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JUDGEMENT No. DF4, 94

DEFENCE FORCE DISCIPLINE
APPEAL TRIBUNAL

DFDAT No 2 of 1994

IN THE MATTER OF THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955
AND THE DEFENCE FORCE DISCIPLINE ACT 1982

B E T W E E N:

WAYNE RONALD HEMBURY

Appellant

A N D :

CHIEF OF THE GENERAL STAFF

Respondent

TRIBUNAL: NORTHROP J - PRESIDENT
COX J - DEPUTY PRESIDENT
BADGERY-PARKER J - MEMBER

PLACE: MELBOURNE

DATE: 9 JUNE 1994

MINUTES OF ORDER

THE TRIBUNAL ORDERS:

That the appeal be dismissed and the convictions confirmed.

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DATE: 9 JUNE 1994

REASONS FOR DECISION

THE TRIBUNAL: On 19 April 1993 the appellant, Sergeant Wayne Ronald Hembury, was charged before a restricted court martial on a total of six counts, three of which were expressed as alternatives. The charges were:

1. That being a defence member at Watsonia on a date between 1 December 1991 and 25 December 1991 he did commit an act of indecency in the presence of Private C.M. Smith in that he stood behind Private Smith and thrust his hips forward towards her without the consent of Private Smith, knowing that she did not consent, or was reckless as to whether Private Smith consented.

2. (In the alternative to the first charge) that being a

defence member at Watsonia on a date between 1 and 25 December 1991 he did behave in a manner likely to prejudice the discipline of the Army in that he did stand behind Private Smith and thrust his hips towards her.

3. That being a defence member at Watsonia on a date between 20 January 1992 and 6 February 1992 he did commit an act of indecency upon Private C.M. Smith in that he touched her on the area of the right breast without the consent of Private Smith, knowing that she did not consent, or was reckless as to whether Private Smith consented.

4. (In the alternative to the third charge) that being a defence member at Watsonia on a date between 20 January 1992 and 6 February 1992 he did assault Private C.M. Smith, a member of the Defence Force, who was inferior to him in rank, by touching her on the area of her right breast.

5. (Also in the alternative to the third charge) that being a defence member at Watsonia on a date between 20 January 1992 and 6 February 1992 he did behave in a manner likely to prejudice the discipline of the Army, in that he touched Private C.M. Smith on the area of the right breast.

6. That being a defence member at Watsonia on a date between 20 January 1992 and 6 February 1992 he did disobey the lawful command given to him by Warrant Officer C.R. Cramp, his supervisor officer, supervisor, Army Clothing Store,

Watsonia, on a date in December 1991 to not touch Private Smith, in that he touched her on the area of the right breast.

He pleaded not guilty to all six counts. The members of the court martial retired to consider their verdicts at 0948 hours on 21 April and announced those verdicts at 1133 hours the same morning. The appellant was acquitted of the first charge, act of indecency, but convicted of the alternative second charge, conduct likely to prejudice discipline.

He was acquitted of the third charge, act of indecency, but convicted of the alternative fourth charge, assault on a defence force member of inferior rank. In view of that verdict, no verdict was taken on the fifth count, the further alternative to the third charge. He was convicted of the sixth charge, disobedience of a lawful command.

Thereafter, and after hearing matter in mitigation, the court martial took action under Part IV of the *Defence Force Discipline Act* 1982 as follows:

In respect of the second charge, a fine of $700.00 was imposed, of which $400.00 was suspended and $300.00 was to be payable in fortnightly instalments of $15.00. In respect of the second charge, further, a reprimand. In respect of the fourth charge, detention for a period of three months but suspended for 12 months, and in respect of the sixth charge, a fine of

$1500.00, of which $1000.00 was suspended and $500.00 was to be paid by fortnightly instalments of $25.00, together with a severe reprimand.

Sergeant Hembury appeals against those convictions and purports to appeal also against the punishments awarded. The case for the prosecution disclosed two separate acts said to have been committed by the appellant against Private Cindy Smith, a female soldier who worked under the supervision of the appellant at the Army Clothing Store at Watsonia. They were alleged to have occurred in the context of a series of incidents in which the appellant, as he passed by Private Smith in the course of work in the store, would frequently touch her on the hips, or the waist, or the shoulders.

