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Defence Force Discipline appeal - admissibility of evidence of reconstruction - weight to be accorded to such evidence - whether basic premises were themselves accurate - no substantial miscarriage of justice

Practice and procedure - terms of charge and particulars - necessity to inform an accused of the specific offence alleged against him - particulars of offence incorrect - material irregularity but no substantial miscarriage of justice

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 550166 Sergeant Carl Stephen St John

DFDAT No.1 of 1989

Members: The Hon. Sir Edward Woodward (President)
The Hon. Mr Justice W.J.E. Cox (Deputy President)
The Hon. Mr Justice J.F. Gallop (Member)

26 June 1989
Canberra

IN THE DEFENCE FORCE)
)
DISCIPLINE APPEAL TRIBUNAL)

No. DFDAT 1 of 1989

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AND IN THE MATTER of an Appeal against conviction from General Court Martial of 550166 Sergeant Carl Stephen St John

REASONS FOR JUDGMENT

Members: The Hon. Sir Edward Woodward (President)
The Hon. Mr Justice W.J.E. Cox (Deputy President)
The Hon. Mr Justice J.F. Gallop (Member)

26 June 1989
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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 15 December 1988 at Victoria Barracks, Sydney. The appellant was convicted of an offence against s.36(1) of the Defence Force Discipline Act 1982. Section 36(1) reads:

> "(1) A person, being a defence member or a defence civilian, who, in or in connection with -
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> (a) the operation, handling, servicing or storage; or
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> (b) the giving of directions with respect to the operation, handling, servicing or storage,
>
> of a ship, aircraft, or vehicle or a weapon, missile, explosive or other dangerous thing or equipment, intentionally, by act or omission, behaves in a manner that causes, or is likely to cause, the death of, or grievous bodily harm to, another person is guilty of an offence for which the maximum punishment is imprisonment for 10 years."

Unfortunately the charge sheet, which also included a second charge of an offence against s.29(1) of the Defence Force Discipline Act, did not recite the offence against s.36(1) in the terms of the section. The relevant parts of the charge sheet read as follows:

> "550166 Sergeant Carl Stephen St John RAAC, a member of the Australian Regular Army and, at the time of the offences specified in the following charges, a Defence member under the Defence Force Discipline Act 1982, is charged as follows:
>
> First Charge
>
> DFD Act Section 36(1)(a) Dangerous Behaviour
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> Sergeant C.S. St John at Tindell Northern Territory on 18 June 1988 as a Patrol Leader did, in connection with the operation of a weapon, namely a Browning Self-Loading Pistol 9mm L9A1, act intentionally in such a manner that was likely to cause the death of or grievous bodily harm to 454740 TPR M.A. Thomas, 2 Cav Regt, by firing a live round from the said pistol at or in the direction of 454740 TPR M.A. Thomas."

It is to be noted that one of the elements of the offence created by s.36(1) is that the person is either a defence member or a defence civilian at the time of committing the offence. In the terms of the charge, the charge sheet alleged that the offence was committed by the appellant "as a Patrol Leader" and did not charge him as being a defence member or a defence civilian. The appellant pleaded not guilty before the General Court Martial to the offence against s.36(1) as charged and the fact that the charge did not describe the offence in the terms of s.36(1) was not adverted to in the course of the hearing. The Court Martial found the accused guilty of the charge as laid, imposed a punishment of detention for a period of 90 days and reduction to the rank of Trooper with effect from 16 December 1988. The conviction and punishment were apparently confirmed by the appropriate reviewing authority.

The notice of appeal dated 23 December 1988 does not raise the apparent defect in the terms of the charge as a ground of appeal. Notwithstanding the failure of the appellant to raise the defect as a ground of appeal, the question arises whether this Tribunal should affirm a conviction for an offence which has been defectively drafted and charged.

