[1994] ADFDAT 1

JUDGMENT No. ......8....../94

IN THE DEFENCE FORCE
DISCIPLINE APPEAL TRIBUNAL
SYDNEY

No. DFDAT 1 of 1993

IN THE MATTER OF:

THE DEFENCE FORCE DISCIPLINE ACT 1982

AND:

THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955

LIEUTENANT COLONEL RUSSELL ALEXANDER STUART

Appellant

CHIEF OF THE GENERAL STAFF

Respondent

CORAM: Northrop J. (President)
Gallop J. (Member)
Badgery-Parker J. (Member)

DATE: 19 May 1994

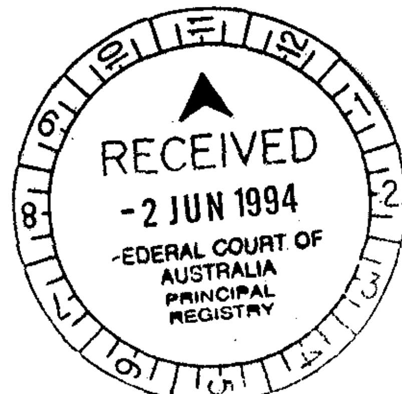
PLACE: Sydney

O R D E R

The Tribunal orders that:

(1) The appeal be allowed.

(2) Both convictions be quashed and a new trial ordered on both charges.



RECEIVED
-2 JUN 1994
FEDERAL COURT OF
AUSTRALIA
PRINCIPAL
REGISTRY

IN THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL SYDNEY)

No. DFDAT 1 of 1993

IN THE MATTER OF:

THE DEFENCE FORCE DISCIPLINE ACT 1982

AND:

THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955

LIEUTENANT COLONEL RUSSELL ALEXANDER STUART

Appellant

CHIEF OF THE GENERAL STAFF

Respondent

CORAM: Northrop J. (President)
Gallop J. (Member)
Badgery-Parker J. (Member)

DATE: 19 May 1994

PLACE: Sydney

REASONS FOR JUDGMENT

The appellant appeals and alternatively seeks leave to appeal against his convictions on 12 August 1993 by a Defence Force Magistrate at Pteah Australii, Phnom Penh in Cambodia on the following two charges:

"First Charge (as amended) DFDA - s.44	**Loss of Service Property** 1203543 LTCOL Russell Alexander Stuart, a defence member at Phnom Penh, Cambodia, on 24 June 1993 did lose service property, namely, one pistol 9 mm automatic L9A1 serial number T271475, one holster pistol 9 mm, 24 cartridge 9 mm ball Mk22, one vest small arms protective body armour kevlar large, which items were entrusted to his care in connection with his duties as part of the United Nationals Transitional Authority Cambodia.

Second Charge
DFDA - s.60

Prejudicial Behaviour
1203543 LTCOL Russell Alexander Stuart, a defence member at Phnom Penh, Cambodia, on 24 June 1993 did behave in a manner likely to prejudice the discipline of ASC UNTAC in that he did direct 553188 SGT T.R. Hayes to secure his 9 mm automatic L9A1 pistol serial number T121643, holster pistol 9 mm cloth disruptive pattern, 24 cartridge 9 mm ball Mk22 in a motor vehicle then parked on USSR Boulevard."

The appeal is brought on the following grounds:

"1. That the Learned Defence Force Magistrate misdirected himself in ruling (as he did) that the appellant had a case to answer in respect of each of the charges preferred against him, and thereby deprived the applicant of the acquittal.

2. That the Learned Defence Force Magistrate erred in law in directing the Defending Officer that s.14 of the Defence Force Discipline Act had been repealed and not replaced, thereby depriving the applicant of the defences lawfully available to him pursuant to that section, namely that the applicant was at all material times acting pursuant to lawful orders, or an unlawful order which he did not know and could not reasonably be expected to have known, was unlawful.

3. That the Learned Defence Force Magistrate erred in law in finding that: 'lose' in the context of the first charge simply means not to have in one's possession, not being in a position to produce something entrusted to your care in connection with your duties.

4. The Learned Defence Force Magistrate misdirected himself by finding that: Exhibit 6 (the guidelines) did not constitute orders applicable to the applicant which he was bound to obey.

