecution called as a witness Lieutenant-Commander Whitehouse, RAN, the Fleet Navigation Officer. Lieutenant-Commander Whitehouse was established as an expert navigator and it is only necessary for the present purpose to refer to one or two passages in his evidence. Before doing so we may observe that the basic premise of Lieutenant-Commander Whitehouse's evidence was that in the circumstances, having regard to the scale of the chart, the warning on the chart, the conditions existing at the time, the absence of navigational aids and the absence of a properly prepared anchorage plan, it was a risky enterprise to choose an anchorage two cables from the southern tip of Gabo Bay and two cables from the eastern coast of the bay. The warning on the chart is in the following terms:

CAUTION

> Some areas within approximately one mile offshore have not been sounded in detail, therefore uncharted obstructions may exist.

Lieutenant-Commander Whitehouse was asked to indicate where he would have selected an anchorage and, somewhat reluctantly, he selected a point some five cables west of the closest point of land. At the same time he made it clear that he did not wish to be taken as contending that this anchorage point was necessarily a safe one.

At p.800 of the transcript the following passage occurs. The assumptions which the witness was asked to make were covered by other evidence which it was open to the court to accept.

"Q. Thank you. Assume again that the ship was going to an anchorage two cables away from Gabo Bay and that the weather was from the south-west and the swell one to two metres, wind 20 knots approximately; that there was a formal blind pilotage plan; there was no dedicated blind pilotage officer; that the last time a fix had been plotted on the chart was at time 25; that no set had been calculated; there had been no tidal calculations made with respect to the anchorage position; what risks are involved to the safety of the ship in those circumstances?
A. Extreme risks.
Q. Extreme risks of what.
A. Extreme risks of endangering the ship.
Q. By what.
A. By running aground."

At p. 804/5 upon very similar matters being put to him, he said:

> "Under those circumstances I would think it would be an accident looking for somewhere to happen."

At p. 828 he was asked questions relating to the warning (reproduced above) which appeared on the chart in use at the time and he said:

> "What I am saying is the caution on the chart is certainly something that I regard very strongly and it is ever present. It would be a very very weighty factor in my decision as to where I would go."

We have carefully examined the transcript of the very lengthy cross-examination of Lieutenant-Commander Whitehouse and we conclude that it is impossible to say that, as a result of this cross-examination, he withdrew or significantly modified the opinions which he expressed in his evidence-in-chief. His evidence, therefore, remained open to be accepted or rejected by the court.

In the defence case much was made of the material in the Australia Pilot relating to Gabo Island and the appellant's reliance upon it, particularly the passage in it relating to the anchorage said to be available for one vessel in a small sandy bay. These entries might have justified a reasonable selection of an anchorage in the bay. Nevertheless it was open to the court to conclude that nothing in the Pilot justified the selection of an anchorage two cables from the southern headland of the bay and two cables from the western shoreline. The discussion in the evidence, particularly the evidence of Lieutenant-Commander Whitehouse, in relation to the length of cable to be veered in anchoring and the swinging radius of the patrol boat provided, in our view, ample justification for the court, if it saw fit, to find that the selection of the anchorage was negligent and, indeed, that it was this selection which, in the events that happened, was the fundamental cause of the stranding of Wollongong.

For the above reasons we consider that Grounds 3 and 6 of the Notice of Appeal have not been made out.

For all of the foregoing reasons we dismiss the appeal.