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JUDGEMENT No. DF1 of 89

Defence Force Discipline Act, ss.23, 24, 37, 55, 56, 116 and 147

IN THE MATTER OF The Defence Force Discipline Appeals Act 1955

AND IN THE MATTER OF An appeal against conviction from General Court Martial of 224815 Captain Rodney Neville Bridges

No. DFDAT 2 of 1988

Canberra
21 April 1989

Members: The Hon. Sir Edward Woodward (President)
His Honour Judge E. Broad (Member)
The Hon. Mr Justice J.F. Gallop (Member)

IN THE DEFENCE FORCE)
) No. DFDAT 2 of 1988
DISCIPLINE APPEAL TRIBUNAL)

IN THE MATTER of the Defence Force Discipline Appeals Act 1955

AND IN THE MATTER of an Appeal against conviction from General Court Martial of 224815 Captain Rodney Neville Bridges

REASONS FOR JUDGMENT

Members: The Hon. Sir Edward Woodward (President)
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This was an appeal against convictions of the appellant before a general court martial held at Brisbane on 8-10 June and 27-28 June 1988. The appellant had been tried and convicted of five charges of making a false statement in relation to an application for benefit, twenty-one charges of stealing property and one charge of obtaining financial advantage by deception. He was sentenced on each charge to be dismissed from the Defence Force and ordered to make reparation of moneys found to be stolen and obtained by deception, namely $6055.53.

On review, the reviewing authority quashed the findings and sentences in respect of a large number of convictions and approved the findings in respect of three charges of making a false statement in relation to application for benefit contrary to s.56 of the Defence Force Discipline Act 1982 (the Act) and two charges of falsification of a service document contrary to s.55(1)(a). In respect of each conviction the reviewing authority quashed the sentences and substituted sentences of two years forfeiture of service for the purposes of promotion and severe reprimand in respect of each of those charges.

The appeal was heard on 21 February 1989. At the commencement of the appeal counsel for the appellant applied for an extension of time within which to lodge the Notice of Appeal. There being no opposition to the extension of time, we made an order that the time for lodgment of the Notice of Appeal be extended until the date upon which it was lodged, 1 November 1988.

Having heard the appeal, we allowed the appeal and quashed the convictions. We reserved our reasons for judgment, which we now deliver.

The terms of the charges upon which the appellant was convicted are:

"First Charge

Defence Force Discipline Act Section 56	False statement in relation to application for benefit At Canberra on 10 November 1986 in support of application for married quarters for himself, being an application based on service in the Defence Force did make a false statement in writing that to his knowledge was false in a material particular by in Form PY26 beside the words 'I own my own home (includes any dwelling which is the subject of a mortgage or other encumbrance)' marking the box beside the word 'No' with a cross.

Second Charge

Defence Force Discipline Act Section 56	False statement in relation to application for benefit At Brisbane on 5 February 1987 in support of an application for an allowance for himself arising out of service with the Defence Force, namely temporary accommodation allowance did make a false statement in writing that to his knowledge was false in a material particular by in Form K87 beside the words 'Do you own or are you purchasing a home in this area' marking the box beside the word 'No' with a tick.

Sixth Charge

Defence Force Discipline Act Section 56

False statement in relation to application for benefit

At Brisbane on 6 March 1987 in support of an application for an allowance for himself arising out of service with the Defence Force, namely temporary rental allowance did make a false statement in writing that to his knowledge was false in a material particular by in Form KK83 beside the words 'Do you own or are you negotiating the purchase of premises in the new locality' marking the box beside the word 'No' with a tick.

Fourteenth Charge

Defence Force Discipline Act Section 55 (1)(a)

Falsification of service document

At Brisbane on a date unknown or on about 18 May 1987 with intent to deceive did sign a service document namely a Temporary Rental Allowance - Review statement that was false in the following material particulars, 'Neither I, my spouse, nor any other co-resident member of my family has any legal or beneficial interest in this Temporary Rental Allowance residence or any other residence in my posting locality either personally or through a private company, family trust or other arrangement in which any or a combination of us have an equal or controlling interest'.

Twenty-first Charge

Defence Force Discipline Act Section 55 (1)(a)

Falsification of service document

At Brisbane on a date unknown on or about August 1987 with intent to deceive did sign a service document namely a Temporary Rental Allowance - Review statement that was

false in the following material particulars, 'Neither I, my spouse, nor any other co-resident member of my family has any legal or beneficial interest in this Temporary Rental Allowance residence or any other residence in my posting locality either personally or through a private company, family trust or other arrangement in which any or a combination of us have an equal or controlling interest'."