5. The Learned Defence Force Magistrate misdirected himself by finding that:

   5.1 The real issue in the case was the reasonableness or otherwise of the applicant's actions in leaving or securing the weapons in a vehicle per se and or alternatively;

   5.2 In failing to interpret the reasonableness of the applicant's actions according to the circumstances of the situations in which the applicant found himself at all relevant material times.

6. The Learned Defence Force Magistrate erred in law in finding in effect that the requirement that the applicant be responsible at all times for his weapon, was an absolute requirement in respect whereof there were no circumstances extant which could absolve the applicant from losing such service property.

7. The Learned Defence Force Magistrate erred in law by equating the applicant's belief in the reasonableness of his actions with the objective belief required to be considered for the purpose of s.44(2) of the Defence Force Discipline Act.

8. The Learned Defence Force Magistrate erred in law in failing to consider objectively whether the appellant's belief was reasonable and finding and substituting therefor his own belief as to the reasonableness of the applicant's actions in the securing of the service property based upon consideration of a limited number of the circumstances bearing on that issue.

9. The Learned Defence Force Magistrate erred in law in failing to consider the reasonableness of the appellant's actions in relation to the statutory defence available to the appellant pursuant to s.44(2) of the Defence Force Discipline Act.

10. That the findings of guilt in respect of each of the charges by the learned Defence Force Magistrate were contrary to the evidence and the weight of the evidence.

11. That the convictions were unsafe and unsatisfactory.

12. That the order for reparations made against the appellant was unjust within the meaning of s.84(1) of the Defence Force Discipline Act."

The right of appeal is conferred by s.20(1) of the Defence Force Discipline Appeals Act 1955 which is in the following terms:

> "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."

The appellant concedes that some of the grounds advanced may not be or are not questions of law and accordingly that leave is required to rely upon them. Such leave is sought in respect particularly of grounds 4, 5.1, 5.2, 6, 7, 10 and 12. At least, in the event that the Tribunal should rule as to any such ground that it is not a question of law. Ground 11 may similarly require leave. As to some of the grounds it is not self-evident that leave is required. At the request of the Tribunal, the appellant argued first those grounds of appeal which might be said to relate to whether mens rea is an

element of the offences created by ss.44(1) and 60 of the Defence Force Discipline Act (the Act). Grounds 5, 7, 8, 9 and 11 raise that issue.

The short facts were stated by the Defence Force Magistrate as follows:

> "Let me turn to the facts. The general physical facts of what happened on the evening of 24 June '93 I believe I can fairly say are not in issue. Shortly stated, the evidence shows that the accused, in company with SGT Hayes, arrived at the Gecko Bar at about 2010 hours on 24 June 1993 for the purpose of consuming a meal. They were in uniform and were carrying pistols. The pistols and other items of service property referred to in the two charges were left in the car. The two entered the establishment, first sitting on the pavement outside the building, then moving inside to a table near the door when it started to rain. They had a meal and LTCOL Stuart had two Tiger beers. At about 2130 hours LTCOL Stuart and SGT Hayes became aware that the vehicle, registered number UNTAC 540, had been stolen and of course the service property that was left in the vehicle."

We consider first the question whether mens rea is an element of the offence created by s.44(1) of the Act. Section 44 reads as follows:

> "44.(1) A person, being a defence member or a defence civilian, who loses any property that is, or forms part of, service property issued for his use, or entrusted to his care, in connection with his duties is guilty of an offence for which the maximum punishment is imprisonment for 6 months.
>
> (2) It is a defence if a person charged with an offence under this section took reasonable steps for the safe-keeping of the property to which the charge relates."

The elements of the charge under that section may be briefly stated as follows:

1. That the accused was at the relevant time a defence member (which was formally admitted).
2. That the accused lost the property specified in the charge.
3. That that property was service property (which also was formally admitted).

4. That that property had been issued to the accused for his use in connection with his duties (also formally admitted).

The matter proceeded before the magistrate upon the basis that, the accused having adduced evidence of an honest and reasonable belief that his conduct was not criminal, the prosecutor had also to prove what may be regarded as a fifth element, namely that in fact the accused had had no such belief.