It was submitted on behalf of the respondent that there is no defect in the charge because in the preamble the appellant is charged by name and rank as a member of the Australian Regular Army and at the time of the offences

specified identified as a defence member under the Defence Force Discipline Act 1982. Furthermore, at the commencement of the proceedings the Judge Advocate asked the accused whether he was correctly described in the preamble in the charge sheet, including whether he was a defence member under the Defence Force Discipline Act 1982 and whether on 18 June 1988 he was a member of the Defence Force subject to the Defence Force Discipline Act. The accused confirmed those matters. The charges were then read to him as set out in the charge sheet. As previously stated, he thereupon pleaded not guilty to the purported offence against s.36(1)(a) and guilty to the offence against s.29(1).

It was submitted on behalf of the respondent that, although the words "as a Patrol Leader" were surplusage, the appellant was properly charged with an offence against s.36(1)(a).

We would reject that submission. In our view it is clear that one of the elements of an offence against s.36(1) is that the person charged is a defence member or a defence civilian at the time of the alleged offence. The subject charge does not charge the appellant as a defence member but as a Patrol Leader, which the Tribunal was informed is an appointment in the Australian Regular Army. The first charge in the charge sheet did not properly allege an offence against s.36(1)(a) of the Defence Force Discipline Act 1955.

It has been decided that a person cannot be convicted on an information that does not charge an offence

(Ex parte Lovell; Re Buckley and Another (1938) 38 SR(NSW) 153 at 168, 173; Ex parte Thompson; Re Ryan (1940) 41 SR(NSW) 10; Ex parte de Mestre; Re Chisholm (1943) 44 SR(NSW) 55 at 58; and Ex parte Fitzgerald; Re Gordon and Another (1945) 45 SR(NSW) 182 at 187). A court has no jurisdiction to try a person for something which is not in law an offence. Looked at in that way, the question is whether the Court Martial had any jurisdiction to record the conviction on the first charge.

In some States and Territories of Australia there are statutory provisions to the effect that the description of an offence in the words of the Act or Ordinance creating the offence or in similar words shall be sufficient in law (see, for example, Magistrates Court Act 1930 (ACT), s.27(2); Justices Act 1902 (NSW), s.145A; Magistrates (Summary Proceedings) Act 1975 (Vic), s.167; Justices Act 1886 (Qld), s.47; Justices Act 1902 (WA), s.45; Justices Act 1921 (SA), s.55; Justices Ordinance 1928 (NT), s.55). For a scholarly exposition of the history of this type of provision and the mischief which it was designed to correct, see Ex parte Lovell; Re Buckley, supra, per Jordan CJ commencing at p.165. However, there is no such provision in the Defence Force Discipline Act 1955.

It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him. *This fundamental right cannot* be exercised if, through a failure or refusal to specify or particularise the offence charged, neither the court nor the

defendant is aware of the offence intended to be charged. The defendant cannot plead unless he knows what is the precise charge being preferred against him (Johnson v. Miller (1937-1938) 59 CLR 467 per Evatt J. at 497).

A Court Martial is not entitled to convict of an offence upon a charge which discloses no offence or (which is not the case in this appeal) to convict of an offence alleged in a charge if the evidence does not support that offence or (which is also not the case here) to convict of an offence established by the evidence if it is a different offence from that charged in the charge sheet. If the Court Martial convicts upon a charge which discloses no offence or for an offence with which the accused has not been duly charged, the conviction is bad.

There is no doubt that in the present case the evidence established the essential ingredient of an offence against s.36(1) that the appellant was at all material times a defence member. What then should this Tribunal do in relation to the conviction of the appellant of a purported offence which did not include by its terms that element?

The terms of the Defence Force Discipline Act 1982 and Rules and Regulations made thereunder and the powers of this Tribunal under the Defence Force Discipline Appeals Act do not clearly cover the present situation. The relevant provisions of the Defence Force Discipline Act 1982 are s.66(1) and 141A which are in the following terms:

> "66. (1) Each punishment imposed, and each order made, by a service tribunal shall be imposed or made, as the case may be, in respect of a particular conviction and no other conviction."