The particular incident which was the subject of the first two charges was alleged to have occurred in December 1991, some time before Christmas. Private Smith described it in her evidence:

> *"I was standing ... at the counter at the clothing store, facing the door leading into the Q-Store and Sergeant Hembury come behind me and he thrust - thrust himself right into the back of me and he moved me approximately one step forward."*

She said that when that occurred she looked around to see who it was, she saw Sergeant Hembury and, "He had a smile on his face". In cross-examination she was asked what she was doing at the time and she said:

"I was standing at the counter, sir, doing absolutely nothing, we had no customers. It was first thing in the morning and Sergeant Hembury just come from behind me and thrust his hips into the back of mine."

Later she gave this evidence:

"Q. When did you become aware of the presence of someone behind you? A. When Sergeant Hembury - when he thrust himself into the back of me.
Q. Hembury was behind you only a very, very short time? A. Yes, he just crashed into me and then just - I turned around and I seen who it was."
Q. You did not see any movement of his hips, did you? A. No, but I felt it.
Q. Did you know if it was his hips or his abdomen? A. It was his hips.
Q. He was moving past you when that incident occurred, was he not? A. No, he wasn't, sir.
Q. But you were facing away from him? A. I was.
Q. How do you know if he was moving past you if you did not become aware of his presence until you felt this crash into the back of you? A. Well, if he was walking past me, why didn't he walk past me and not crash himself right into the back of me?
...
Q. Do you dispute that he was moving past? A. Yes, I do.
...
Q. There is no ongoing backwards and forwards motion with his hips? A. No, it was just one bang into me and that was it."

(Perhaps, looking at the verdicts, it was that answer which accounts for the verdict of not guilty on the first count, whereas there was a conviction on the second.)

Corporal Simon Coleman, who was also working in the store at the time, observed the incident. He described it as follows:

"It was in the foyer of the clothing store, just behind the counter. There is a door that leads into the office. I was standing there, and Sergeant Hembury was in front of me with his back to me, and Private Smith was in front of him

with her back to him. It was like - she was going out the door, but she was just standing there and Sergeant Hembury was - was standing directly behind her. He had his arms out in front of him, like this, thrusting his hips forward, behind her. Private Smith must have sensed that he was there, because she turned around to face him and Sergeant Hembury just turned around to face me and had a bit of a chuckle and that was it.

Q. Did you see any contact made between Sergeant Hembury and Private Smith? A. No ma'am, because of the angle I was at."

He was then asked to demonstrate and, in the course of giving a demonstration, which of course the transcript does not describe, he said:

"Sergeant Hembury was - had his back to me and Private Smith was in front of him, he had his hands like this and was thrusting forward."

He was asked whether there was plenty of room for the sergeant to have walked around behind Private Smith, and he said:

"In the context of that where he was behind Cindy, no, there wasn't. Normally the environment is such that it's very, very close so you have to physically squeeze past people. But he was not trying to squeeze past her."

In cross-examination he gave this evidence:

"Q. Sergeant Hembury moved past Private Smith, did he not, at this particular point? A. I didn't see that happen, sir, no.
Q. You saw a movement with Sergeant Hembury's hips; is that correct? A. Yes, sir.
Q. And at the time you saw this movement his hands were raised? A. They were to his front, sir.
Q. They were raised upwards? A. He - yes, he was holding onto her like a handlebar of a bike."

It was put to him that Sergeant Hembury was making an exaggerated move to move away from Smith to avoid touching her, and he was asked would he concede that possibility. He said, "No sir".

The accused gave evidence. He denied any series of touching incidents save as was necessary in moving past other workers in the confined areas of the store. He denied the incident described by Private Smith and Corporal Coleman, but he said:

> *"The only recollection I've got of something like that happening at all, and again there was no contact made at this time, is when she was moving down towards the Q-Store entrance or exit from the clothing store and I was walking behind her to go to the computer terminals to reset them for the day, because that again, that was my task when Warrant Officer Cramp wasn't there, because I has the password. From what I can recall, she actually stopped and then I had to make - well, correction. Because of the exaggerated - correction. Because of the warning I had, I ended up making what you'd call an exaggerated movement to show that I was not near her, to get past her around to the other side where the computer terminals were.*
> *Q. Why did you make this exaggerated movement? A. Again, because of the warning I had by Warrant Officer Cramp not to touch her and because she had stopped for some reason along the way.*
> *Q. Can you describe what you did with your hips or body in relation to this exaggerated movement? A. Yeah. Basically I put my hands up in the air with the palms sort of flat as if say, pushing against something and sort of tried hard to sort of wriggle to the one side, sort of stopped, sort of stepping away to one side.*
> *Q. You said 'wriggle'; what part of your body did you use to wriggle? A. My hips mainly, in sort of a shuffling motion is what I am trying to explain."*

The second incident was the subject of the third, fourth and fifth counts. It was alleged to have occurred in late January 1992 or in early February. Private Smith said:

"I was at the end of the compactor, I was - Sergeant Hembury walked past me and his right arm brushed up the right hand side of my body, up past my breast, as he moved past me. Nothing was said."