Section 56 of the Act reads:

"56. A person, being a defence member or a defence civilian, who, in or in connection with, or in support of, an application for -

(a) a grant, payment or allotment of money or an allowance;

(b) leave of absence; or

(c) any other benefit or advantage,

for himself or another person, being an application arising out of, or based on, membership of, or service in or in connection with, the Defence Force, makes, either orally or in writing, any statement that is to his knowledge false or misleading in a material particular is guilty of an offence for which the maximum punishment is imprisonment for 2 years."

Section 55(1)(a) reads:

"55. (1) A person, being a defence member or a defence civilian, who, with a view to gain for himself or another person or with intent to deceive, or to cause loss, damage or injury to, another person -

(a) makes or signs a service document that is false in a material particular;

(b) ...

(c) ...

(d) ...

(e) ...

is guilty of an offence for which the maximum punishment is imprisonment for 2 years."

The grounds of appeal as expressed in the Notice of Appeal are:

> "1. As to the convictions with respect to charges 1, 2 and 6 the learned Judge Advocate erred in law in directing the General Court Marshall (sic) with reference to the mental element of the offences charged that in order to be found not guilty the accused had to show on the balance of probabilities that he honestly and reasonably but mistakenly believed that the statements therein referred to were true.
>
> 2. As to the convictions with respect to charges 14 and 21 the learned Judge Advocate erred in law in directing the General Court Marshall (sic) with reference to the mental element of the offences charged that in order to be found not guilty the accused had to show on the balance of probabilities that he honestly and reasonably but mistakenly believed that the statements therein referred to were true.
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> 3. The convictions with respect to charges 1, 2, 6, 14 and 21 are unreasonable or are unsafe or unsatisfactory in that they are inconsistent with the orders of the Reviewing Authority made on the 24th day of August 1988 quashing the convictions on charges 3, 4, 5, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 27 and 28."

At all material times the appellant was a serving officer in the 2nd/3rd Field Engineer Regiment of the Australian Regular Army holding the rank of Captain. Between November 1986 and November 1987 he made a number of applications for temporary rental allowance. During that period the appellant had an interest in two residential properties. In none of those applications did he disclose his interest in those properties, although he had previously disclosed his ownership of one of the properties in an application for married quarters lodged in July 1984. His failure to disclose his interest in the two residential properties between November 1986 and November 1987 gave rise to the charges against the appellant.

In the course of an investigation into the circumstances surrounding the appellant's applications for temporary rental allowance during the relevant period, the appellant provided a signed statement in which he said that he understood that he was entitled to rental allowance because he did not have an alternative suitable home for his family and himself and that he had completed the applications accordingly.

It is necessary to deal only briefly with his evidence, which was to the effect that he had not disclosed his interests in the two residential properties because he did not regard either of them as being suitable as a residence for his family and himself.

Grounds 1 and 2

In the course of his summing up the Judge Advocate observed that "essentially the matter seem(ed) to turn about the accused's belief at the time of completing or signing each of the documents the subject of the various charges". He directed the court on the criminal onus of proof and distinguished proof beyond reasonable doubt and proof on the balance of probabilities. He then went on to say:

> "I refer now to another matter which is necessary in your consideration of these matters and it is the question of mistaken belief. I instruct you that as a general rule an honest and reasonable belief in a state of facts which if they existed would make the accused person's act innocent, affords an excuse for doing what would otherwise be an offence. For example, if a householder believing that a burglar is about to perpetrate a crime of violence against him and members of his household, uses reasonable force as he believes necessary against the burglar to avert that threat of violence, but by mistake uses it against a member of his own household, the householder would not be guilty, if it be an assault, of assault in those

circumstances. Mistake of fact can only be an offence when the act done would have been lawful if the circumstances had been as the accused supposed them to be. To take the example from this case, if the accused in answering the question about 'own home' believed that the reference is to a suitable own home, then to fill out the answer that he does not own a suitable own home may be judged as being a quite lawful act. It does not constitute an offence in doing that in response to that belief. Therefore, if the evidence before you establishes that the accused held that belief although it was mistaken but it was honest and reasonable, then you would in those circumstances bring in in regard to those offences where that belief is a necessary element a verdict of not guilty.

The onus of establishing that the act was done under a mistake of fact lies on the accused, although it is an onus to be discharged by proof on the balance of probabilities only. The accused must show not only that he acted under mistake as to the existence of a fact which if true would have made his act innocent, but he must also show that his mistaken belief was based on reasonable grounds."