That the matter was conducted on that basis was the result of a ruling given by the magistrate at the close of the prosecution case when he delivered a judgment upon an application by the accused for acquittal on both counts on the ground that there was no case to answer. The magistrate said in the course of that ruling:

> "The case of **He Kaw Teh** (1985) 157 CLR 523 ... is authority for the proposition that for the purpose of considering criminal intent, statutory offences fall into three categories; one, those in which there is an original obligation on the prosecution to prove mens rea of intent; two, those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal, in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt and three, those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence. In my opinion, s.44 of the Defence Force Discipline Act falls into the second of those categories. In relation to the second charge, I say that that would fall into the first category, that is, that the prosecution is required to prove mens rea or intent."

In so ruling the Defence Force magistrate was rejecting the submission advanced on behalf of the accused that the s.44 offence was one which required original proof by the prosecution of means rea. The alternative submission on behalf of the accused was that the offence was one of so called strict liability in which mens rea was presumed but only so long as there was not before the court material raising an issue as to whether the

accused had at the time of the alleged offence an honest and reasonable belief that his conduct was not criminal, in which event the onus fell upon the prosecution to prove beyond reasonable doubt that he had no such belief. That alternative position of counsel for the accused was adopted also by the prosecutor and was the view which ultimately the magistrate accepted.

In construing s.44, the starting point is the provisions of s.10 of the Act, which is in "Part II - Criminal Liability" and states:

> "10. Subject to this Part, the principles of the common law with respect of criminal liability apply in relation to service offences other than old system offences."

By that provision, the legislature is giving a clear indication that the principles of the common law with respect to criminal liability are preserved in relation to service offences only to the extent that they are not supplanted by specific provisions of Part II of the Act.

In **He Kaw Teh v. The Queen** (1985) 157 CLR 523 each member of the High Court took the relevant principles of the common law to be as stated in **Sherras v. De Rutzen** [1895] 1 QB 918 at 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 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. The question here is whether that presumption has been displaced in s.44(1) of the Act.

In **He Kaw Teh** Gibbs CJ said (at p.529) that in deciding whether the presumption has been displaced and whether the Parliament intended that the offence created should have no mental ingredient, there are a number of matters to be considered. First, of course, one must have regard to the words of the statute creating the offence. The second matter to be considered is the subject matter with which the statute deals. A third consideration is whether putting the defendant under strict liability will assist in the enforcement of the legislation. In the present context, the public interest demands that care should be taken by defence members to ensure that service property entrusted to their care is not lost.

The words of the statute creating the offence of loss of service property include a defence, namely that the person charged with losing service property has a defence if the person took reasonable steps for the safe-keeping of the property to which the charge relates.

Section 12 of the Act has application. It reads:

> "12.(1) Subject to this section, in proceedings before a service tribunal, the onus of proving that a person charged has committed a service offence is on the prosecution and the standard of proof is proof beyond reasonable doubt.
>
> (2) In proceedings before a service tribunal, the onus of proving a defence is on the person charged and the standard of proof is proof on the balance of probabilities.
>
> (3) In this section, 'defence' means:
>
> ...
>
> (c) where the service offence charged is an offence against this Act (other than sub-section 61(1)) or the regulations - a defence set out in the provision creating the offence.
>
> ..."

Next, it may be observed that the section is one of a group dealing with the preservation of service property (ss.43, 44, 45). In section 43 relevant guilty states of mind are specifically spelled out (s.43(1) - intention; s.43(2) - recklessness; s.43(3) - negligence). But that is not so with ss.44 and 45, each of which allows a defence, the proof of which is by s.12(3) cast on the accused person. The inference is that in respect of that subject matter, proof of mens rea is only required in the circumstances specified in s.43, the offences created by ss.44 and 45 falling into a third category recognised in **He Kaw Teh**, namely "those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence", but subject to the defence created by s.44(2) (see also per Street CJ in **R. v. Wampfler** (1987) 11 NSWLR 541 at 546).