She was asked how it made her feel when Sergeant Hembury had touched her on the breast, or near the breast, and she said:

"I was shocked because I didn't know what to think. I didn't know whether it was an accident or whether it was meant. I don't know.
Q. And he said nothing to you? A. No, ma'am ..."

In cross-examination, she conceded that, at the time, the appellant seemed to be in a rush and that the area they were in was confined. She was asked whether she would concede the possibility that Sergeant Hembury was in a rush, that she was in his way, blocking the passageway between the two compactors, and that he was simply trying to get around her. She said:

"No, for the simple fact that he had no need to put his hand up the right hand side of my body. There was no need for it."

There were no witnesses to this incident, which was denied by the appellant, although he did describe in the course of his evidence one occasion when he had deliberately touched the complainant. He said:

"... she was, as far as I was aware, in a lousy mood, and I sort of tickled her in the office area, but otherwise, no."

He was asked what part of the body he tickled, and he said:

"Just in the sides, at the hips, just there - in there. Q. Why did you tickle her? A. Because, as I said, she seemed to be in a lousy, rotten mood that morning. That's the impression I got, and that was the only reason, to try to get her to sort of to laugh or get - sort of get her out of that mood type thing."

Lieutenant Margaret Beavan gave evidence that on one of her weekly visits to the store one of the supervisors, Warrant Officer Cramp, told her that Private Smith wished to speak with her privately, this was on Wednesday 12 February 1992. And she said that Private Smith had told her that Sergeant Hembury, who worked with her, made her feel uncomfortable while working with her, by touching her and making unnecessary comments and generally making her feel uncomfortable. Asked "Did she tell you anything else?" she said "I do not recall."

Two days later Lieutenant Beavan made a special visit to the store, having been directed to conduct an investigation into some other matter, the nature of which the evidence does not reveal. On that occasion she spoke to Private Smith who told her of the hip thrusting incident. Lieutenant Beavan had no recollection of having been told by Private Smith that the appellant had touched her on the breast.

Private Smith was cross-examined about her conversations with Lieutenant Beavan and she said that she had made a complaint about being touched and that Lieutenant Beavan was investigating her complaints. She was asked "You never told her you were

touched on the breast, did you?" and she said "I cannot ecall."

Evidence was given by Warrant Officer Clive Cramp that after Private Smith made a complaint to him of the appellant's touching her in a way that she did not like, he spoke to the appellant and expressly directed him not to touch her, as asked by her. It was not disputed that such an order was given during December 1991. The sixth count charged the breast touching incident as a disobedience of that order.

The first ground of appeal is that the convictions were unsafe and unsatisfactory. Like any Court of Criminal Appeal to which such a submission is made, this Tribunal is called upon to make its own examination and assessment of the evidence and to consider whether the evidence is such that in the opinion of the Tribunal the court martial should have had a reasonable doubt as to the guilt of the accused. The function of the Tribunal is not to disturb the verdict merely because it may disagree with the conclusion of the court martial which had the sole responsibility of deciding the facts.

The relevant principles are those stated by the High Court in *Chamberlain* (No 2) (1984) 153 CLR 521, *Morris* (1987) 163 CLR 454, *Chidiac* (1990-91) 171 CLR 432. In performing that task an appellate court cannot ignore the advantage enjoyed by the tryers of fact, of having seen the witnesses and having had the opportunity thereby to assess their credibility. In such a case as the present where the issue depended on a determination of

which of the conflicting testimony should be believed, it would be very difficult for an appellate court to say that the tryers of the facts should have had a doubt unless it is evident from the transcript that the evidence on which the prosecution rested was seriously flawed.

In the present case there is nothing in the transcript to cast doubt on the reliability of the evidence of Private Smith, unless it be the omission of a complaint about the breast touching incident to Lieutenant Beavan. That was a matter which, of course, the court martial had to evaluate, but it was by no means necessarily fatal to the credibility of the complainant. At the least the court martial was entitled to have regard to the fact that Lieutenant Beavan was evidently enquiring into a different matter to which any discussion of the breast incident may not have been relevant.