"141A. (1) Where it appears to -

(a) a summary authority, before dealing with or trying a charge or at any stage of dealing with or trying a charge;

(b) a convening authority, at any stage when a charge is before him under section 103;

(c) the judge advocate of a court martial, before the court martial tries a charge or at any stage of the trial of a charge; or

(d) a Defence Force magistrate, before trying a charge or at any stage of trying a charge,

that the charge is defective, the summary authority, convening authority, judge advocate or Defence Force magistrate, as the case may be, shall make such amendment of the charge as he thinks necessary unless the amendment cannot be made without injustice to the accused person.

(2) In sub-section (1), 'amendment' includes the addition of a charge or the substitution of a charge for another charge."

The relevant provisions of the Defence Force Discipline Rules are Rules 9, 10 and 12, which read:

"9. (1) A charge shall state one offence only.

(2) A charge shall consist of 2 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.

(3) A statement of an offence shall contain -

(a) in the case of an offence other than an offence against the common law - a reference to the provision of the law creating the offence; and

(b) in any case - a sufficient statement of the offence.

(4) Without prejudice to any other sufficient manner of setting out the statement of an offence, the statement of an offence shall be sufficient if it is set out in the appropriate form in the Schedule.

(5) Particulars of an offence shall contain a sufficient statement of the circumstances of the

offence to enable the accused person to know what it is intended to prove against that person as constituting the offence.

(6) At a trial by court martial or a Defence Force magistrate, 2 or more accused persons may be charged jointly in 1 charge of an offence alleged to have been committed by them jointly.

10. The statement of an offence and particulars of that offence, in a charge, shall be read and construed together."

"12. Where it appears to a service tribunal at any time during a hearing of proceedings that there is, in the charge sheet -

(a) a mistake in the name or description of the accused person; or

(b) a mistake which is attributable to clerical error or omission, the service tribunal may amend the charge sheet so as to correct the mistake."

The statement of the offence against s.36(1) as set out in the charge sheet was appropriately stated pursuant to r.9(4) and the Schedule. It is the particulars of the offence which are incorrect in charging the appellant of having done the act "as a Patrol Leader" instead of "as a defence member". Rule 9(4) requires that the particulars of the offence should contain a sufficient statement of the circumstances of the offence to enable the accused person to know what it is intended to prove against that person as constituting the offence.

Either s.141 or Rule 12 would have provided ample authority to the Court Martial to amend the subject charge by deleting the words "as a Patrol Leader" and substituting "as a defence member" without injustice to the appellant at an appropriate time before or during the trial.

The powers of this Tribunal on appeal are set out in Part II, Divisions 1, 2, 3 and 4 of the Defence Force

Discipline Appeals Act 1955. Power to direct that a conviction be amended so as to accord with the wording of an offence created by the Defence Force Discipline Act 1982 is not expressly contained in those provisions under Part II.

The Tribunal is, however, invested in s.23, which appears in Part II, Division 2, with power to quash a conviction where there has been a material irregularity in the course of the proceedings before the Court Martial and a substantial miscarriage of justice has occurred. Clearly there has been a material irregularity in the course of the proceedings before the Court Martial, but no substantial miscarriage of justice. The appellant was charged in the preamble as a defence member. He confirmed that he was correctly described in the preamble of the charge sheet and that on 18 June 1988 he was a member of the Defence Force subject to the Defence Force Discipline Act. The evidence also established that at all material times he was a defence member. It is also to be noted that the material irregularity was not raised by the Notice of Appeal.

In the circumstances it is quite apparent that a substantial miscarriage of justice has not occurred and it would not be appropriate to allow the appeal and quash the conviction on the ground of irregularity.

We turn now to consider the merits of the appeal.