At the end of the summing up the Judge Advocate invited the defending officer to apply for any further directions to the court. The defending officer did not seek any further directions. On the application of the prosecutor, however, the Judge Advocate did give further directions, in the course of which he said:

"Now, the evidence has been led, and you may find that this is the case - it's a matter of fact for you - that certain entitlements followed the compiling or signing of documentation by the accused so that where, for example, he made an application for married quarters, as in the first charge, and in that application indicated in that box by the answer 'No' that he did not own a home which included any dwelling which is the subject of a mortgage or other encumbrance - following that, procedures commenced to give him the benefit of one or other type of allowance then in respect to the first charge, if you find that at that time he did not have a belief that the answer 'No' was a correct answer, then you would find him guilty in respect to that charge.

If you found that he had a belief which was a mistaken belief, then you would have the (sic) examine the evidence to see if that mistake was honestly and reasonably held by him. If you found that it was not,

then he once again would be guilty of the first charge. If you found that the mistake was an honest mistake and it was reasonable in the circumstances and, in this regard, you could, for example, if you choose, use the evidence from COL Shannon which he subsequently retracted - but it's up to you to decide what weight you give to that; you could use the INDMAN instruction; you could use the accused's own evidence of his beliefs. If you found that he had the belief which was mistaken but was honest and reasonable, he must, of course, be found not guilty of that charge.

Now, when you come then to the questions of stealing, the evidence seems to establish - and this is a matter for you - that the moneys have come to him by reason of the matters which were set out in the documentation. Now, if that be so, then it lies for your consideration whether, at the time when each sum was received, he intended, by its reception, to dishonestly appropriate that sum with the intention of permanently depriving the Commonwealth thereof. Involved in that consideration once again is the attitude that he believed or may have believed at the time when he was filling out the documents that they were correctly filled out. If it be that he honestly and reasonably, even if mistakenly, believed that he filled out the documents correctly, then you may reach the conclusion that at the occasion of each charge of stealing, he was receiving the funds in accordance with that pre-held honest and reasonable belief. In those circumstances and in respect to each charge of stealing, you would find him not guilty. If, however, you believe in respect to each occasion of the stealing that at the time when he came into possession of that money he did not have an honest and reasonable but mistaken belief in the accuracy or the correctness of the documentation which was the foundation for the receipt of the money and that at the time when he received it his intention was to dishonestly appropriate it and permanently deprive the Commonwealth of it, then you would find him guilty in respect to the stealing. Are there any further redirections which are sought?"

Those directions were clearly wrong.

In He Kaw Teh v. The Queen (1985) 157 CLR 523 each member of the High Court took the relevant principle to be that stated in Sherras v. De Rutzen [1895] 1 QB 918 at p.921:

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

In He Kaw Teh the High Court held that, in respect of the provisions of the Customs Act 1901 (Cth) there considered, the presumption that mens rea is required before a person can be held guilty of a grave criminal offence had not been displaced.

In Holt v. Cameron (1979-1980) 27 ALR 311 the Full Court of the Supreme Court of South Australia construed s.138(1)(d) of the Social Services Act 1947, which creates very similar offences to those set out in ss.55 and 56 of the Act, as containing an element of mens rea and held that even if the defendant in that case had acted unreasonably, it had not been shown that he had acted "dishonestly" or with "guilty mind". Holt v. Cameron was upheld on appeal to the High Court; see Cameron v. Holt (1979-1980) 28 ALR 490.

Nothing in the language of ss.55 and 56 of the Act, read with the rest of the statute, warrants the displacement of the presumption that in creating the criminal offences in those sections the legislature intended a guilty intent appropriate to the nature of the offences to be an ingredient of the offences.

In respect of the offences against s.55(1)(a) of the Act it was for the prosecution to prove beyond reasonable doubt a guilty intent on the part of the appellant. In respect of the offences against s.56 it was necessary for the prosecution to prove knowledge on the part of the accused that the statements made by him were false. The appellant did not bear any onus at all in relation to any of the offences upon which he was convicted and in

particular the appellant bore no onus of proving honest and reasonable belief in the truth of his statements.

That the directions were wrong was conceded by the respondent on the hearing of the appeal. However, it was submitted on behalf of the respondent that, although as a result of the wrong directions on questions of law, the appellant's convictions were wrong, a substantial miscarriage of justice had not occurred.