Indeed, the Act almost universally adopts a similar form of drafting whereby an offence is created in terms silent as to any mental element but subject to the right of the accused person to be exonerated by proving a specified matter of defence, either an absence of knowledge (for example ss.25, 26, 27, 29, 31, 41, 45, 46, 49, 58) or a reasonable excuse sometimes provided for in those words sometimes by a similar expression such as used in s.44 (cf. ss.15, 16, 17, 23, 24, 28, 32, 40, 43, 44, 47, 48, 50). Section 44 may be regarded as affording a defence of reasonable excuse in the form of due diligence. In the case of major offences such as aiding or communicating with the enemy (ss.15, 16, 17, 39, 41, 43) the provision creating the offence clearly specifies the relevant mens rea while at the same time providing for a matter of defence which goes beyond the absence of that defined mens rea. In many other instances, mens rea (usually knowledge) is clearly implied (ss.17. 19, 20, 21, 22, 30, 34). However, so often is the form of drafting that which is used in s.44, that one is driven to conclude that the best construction of the

Act is that in such instances, no mens rea being prescribed or inescapably implied, proof of guilt requires no more than proof of the objective elements of the offence, leaving it to the accused defence member to establish, if he or she can do so, the prescribed statutory defence.

Such a construction is consistent with the purpose of s.44 which clearly is to protect and preserve service property by placing a heavy obligation on each defence member to take reasonable care of property entrusted to him or her (Acts Interpretation Act 1901, s.15AA). Given the variety of circumstances in which Defence members will have custody of service property, that objective is best achieved by prescribing an absolute rule with a statutory defence that reasonable steps for the safe-keeping of the property were taken: cf. **Lim Chin Aik v. The Queen** (1963) AC 160 at 173; **He Kaw Teh v. The Queen** (supra at 530).

For these reasons we are of the view that an offence against s.44(1) is a "third category" offence in terms of **He Kaw Teh** and the magistrate was wrong in holding otherwise. That being so, ss.12(2) and (3) and s.44(2) have a combined effect, the result of which is that the appellant was entitled to be acquitted if he had established, on the balance of probabilities, that he took reasonable steps for the safe-keeping of the property to which the charge under s.44(1) related.

The learned magistrate misdirected himself. The real issue before him was not whether the prosecution had proved beyond reasonable doubt that the appellant did not entertain an honest and reasonable belief in the lawfulness of his conduct, but rather the loss of the property being proved beyond reasonable doubt as an objective fact, the prima face conclusion of

guilt was displaced because the accused had succeeded in establishing, on the balance of probabilities, that he had taken reasonable steps to safeguard the service property.

We consider later in these reasons the appropriate course to be taken by way of disposition of this appeal in consequence of that clear misdirection.

It may be helpful to those administering the Act if we add the observation that the guidance provided in the Discipline Law Manual Volume I under "Strict Liability" (see paras 5.136-5.139) correctly states the relevant principles. It is unnecessary to set out the terms of those paragraphs of the Manual in these reasons.

It is important to note the manner in which the magistrate directed himself, although, as we have found, wrongly, and applied those directions to the facts of the case before him. Having held that the prosecution was required to undertake the burden of negativing the accused's honest and reasonable belief that his conduct was not wrongful, the magistrate then reviewed the evidence of that belief and held that the belief had been negatived by the prosecution in the following terms:

> "I simply cannot accept that an officer of LTCOL Stuart's extensive experience, his local knowledge, being the longest serving Australian soldier in Cambodia, his knowledge of the state of vehicle thefts, could possibly believe it reasonable to leave weapons in a vehicle.
>
> The defence referred to in s.44(2) of the Defence Force Discipline Act having been raised, I find that the prosecution has negatived that evidence."

He then moved to consider the offence of behaving in a manner likely to prejudice the discipline of the Defence Force contrary to s.60 of the Act. After defining the elements of the offence, he said:

> "The question for me then is whether directing a subordinate to secure his weapon and other service property in a vehicle is likely to prejudice the discipline of the Defence Force, or more particularly the Australian contingent of UNTAC. I have found that in all the circumstances, those circumstances being LTCOL Stuart's knowledge of Cambodia, his knowledge of the number of vehicles stolen, or if not precisely a number, that it was not uncommon for vehicles to be stolen from Phnom Penh, his extensive experience and seniority, his admission in cross-examination that a member is responsible at all times for the security of his weapon, that his actions on the night of 24 June '93 were not reasonable steps for the safekeeping of the property to which the first charge relates. It follows logically that to direct a subordinate to leave his weapon and other military equipment in a vehicle is not reasonable, and puts that subordinate in jeopardy.
>
> I find that he directed SGT Hayes to secure his pistol and other items referred to in the charge, to secure them in the car, and that giving such a direction was blameworthy on his part. I find that such conduct was likely to prejudice the discipline of the Defence Force."