On 18 June 1988 the appellant was engaged in a patrol to the south of Tindell in the Northern Territory, as part of Exercise "Northern Courage" which involved B Squadron of 2 Cavalry Regiment, RAAC. There were on the

patrol two armoured vehicles, a light reconnaissance vehicle (LRV) and a medium reconnaissance vehicle (MRV), the latter being commanded by the appellant who was also the Patrol Leader. At about 0900 hrs both vehicles came to a halt on flat land alongside each other. A distance of approximately one metre separated them and they were roughly level with each other.

The driver of the LRV, Trooper Thomas, was seated in the front left compartment with his head and shoulders protruding above the top of the vehicle. He had swung his body round to the right to face the appellant. The appellant was standing in the Commander's position of the MRV to the rear of his own driver, Trooper Semmler, who occupied a similar position to that of Trooper Thomas. The appellant's body from about waist height protruded from the turret of the MRV. A third member of his crew, Trooper Green, was immediately to the appellant's rear, and in the LRV the crew commander, Lance Corporal Handford, was in a corresponding position to the appellant, and to the right rear of Trooper Thomas. These five soldiers were the only eye witnesses to what then transpired.

As the result of a sarcastic remark concerning him being uttered by Trooper Thomas, the appellant, after saying words to the effect "I've had enough of you", removed from its shoulder holster, a Browning 9mm pistol which was, contrary to the general order referred to in the second charge which is not before us, loaded with live ammunition. He then, on his own evidence, took aim at a point on Trooper

Thomas' face between the eyes, holding the pistol in one hand, moved the point of aim to the right and high, placed his finger on the trigger and discharged one round. He then replaced it in the holster and the patrol moved on.

The round did not strike Trooper Thomas, who was approximataely three metres from the appellant's position, and only three of the five soldiers present claimed to see it land. Trooper Thomas estimated that the round landed roughly six metres from where he was sitting, over his left shoulder. Trooper Green said it went approximately eight metres beyond Trooper Thomas and about three feet and to the right of a line between his and the latter's positions, while Trooper Semmler saw dust rise about five metres from the front of the LRV and to the right of the line between the two drivers.

In support of its case that the admitted act of the appellant was one likely to cause death or grievous bodily harm to Trooper Thomas in the circumstances, the prosecution called a member of the Forensic Ballistics Unit of the NSW Police Force, Detective Senior Sergeant Ransome, whose expertise was unchallenged. In addition to examining the weapon in question, he conducted a series of tests at 2 Cav Regt at Holsworthy in December 1988. There an MRV and an LRV were parked on even ground alongside each other at a distance of one metre. An officer of approximately the same height as the appellant was placed in the turret of the MRV and took aim with the Browning pistol at a cut-out model of a soldier seated in the driving seat of the LRV, his head

and shoulders protruding above the driver's turret. The model was placed in this position after Trooper Thomas himself had occupied such a position. Using a laser sighting device, Detective Senior Sergeant Ransome simulated the trajectory of a projectile from the pistol. He simulated the firing of the weapon at various points in the vertical plane, starting at a point level with the top of the hull of the vehicle near the driver. He subsequently calculated the vertical height of the projectile above the hull of the vehicle itself in relation to a number of points of impact on the ground roughly corresponding to the estimates given by the eye witnesses concerning the fall of the shot. The chart he tendered as an exhibit had superimposed upon it the silhouette of the driver's head and the lines depicting the vertical height of the projectile at the different points of impact passed through it, or as little as six centimetres above it in the case of the furthest point of impact (slightly in excess of ten metres).

It should be emphasised that the exercise undertaken by Detective Senior Sergeant Ransome was one in the vertical plane only and did not claim to be of any relevance in determining the path of the projectile in relation to the horizontal plane. There could not, in our view, have been any confusion in the minds of the members of the Court Martial about this aspect.