The credibility generally of Private Smith was significantly reinforced by Corporal Coleman's corroboration of the hip thrusting incident. The court martial was entitled to conclude that Private Smith was a witness of truth and could be believed on all issues, and that the appellant, whose description of the hip incident certainly does not appear convincing from a reading of the transcript, was not a truthful witness. An examination of the evidence affords no basis for a conclusion by the tribunal that the convictions were unsafe and unsatisfactory. The first ground of appeal fails.

The second and third grounds originally filed, and the eighth ground added by leave in the course of the argument, all relate to a particular aspect of the trial which was, to say the least, highly unusual. Before going on to describe what happened it is desirable to refer to the relevant statutory provisions. By section 146 of the *Defence Force Discipline Act* 1982, the rules of evidence applicable to proceedings before a service tribunal are those in force in the Jervis Bay territory, as modified by regulation. The effect is to make applicable to such proceedings the provisions of the *Evidence Ordinance* 1971 of the Australian Capital Territory. The only modification which has been made by regulation 29 of the *Defence Force Discipline Regulations* does not affect the present case.

So far as relevant, s70 of the ordinance provides:

"(1) Except as provided by this section, a person charged in a criminal proceeding shall not, if he gives evidence in the proceeding, be asked a question tending to show that he has committed or has been convicted of or has been charged with an offence (other than the offence to which the proceeding relates) that he has otherwise engaged in improper conduct or that he has a bad reputation, if the question is asked merely for the purpose:

(a) of showing that the person charged is guilty of the offence to which the proceeding relates by reason of his disposition towards wrongdoing, his tendency to commit crime or his bad character; or

(b) of attacking the credibility of the person charged.

2. Where, in a criminal proceeding ... :

(c) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or a witness for the prosecution; ...

the person charged, if he gives evidence, may, with the permission of the judge, be asked and is bound to

answer a question of a kind referred to in the last preceding subsection."

The section contemplates that at a trial, during, or perhaps prior to cross-examination of the accused, if he or she elects to give evidence, the prosecutor may seek the permission of the trial judge, or in a proceeding before a court martial the Judge Advocate, to put questions of the kind which prima facie are excluded. The occasion for the making of such an application is only where:

(a) it has emerged that the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or a witness for the prosecution;

(b) the accused has given evidence and is liable to be cross-examined; and

(c) the prosecutor desires to put such questions.

At that stage the Judge Advocate must decide, first, whether the nature of the defence, or the conduct of the defence, involves imputations on the character of the prosecutor or a witness for the prosecution. We may pass over the case where such is the nature of the defence. The more usual case will be one where the defence has been so conducted as to make such imputations, and ordinarily that will be where such imputations have been conveyed by the cross-examination of the complainant or other prosecution witnesses.

The Judge Advocate, having heard that cross-examination, is in a position to rule if called upon to do so, whether in the relevant sense the cross-examination did convey imputations on the character of any of them. The qualification, "in the relevant sense", is intended to exclude the case where the only imputation is that the complainant is a liar, an imputation conveyed simply from the fact that the accused denies the truth of the charge against him. Such a denial implies that the evidence of the complainant is false, but however strongly that denial is expressed or the assertion of a lie is made it does not satisfy the test prescribed in s70(2)(c).

If, however, the cross-examination goes beyond that to impute to the prosecutrix malice, or a propensity to lie or to advance false allegations, the test may be satisfied. If it is, and if the prosecutor then seeks leave to ask questions of the prima facie excluded kind, the Judge Advocate must exercise a judicial discretion. He or she must weigh up the significance of those imputations as diminishing the credit of the prosecution witnesses, against the likely prejudicial effect of the putting of the proposed questions to the accused person. See generally *R v Phillips* (1985) 159 CLR 45, especially in the majority judgment at page 59, and in the judgment of Deane J at pp62-64.

The discretion therefore quite clearly cannot be exercised (nor can any occasion arise for its exercise) until after the conclusion of the cross-examination of the prosecution witnesses. How it will be exercised, and in particular the foundation

question, whether the court regards that cross-examination as having involved imputations of the relevant kind, may sometimes influence the decision of an accused person whether to give evidence at all, so that in the interests of a fair trial, the judge may be prepared to rule on that foundation question at the close of the Crown case as was done by Sangster J in the South Australian case of *R v Karan & Dwyer* (1980) 26 SASR 408. But even then it would not be proper for such a ruling to be sought or made unless the prosecutor had indicated a wish so to cross-examine the accused person. The prosecutor cannot be in a position even to consider that question until the cross-examination of the prosecution witnesses has been completed.