Section 60 reads:

> "60.(1) A defence member who, by act or omission, behaves in a manner likely to prejudice the discipline of, or bring discredit upon, the Defence Force is guilty of an offence for which the maximum punishment is imprisonment for 3 months."

It was common ground on the hearing of the appeal that in construing s.60 the general doctrine of the common law that mens rea must be established has not been displaced. Nor was it contested that, although the expression "mens rea" is ambiguous and imprecise, the sort of mens rea preserved in s.60 is embraced in the concept of blameworthiness. The meaning of mens rea has been variously described, but the adoption of the following meaning from the judgment of Gibbs CJ in **Ke Haw Teh** at p.530 conveys the concept, ie it means: "evil intention or a knowledge of the wrongfulness of the act". In **Ianella v. French** (1968) 119 CLR 84 at pp.108-

109, Windeyer J. approved of the statement in which Jordan CJ in **R. v. Turnbull** (1943) 44 SR(NSW) 108 at 109 described the mens rea of an offender:

> "... assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing".

As is apparent from the above passage, the way in which the magistrate disposed of the second charge was to apply his finding that the appellant had not taken reasonable steps for the safe-keeping of the property and hold that to direct a subordinate to leave his weapon and other military equipment in a vehicle was not reasonable and put that subordinate in jeopardy. He found that giving such a direction was blameworthy and likely to prejudice the discipline of the Defence Force. Hence a conviction on the second charge followed logically from a conviction on the first charge.

It was submitted on behalf of the appellant that as the conviction on the first charge was based upon a misdirection of law, the conviction on the second charge recorded as a logical consequence of the conviction on the first charge, could not be allowed to stand.

The respondent submitted that, notwithstanding the misdirection leading to a conviction on the first charge and, should the tribunal so order, the consequence that that conviction must be set aside, the conviction on the second charge should stand because, adopting mens rea in the sense of blameworthiness as an element of the offence, the appellant's conduct in directing Sergeant Hayes to secure his service property in the motor vehicle constituted behaving in a manner likely to prejudice the discipline of the Defence Force. The blameworthiness relied upon was in directing Sergeant

Hayes to take a risk in respect of the safe-keeping of his service property and, additionally, in directing Sergeant Hayes to act contrary to the terms of a document headed "Guidelines for the Carriage and Use of Weapons by UNTAC Non-Formed Unit Personnel within PNP SZ" which provided, inter alia, that weapons were not to be taken into bars, nightclubs or other entertainment venues unless the individual's duty required it.

Having considered the arguments advanced, we have come to the conclusion that if the magistrate had addressed the correct issue on the first charge, the conduct of the trial before him might well have been different. If the onus of establishing that reasonable steps for the safe-keeping of the property were taken by the appellant had been cast upon the appellant, there may well have been other evidence which the magistrate would have had to consider. Whether reasonable steps for the safe-keeping of the property were taken is, of course, a question of ultimate fact to be determined from the whole of the circumstances as proved in evidence. There was, for instance, no evidence before the magistrate from Sergeant Hayes. Some explanation for the failure to call Sergeant Hayes was advanced by counsel for the appellant, who also appeared at the trial. But, in the end, we are not persuaded that the question whether the appellant took reasonable steps for the safe-keeping of the property was properly examined, even on the evidence at the trial. The magistrate clearly concentrated upon the appellant's state of mind about the reasonableness of his actions rather than upon an objective assessment of whether reasonable steps for the safe-keeping of the property were taken.

Because the conviction on the first charge cannot stand, the conviction on the second charge cannot stand either. We feel unable to give effect to the respondent's submissions to the contrary in view of the fact that

the whole trial was conducted on the footing that the two charges must stand or fall together.

The powers of this Tribunal are set out in Part II, Division 2 - Determination Appeals. Section 23(1) provides that the Tribunal shall allow the appeal and quash the conviction where, in an appeal, it appears to the Tribunal, inter alia, that as a result of a wrong decision on a question of law, the conviction was wrong in law and that a substantial miscarriage of justice has occurred; or that there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or in all the circumstances of the case the conviction is unsafe and unsatisfactory.