Section 23(1)(b) of the Defence Force Discipline Appeals Act 1955 provides that where in an appeal it appears to the Tribunal that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred, the Tribunal shall allow the appeal and quash the conviction or the prescribed acquittal. In the absence of a substantial miscarriage of justice the Tribunal should not, so it was submitted, allow the appeal and quash the conviction.

The test as to whether there has been a substantial miscarriage of justice has been considered in legislation of the States empowering courts of criminal appeal to dismiss an appeal notwithstanding an opinion that points raised might be decided in an appellant's favour, if it considers that "no substantial miscarriage of justice has actually occurred".

In Driscoll v. The Queen (1977) 137 CLR 517 at 524, Barwick CJ said in considering s.6 of the Criminal Appeal Act 1912 (NSW):

> "The meaning of the expression 'miscarriage of justice' as used in these sections has been elucidated over many years. It has, in my opinion, correctly been said that the test of miscarriage in relation to the proviso to s.6(1) is whether the court is satisfied that no reasonable jury, properly directed, could have failed to return a verdict of guilty on the evidence before it had it applied itself to its task in a proper manner, making in favour of the accused the presumption of innocence and bearing in mind the necessity that the charge be proved beyond all reasonable doubt: see Reg. v. McGibbony [1956] V.L.R. 424, at pp.426-427; or, put another way, that no reasonable jury properly directed could fail in the performance of their duty on the evidence before them to have convicted the accused of the charge laid against him."

Barwick C.J. referred to the oft-quoted passage from the reasons for judgment of Fullagar J. in Mraz v. The Queen (1955) 93 CLR 493 at p.514:

> "It is very well established that the proviso to s.6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

A similar view has more recently been expressed by Deane J. in Chamberlain v. The Queen (No. 2) (1983-84) 153 CLR 521 at 615 in relation to appeals from the Supreme Court of the Northern Territory to the Federal Court of Australia.

The same test has been adopted most recently by the High Court in Wilde v. The Queen (1988) 62 ALJR 100 where the authorities are reviewed by Brennan, Dawson and Toohey JJ at pp.102-103 and by Gaudron J at p.107.

It is to some extent relevant that, notwithstanding the serious misdirections in the summing up resulting in a miscarriage of justice, the appellant's defending officer did not seek any further directions from the Judge Advocate at the conclusion of the summing up.

In our view, such failure is not necessarily fatal in circumstances where the summing up was manifestly wrong (R. v. Lovet [1986] 1 Qd. R. 52 per Kelly SPJ at pp.56-57). We are firmly of the view that the directions casting an onus of proof upon the appellant where the onus in relation to all offences remained upon the prosecution throughout and not adequately explaining the elements of guilty mind in s.55 and knowledge of falsity in s.56 deprived the appellant of a chance which was fairly open to him of being acquitted. The prosecution case was not such that without the misdirections the court could not have failed to return a verdict of guilty on the evidence before it applying itself to its task in a proper manner.

Nevertheless, it was submitted on behalf of the respondent that a court martial is not a jury and should be looked at differently. It was submitted that this Tribunal should be more robust in determining the effect of any incorrect statement in the summing up on the members of the court martial and should, in the circumstances, give the court the benefit of their experience and rank. Counsel referred to ss.116 and 147 of the Act.

Section 116 provides for the eligibility to be a member of a court martial, which is that a person is

eligible to be a member if and only if he is an officer, has been an officer for a continuous period of not less than three years, or for periods amounting in the aggregate to not less than three years, and holds a rank that is not lower than the rank held by the accused person.

Section 147 provides that in addition to the matters of which judicial notice may be taken by a court under the rules of evidence, a service tribunal, which by definition (s.3) means a court martial, a Defence Force magistrate or a summary authority, shall take judicial notice of all matters within the general service knowledge of the Tribunal or of its members.

Counsel also relied upon R. v. Jorgic (1963) 80 W.N.(NSW) 761. In that case there had been a failure on the part of the trial judge to direct the jury that the burden of proof was on the prosecution and to direct them to examine the explanation given by the accused, and if they came to the conclusion that the explanation might reasonably have been true, even though they did not believe it, they were not entitled to use the doctrine of recent possession against the accused. There was no passage anywhere in the summing up in which the trial judge used words to explain that it was for the prosecution to prove its case or that the burden of proof lay upon it. The Court of Criminal Appeal noted the observation in the trial judge's report that in all criminal cases jurymen would know that the Crown cannot succeed unless every reasonable doubt of guilt has been resolved in favour of the prosecution, but said that,

nonetheless, it had always been the invariable practice to tell juries that the onus of proof was on the Crown from start to finish and to point out the degree of proof required. To do otherwise was to take the chance that some jurymen might think that it was the accused who had some onus cast upon him in the matter. The court allowed the appeal in that case, set aside the conviction and ordered a new trial.