In the present case, this rational and ordered approach to the matter was departed from at the behest of counsel for the accused who, after some cross-examination of the complainant, asked the Judge Advocate, in the absence of the court martial members, to rule upon a hypothetical question as to whether, if he were to cross-examine her in a manner which he proceeded to foreshadow in very general and, with respect, ambiguous terms, that would be regarded by the Judge Advocate as conduct of the defence involving implications as to the character of the complainant, and, if so, whether he would so exercise his discretion as to grant leave to the prosecuting officer to cross-examine the accused as to his past record or conduct.

The cross-examination of the complainant which was foreshadowed was said to be such as would suggest that she had

a reputation for lying or suffered from mental unreliability, that she had on one occasion made an allegation against another soldier in relation to drug use, which allegation had been investigated and refuted, to suggest that she had a history for making mistakes in relation to allegations of offences by service members and to suggest a particular bias against the accused because of his propensity to make jokes about obesity.

It is desirable to set out verbatim just what occurred during the exchange between the defending officer and the Judge Advocate. The Judge Advocate said:

> *"I assume, and I am sure it is the case from what you said earlier, that your client understands exactly what may happen if you adopt the course."*
>
> Defending officer:
>
> *"That is right, and that is the purpose, I might as well just remove all doubt as to what would happen if I did cross-examine on that. And obviously if the learned Judge Advocate was to bring these things to be - either the matter involving Private Lane's reputation, making false allegations, or she was biased against him because she thought he was referring to her when - being fat or something,then if you do concede that they - or rule that they are imputations, then if whatever the prosecuting officer wants to put to Sergeant Hembury, if Sergeant Hembury gives sworn evidence, if that is going to be allowed to be put, then I will probably not put those particular matters.*
>
> *And I just do not want to run the risk of cross-examining and then, if I give Sergeant Hembury the opportunity of sworn evidence, and then the prosecutor jumps up at the end or the start of her cross-examination and says - then applies for leave, and the learned Judge Advocate grants leave, then that could be very, very prejudicial to - particularly as this is roughly a jury matter, to the defence case.*
>
> *And I do not wish to put those matters if you regard those as imputations and if you would grant leave to the prosecutor to put certain matters to him. I suppose that is*

it in a nutshell."

Prosecutor:

"Well, I think I gave my answer in a nutshell."

Judge Advocate:

"I think I know what your answer will be."

Prosecutor:

"Well I gave it to my learned friend outside of court and I think he has repeated it, and I have given that in a nutshell and I think I have got no doubt that is precisely what I will do."

Judge Advocate:

"Well it is a very dangerous course that you propose."

Defending officer:

"Yes, you see, I do not know exactly what the prosecutor wants to say. I do not know."

Prosecutor:

"I am not going to tell you, I am not obliged to."

Defending officer:

"That is it, that is just it, she is not going to tell me, she is not obliged to, it is true, she is quite correct. And that is the quandary I find myself in. So I may as well at least avail myself of an opportunity where - there is some judicial authority which says I am entitled to seek a preliminary ruling in a doubtful case - "

We interpose that that was presumably a reference to the South Australian case of *Karan v Dwyer* (supra):

"I am not going to be calling, you know, Private Smith - I am not going to be calling her a perjurer or a - 'you are this, that and the other thing' and calling her every name under the sun. I am simply going to be saying, 'You've made a false allegation before, something which is quite false, and it relates to this Private Lane' - who is available as a rebuttal witness for the defence if she denies saying that."

Judge Advocate:

"Well, if you want a ruling my ruling would be that I would allow the prosecutor to put, not just prior convictions, and there may or may not be any, but it also refers to other matters. I think it would be most unfair to allow you to adopt the course you propose and then deny the prosecutor the opportunity of doing the same, if you like. And certainly the Evidence Act allows me to do that under section 70.

The defending officer referred to *Phillips v R* and said:

*"Basically the question is one of discretion. The reality is the prosecutor is not going to show her hand at this stage as to what she is going to put. And I submit it is probably - in a voir dire situation it might be fair if the prosecutor would provide to the learned Judge Advocate the information she intends to put to the defence witness, Sergeant Hembury, if he gives sworn evidence, to find out exactly what that is. That may then be a matter that the learned Judge Advocate can look at in deciding which way discretion will go. For example, if the matters are not prior convictions, if they are just simply, for example, similar matters, that may be a matter going to exercise discretion in favour of the defence. That is, they are not proven, they are just suspicions, or the prejudicial effect of the admission of certain evidence, or the permission of a certain line of cross-examination by the prosecutor may be so overwhelmingly prejudicial it may outweigh any probative value. Again it is a matter of fairness, as I am sure you are aware, sir, what fairness dictates in the case, and that was made quite clear in **Dawson**."*

Judge Advocate:

"I am aware of the balancing act that is required but I do not believe the prosecutor is required to show her hand at all."