In the course of his evidence the appellant said that after taking aim at Trooper Thomas at a point between his eyes he had moved the point of aim two feet to the right

and high at an angle of 45 degrees to his original point of aim. As this had not been put to any of the relevant witnesses for the prosecution, the learned Judge Advocate acceded to a submission by the prosecuting officer that there had been a breach of the rule in Browne v. Dunn (1894) 6 R 67 (HL) and in the exercise of his discretion permitted him to call another member of the NSW Police Force Forensic Ballistics Unit, Constable Roach, who had assisted Detective Senior Sergeant Ransome in his investigations, to give evidence as to the likely fall of shot based on the version advanced by the appellant. His evidence was that the fall of shot would have been no less than sixteen metres and no greater than eighteen metres from the edge of the LRV.

The grounds of appeal are as follows:

"1. That the Judge-Advocate was in error in admitting into evidence Exhibits 11A, 11B, 11C, 12, 15A, 15B, 15C, 15D, 15E, 15F and oral evidence of Detective Senior Sergeant David John Ransome and Constable Sean Patrick Roach relating to a purported reconstruction of the circumstances which formed the basis of the charge, by reason of the failure of the prosecution to adduce other evidence which would have made the abovementioned evidence admissible and/or that the probative value of the evidence admitted was far outweighed by its prejudicial nature.

2. In the circumstances outlined in 1 above there was a substantial miscarriage of justice."

Counsel for the appellant argued that the exercise conducted by the ballistics experts was so scientifically inexact that either it was inadmissible or it had such little probative weight in comparison with its prejudicial effect that the learned Judge Advocate ought to have exercised his discretion to exclude it. He argued that

there was uncertainty about the exact height above the LRV that Trooper Thomas' head and shoulders had protruded from the turret; about the direction in which he had been facing; about the position in the commander's turret that the appellant had occupied as compared with that taken by the officer holding the weapon at the time of the reconstruction; about the length of that officer's arms as compared with those of the appellant; and about the height of the adjustable seat in the vehicle commander's position. He also submitted that doubt existed as to the precise distance separating the two vehicles and whether they were level or whether one was slightly ahead of the other.

We are in no doubt that the evidence was admissible. How much weight it deserved was a matter for the Court Martial, to be determined largely by the degree to which the members of it were satisfied that the basic premises assumed by the ballistics officers were themselves accurate. Obviously not every condition can be reproduced identically but there was evidence which in our view would have entitled the Court Martial to find that the assumptions made were sufficiently accurate to enable it to derive guidance from the experts' conclusions.

Nor are we persuaded that the evidence had a prejudicial effect which was of any significance in comparison with its probative weight. While the chart showing the silhouette of the driver's head somewhat graphically demonstrated in the vertical plane the proximity to it of a projectile being fired at ranges corresponding to

the estimates given by the eye witnesses without allowing for lateral deviation, we see no reason to suppose that the members of the Court Martial would have overlooked that aspect of the appellant's defence or would have given the chart greater weight than it deserved. The path of the bullet in both planes was obviously important and it was never contemplated that this evidence could demonstrate where in the horizontal plane the round might have passed Trooper Thomas.

The evidence of Constable Roach was in itself clearly admissible and no complaint was made on the hearing of the appeal that the learned Judge Advocate erred in permitting its reception in rebuttal.

Of the exhibits referred to in ground 1 of the Notice of Appeal, exhibits 15A-F inclusive consist of photographs taken from the positions occupied by each of the five eye witnesses. They clearly do not purport to show exhaustively the view each observer would have had, nor could they reasonably cause any confusion to the members of the Court Martial as to his field of observation, notwithstanding the possibility that the photographer took each photograph from a different height from that of the original observer at the material time. These exhibits were not relied upon by the ballistics experts in conducting their tests or formulating their opinions and served merely to depict in general terms what could be observed from each position. They may have been of limited assistance to the

Court Martial but were clearly admissible and no prejudice to the appellant by their use has been demonstrated.

For these reasons the appeal must be dismissed.

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

Dated 26 June 1989

Meredith Bowers.

Associate