We can find nothing in the language of ss.116 and 147 or R. v. Jorgic which justifies, in the conduct of criminal proceedings in a service context, a departure from the essential requirements of the law that go to the root of the proceedings. What happened in the appellant's trial was no mere irregularity. It was a radical and fundamental error so serious as to cause a mistrial.

Having regard to what we have said in relation to grounds 1 and 2, it is unnecessary to deal with ground 3, which is based upon the proposition that the convictions are unreasonable, unsafe or unsatisfactory in that they are inconsistent with the orders of the reviewing authority quashing the several convictions on other charges.

It only remains for us to deal with the submission that this is not an appropriate case in which to order a new trial as the Tribunal is empowered to do under s.24 of the Defence Force Discipline Appeal Act 1955 if the Tribunal considers that in the interests of justice the person should be tried again.

In Director of Public Prosecutions for Nauru v. Fowler (1983-1984) 154 CLR 627 the High Court had to

construe a similar provision allowing the Supreme Court of Nauru to order a new trial, if the interests of justice so required. In construing the provision the High Court (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ) in a joint judgment held:

> "The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial to be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case. ... Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused."

In declining to order a new trial, we came to the conclusion that, while the admissible evidence given at the court martial may have been sufficiently cogent to justify a conviction, there was also evidence both in the investigation stage and in the appellant's oral testimony at the court martial refuting any guilty state of mind or knowledge of falsity of statements made.

We also took account of the cause of the mistrial, which could in no way be attributed either to the accused or to his defending officer. There were also factors personal to the accused which suggested it could be unjust to the accused to make him stand trial again.

We also refused to make an order that the Commonwealth pay the appellant's costs of the appeal. Where the Tribunal allows an appeal, s.37(1) of the Defence Force

Discipline Appeals Act 1955 confers an unfettered discretion on the Tribunal to direct the payment by the Commonwealth to the appellant of such sums as appear to the Tribunal reasonably sufficient to compensate the appellant for expenses properly incurred by him in the prosecution of his appeal, and any proceedings preliminary or incidental to the appeal, or in carrying on his defence against the charge or charges out of which the appeal arose.

Where the Tribunal dismisses an appeal, s.37(3) confers a reciprocal discretion to order the appellant to pay to the Commonwealth the whole or any part of the costs of the appeal and expenses.

Such a discretion must be exercised judicially and within generally accepted principles (Trade Practices Commission v. Nicholas Enterprises Pty Ltd and Ors (1979-1980) 28 ALR 201; Thompson v. Mastertouch TV Services Pty Ltd (1977) 15 ALR 487).

There is nothing in the provisions of s.37 which replaces generally accepted principles in criminal matters. One of those generally accepted principles in criminal matters is that costs will not be awarded in favour of or against the Crown.

It is appropriate to equate the convening authority who convened the general court martial for the trial of the appellant on the charges set out above to the position of the Crown in criminal proceedings in a civil court. Accordingly, it would not be appropriate to order that the Commonwealth pay the appellant's costs merely on the ground that he has been successful in the present

appeal. This is not to say that costs could not be awarded against the Commonwealth in an appropriate case. If, for instance, it should appear to this Tribunal that a prosecutor's presentation of a case to a court martial contributed to a mistrial, an appropriate case might be made for this Tribunal to make an award of costs against the Commonwealth. Such considerations, however, do not arise in this appeal. Likewise, if the present appeal had been dismissed, the Tribunal would not have made an order that the appellant pay the Commonwealth's costs in the absence of any strong and compelling reasons for such an order.

It is well established that a private informant, e.g. a police officer, who is unsuccessful either as the moving party or as the respondent to a successful appeal will be liable to be mulcted in costs, except in certain circumstances (see Hamdorf v. Riddle [1971] S.A.S.R. 398; McEwen v. Siely (1972-1973) 21 F.L.R. 131; Walters v. Owen [1972-73] A.L.R. 1177; Puddy v. Borg [1973] VR 626; Schaftenaar v. Samuels (1975) 11 S.A.S.R. 266 cited by Franki J. in Thompson v. Mastertouch TV Services Pty Ltd (supra)). But the convening authority was not a private informant and the principles enunciated in the above cases do not arise.

For the reasons given above, we allowed the appeal and quashed the convictions.

I certify that this and the sixteen preceding pages are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate

Dated: 21 April 1989