We interpose, that we would understand him to have been saying, "at this stage of the trial".

We continue to quote from the Judge Advocate:

"I think you, as I say to you, it is a dangerous course you

are contemplating. You have got to make a choice. If you do make that choice of putting allegations of lying and mental unreliability, as you put it, to Private Smith, I am telling you that I would allow the Prosecutor to put other matters to the accused if he is - "

Defending officer:

"You would allow the prosecutor to do it?"

Judge Advocate:

"I would allow the prosecutor."

Defending officer:

"Notwithstanding, sir, that you do not (know) exactly what those matters are? They could well be unfair to be put."

Judge Advocate:

"Well, with the reservation that it is extreme, if I can put it that way. I may refuse to allow such a question to be put but, if it is matters that, if you like, are being foreshadowed prior to the trial that we are aware of that may be put, that sort of thing I would allow."

Defending officer:

"In view of that ruling, sir, I do not propose to cross-examine Private Smith on those particular matters."

The second ground of appeal is that "the learned trial Judge Advocate erred in law in ruling that certain proposed cross-examination of the prosecutrix, Cindy Smith, amounted to conduct of the defence such as to involve imputations against her of the kind contemplated in *Evidence Ordinance* 1971, s70(2)(c), and further erred in law in ruling that if such imputations were made and the accused later gave sworn evidence he would grant leave to the prosecuting officer, if she sought it, to cross-examine the accused on his alleged bad character pursuant to *Evidence Ordinance* 1971, s70(1) and (2)".

Ground three is that "the learned prosecuting officer acted unfairly towards the accused, when a preliminary ruling was sought during a voir dire, in refusing or failing to disclose to the trial Judge Advocate or to the accused, what matters of alleged bad character she intended to put to the accused, if she sought leave to do so, pursuant to *Evidence Ordinance 1971*, s70(1) and (2) if the conduct of the defence involved imputations on the character of the prosecutrix and if the accused gave sworn evidence."

With respect, it is not correct to say that the Judge Advocate ruled that "certain proposed cross-examination of the prosecutrix amounted to conduct of the defence such as to involve imputations" etc. He could not so rule because there was not yet anything before him to rule upon. He did not purport so to rule but only in a very fair and cautionary way to warn counsel for the accused as to what his ruling was likely to be if the cross-examination followed the line foreshadowed by counsel.

Nor is it correct to say that the Judge Advocate ruled "that if such imputations were made and the accused later gave sworn evidence he would grant leave to the prosecuting officer if she sought it, to cross-examine the accused on his bad character". He could not exercise his discretion at that stage, there was no discretion available to be exercised because the conditions which might give rise to it did not yet exist and might never do so, and none of the material necessary to enable him to exercise that discretion was yet before him, in particular, the actual cross-

examination, the questions actually asked and answers given, to enable an evaluation of its significance in the context of the trial as a whole and its effect, if any, on the credibility of the complainant, and also the nature of the questions, if any, which the prosecuting officer might seek to put to the accused. Nor did the learned Judge Advocate purport to make any final decision. What he did, we repeat, in a very fair and cautionary way, was to make clear to counsel for the appellant the nature of the risk which he would run if he pursued the course which he had foreshadowed. That is made abundantly clear by the concluding portions of the passage which we have just cited at length from the transcript. Ground two must be rejected.

The third ground attacks the conduct of the prosecuting officer and the submissions in support of it relied on authorities such as *Richardson* (1974) 131 CLR 116 and *Apostolides* (1984) 53 ALR 445 which, in the context of a discussion of the extent of the duty of a prosecutor to call all relevant witnesses, even if their evidence does not advance the case which the prosecution seeks to make, contain generally expressed observations on a prosecutor's duty to be fair. The submissions relied also on authorities such as *McGuire* (1992) 2 WLR 767 dealing with the Crown's undoubted obligation of complete pre-trial disclosure of the evidence available to it and bearing on the offence charged.