What amounts to a miscarriage of justice was defined by Fullagar J. in **Mraz v. The Queen** (1955) 93 CLR 493 at 514, in applying the proviso to s.6(1) of the Criminal Appeal Act 1912 (NSW), in the following terms:

> "... 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."

We are satisfied that as a result of the magistrate's wrong decision on questions of law discussed above, both convictions were wrong in law and a substantial miscarriage of justice has occurred. We are also satisfied that in all the circumstances of the case the convictions are unsafe or unsatisfactory. Ordinarily the test to be applied in determining whether the verdict of a jury should be set aside as unsafe or unsatisfactory is whether it was open to a reasonable jury to be satisfied beyond reasonable doubt of the accused's guilt

(**Chidiac v. The Queen** (1991) 171 CLR 432 per Mason CJ, Dawson and McHugh JJ, applying **Whitehorn v. The Queen** (1983) 152 CLR 657, at pp.660, 686; **Chamberlain v. The Queen [No. 2]** (1984) 153 CLR 521, at pp.534, 607; and **Morris v. The Queen** (1987) 163 CLR 454, at pp.461-462, 472, 478-479). It is not altogether easy to apply that test in an appeal where the question is not whether the tribunal of fact should have had a doubt as to the prosecution case, but whether it was open to the tribunal of fact to conclude that the accused had failed to establish a defence the onus of proof of which rested on him.

However, in **R. v. Clough** (1992) 28 NSWLR 396 at 408, Hunt CJ at CL recognised that there is a species of an unsafe and unsatisfactory verdict different from that covered by the test in **Chidiac** and other cases. After referring to **Davies and Cody v. The King** (1937) 57 CLR 170 where the High Court adopted the approach of the English Court of Appeal to which Hunt CJ at CL referred, he went on to quote the following passage from the judgment of Deane, Toohey and Gaudron JJ. in **Morris v. The Queen** (1987) 163 CLR 454 at 472-473 where they said:

> "... For our part, we would think that there might be verdicts falling within the concept of miscarriage of justice, as that expression is used in the common criminal appeal provisions, by reason of some defect or weakness of the evidence even though on the evidence it was open to the jury to be satisfied beyond reasonable doubt, as, eg, where there is some feature of the evidence which raises a substantial possibility that the jury may have been mistaken or misled: see **Davies and Cody v. The King.**"

Applying those dicta to the present case, it appears to us that there may be some defect or weakness of the evidence and that the less than total examination of available evidence on the issue of reasonable steps for the safe-keeping of the property raises a substantial possibility that a mistake has occurred. In that sense the convictions are unsafe and unsatisfactory.

The appropriate course is to quash both convictions. To the extent that it is necessary to grant leave to appeal, such leave is granted. The Tribunal is additionally empowered by s.24 of the Defence Force Discipline Appeals Act to order that a new trial of the appellant take place for the offences if it considers that in the interests of justice the appellant should be tried again. In our view this is the appropriate course in this case.

The orders of the Tribunal are that the appeal is allowed, both convictions are quashed and a new trial ordered on both charges.

Counsel for the appellant applied for an order for costs in the event that the appeal was successful. Pursuant to s.37(1) of the Defence Force Discipline Appeals Act 1955, where the Tribunal allows an appeal it may, if it thinks fit, 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.

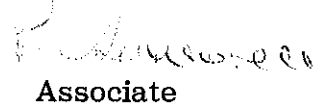
We were referred by counsel for the respondent to the decision of this Tribunal, differently constituted, in the **Appeal of Bridges**, delivered 21 April 1989. In that case the Tribunal allowed the appeal of the defence member, but refused to make an order that the Commonwealth pay the appellant's costs of the appeal, applying the ordinary principles in criminal matters, and in particular that costs will not be awarded in favour of or against the Crown in criminal matters. In that case, the Tribunal went on to say that, nevertheless, if it should appear to the Tribunal that a prosecutor's presentation of a case to a Court-Martial contributed to a mistrial, an

appropriate case might be made for an award of costs against the Commonwealth.

In view of the respondent's opposition to an order for costs in favour of the appellant, we shall have to defer a decision on that question until we have heard counsel's submissions.

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

Dated: 19 May 1994



Associate