With respect, those cases have no bearing on the present issue. There is no doubt, and counsel for the respondent did not

contest, that if the prosecuting officer had in due course made application for leave to cross-examine the appellant on his record or other bad conduct, she would at that stage have to disclose to the Judge Advocate the topics about which she sought to cross-examine, for if she did not the Judge Advocate would not have before him the material necessary to enable him to consider whether to exercise his discretion in favour of the prosecution, so that any such application by the prosecuting officer would necessarily fail if proper disclosure was not at that stage made.

But the occasion for such disclosure could not possibly arise until and unless she made such an application. She was under no obligation whatever to disclose such matters at the stage of the trial when counsel for the appellant made his request to the Judge Advocate for, in effect, judicial advice. The truth of the matter is that no such application as counsel then made to the Judge Advocate should have been made, at least not before the close of the prosecution case. Ground three is rejected.

The eighth ground of appeal was added by leave during the argument. It seeks to seize upon the view tentatively expressed by members of the bench during argument, and now affirmed in this judgment, that the application to the Judge Advocate in respect of section 70 of the *Evidence Ordinance* was premature and if made, should not have been entertained by him.

Ground 8 asserts, alternatively, to grounds 2 to 3 inclusive,

that "the learned Judge Advocate erred in law in acceding to the defending officer's request for a preliminary ruling on whether a proposed line of cross-examination of the prosecutrix may amount to imputations under the *Evidence Ordinance* s70".

This ground must also fail and for similar reasons. The fact is that the Judge Advocate made no ruling which precluded counsel for the then accused from cross-examining as he wished. He was and remained fully entitled to put to the complainant all such questions as he wished, subject to ordinary considerations of relevance and fairness and form. Nothing which had occurred prevented him from doing so, although it had been very clearly brought home to him the risks that might attach to his doing so. There having been no ruling, even though what occurred was unusual and highly undesirable, there was not in a technical sense an irregularity in the proceedings such as may give rise to a right of appeal.

Even if what occurred could be said to have been a material irregularity, it cannot be said that it produced any miscarriage of justice. If the foreshadowed cross-examination had taken place and had extended as far as originally foreshadowed, involving imputations against the complainant of a propensity to lie and to make false allegations, a ruling that the test laid down in s70(2)(c) was satisfied was virtually inevitable.

Before us counsel seemed to indicate that the cross-

examination if pursued would in fact have gone no further than to suggest that on a single occasion, that relating to Private Lane, she had made an allegation which turned out not to be supported when all of the evidence was looked at. If that were so, no doubt leave would never have been sought by the prosecutor to cross-examine the accused on his record, and if sought would not have been granted. On the other hand if the cross-examination had been limited to what was indicated in the course of argument here, it would have had virtually no significant effect on the credibility of Private Smith, and therefore it could not be said that having for whatever reason not put that matter to her, the appellant lost any chance of acquittal which was fairly open to him. Ground eight is therefore rejected.

The sixth ground of appeal also was added by leave in the course of the hearing, after a member of the bench drew the attention of the parties to a passage in the Judge Advocate's summary at page 214 of the transcript. The Judge Advocate directed the court martial in the following terms:

> *"When you come to voting on the questions of guilt, you should vote, orally, in order of seniority. Voting is by majority vote. It does not have to be unanimous."*

Rule 33 of the *Defence Force Discipline Rules* (1985) No 128 is in the following terms:

> *"On any question to be determined by the court martial, the members of the court martial shall vote orally, in order of seniority commencing with the junior in rank."*

The Judge Advocate was clearly aware of that provision because later in directing the court martial in respect of the matter of punishment he said this:

> *"There is one matter I omitted to tell you, which I am sure will be obvious to you, but as far as voting is concerned on punishment it is done in the same manner as reaching your verdict. In other words, orally, starting with the junior member and it will be a majority vote on punishment."*

It is clear then that the learned Judge Advocate was aware of the requirement of Rule 33 and that his omission in directing the court martial how they should vote on the question of guilt was entirely inadvertent. Nevertheless it is clear, notwithstanding the attempt of counsel for the respondent to persuade us otherwise, that the most obvious meaning of the direction in fact given by the Judge Advocate was that on the question of guilt the members should vote in order from the president down to the most junior member, and what was said was a clear misdirection.

No doubt the policy behind Rule 33 is to avoid a situation in which junior members of a court martial are overborne by their superior officer to arrive at a particular verdict, notwithstanding their own conscientious contrary view. It is difficult to imagine any other reason for its inclusion. It must be presumed here that the voting took place in the manner directed by the Judge Advocate and contrary to the rule. That was a material irregularity in the course of the proceedings

within the meaning of s23(1)(c) of the *Defence Force Discipline Act*.

However, the question then is whether any substantial miscarriage of justice has occurred. As noted earlier, the court martial commenced to deliberate upon the verdicts at 0948 hours and was so engaged until 1133 hours, a period of about one and three-quarter hours. It cannot but be the case that before any vote was taken which resulted in the announcement of the verdicts as set out earlier, each of the three officers was well aware of the views of the others, and if contrary to their oath, the junior officers were, or either of them was, willing to mould his or her decision to confirm with that of the president, he or she must have had every opportunity to do so, irrespective of the order of voting.

It does not appear in those circumstances that any miscarriage of justice resulted, or was likely to result, from the misdirection, and accordingly ground six is rejected.

Grounds four and five purport to appeal against the asserted severity of the punishments awarded. They must be rejected without any consideration of their merits, simply because this tribunal has no jurisdiction to entertain an appeal against a punishment.

The rights of appeal which exist are exhaustively defined in s20 of the *Defence Force Discipline Appeals Act*, subsection

(1) of which provides:

> *"Subject to this act, a convicted person or a prescribed acquitted person may appeal to the Tribunal against his conviction or his prescribed acquittal but an appeal on a ground that is not a question of law may not be brought except by leave of the Tribunal."*

Counsel for the appellant submitted that the word "conviction" in that subsection should be given a very wide meaning, as in some very particular contexts it has, which includes sentence. There are many obstacles to that submission. First, section 20 as it now stands, is modelled upon - and so far as is now relevant is indistinguishable from s20 in the *Courts Martial Appeals Act* 1955-1973.

In *Re Brown's Appeal* (1976) 28 FLR 231, the Courts Martial Appeal Tribunal, the predecessor of this Tribunal, held that the Tribunal has no power to interfere with a sentence except in the very particular circumstances of the former ss24-28, the substance of which is now reproduced in section 26 of the *Defence Force Discipline Appeals Act*.

Secondly, the appeal provisions now in force were inserted in the act by the *Defence Force Discipline (Miscellaneous Provisions) Act* No 153 of 1982, which was legislation cognate to the *Defence Discipline Act* No 152 of 1982. The legislature must be taken to have been aware at the time of the enactment of those provisions of the interpretation placed on the former section 20 in *Brown's* case, and yet it re-enacted the right of appeal in

relevantly indistinguishable terms.

Thirdly, there are ample indications throughout the *Defence Force Discipline Act* that the Parliament intended to draw a very clear distinction between the conviction of a defence member of an offence and the taking of consequential action under Part IV by way of punishment. See for example ss66, 67, 75, 130(1)(g), 132(1)(g) and 125(1)(g).

It is clear that by section 153 and 162 of the Act there is constructed a special scheme for the review by service authorities of questions including questions of punishment. The imposition of punishment under the Act is required by s70 to take account not only of the principles of sentencing applied by the civil courts but also of the need to maintain discipline in the Defence Force. It seems very likely that as a matter of deliberate policy while matters of law affecting a conviction should be referred by way of appeal to a tribunal constituted by civilian judges, matters of punishment are retained for internal service review.

Fourthly, it is a common feature of the legislation of the several States establishing Courts of Criminal Appeal and prescribing rights of appeal in respect of criminal matters that the same clear distinction is made between appeals against conviction which ordinarily, at least on matters of law, are as of right and appeals against sentence which usually are by leave only.

When all of these matters are taken into account it is clearly not possible to construe section 20 otherwise than as the similar section of the previous legislation was construed by the tribunal in *Brown's* case, that is as giving a right of appeal which is limited to conviction in the strict sense, and as excluding any appeal against the severity of punishment. Accordingly grounds four and five also are rejected.

The appeal therefore is dismissed and the convictions are confirmed.

I certify that this and preceding twenty eight (28) pages are a true copy of the Reasons for Decision of the Tribunal.

Associate: B McMoore

Date: 12 July 1994

ATTACHMENT

Counsel for Appellant:	Mr W.R. Walsh-Buckley
Solicitors for Appellant:	Bullards
Counsel for Respondent:	Mr F.B. Healy with Mr S.S. Petterson
Solicitors for Respondent:	Army Legal Services
Date of Hearing:	8 June 1994
Date of Judgment:	9 June 1994

Signed: (Gerard) Moore

Dated: 12 July 1994