(10)

[1994] ADFDAT 2

DEFENCE FORCE DISCIPLINE

APPEAL TRIBUNAL DFDAT No. 1 of 1993

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

BETWEEN:

LIEUTENANT COLONEL RUSSELL ALEXANDER STUART
Appellant

AND:

CHIEF OF THE GENERAL STAFF
Respondent

COURT NORTHROP, J. (President)
GALLOP, J. (Member)
BADGERY-PARKER, J. (Member)

PLACE SYDNEY

DATE WEDNESDAY 27 JULY 1994

BADGERY-PARKER, J: In this matter the Tribunal was constituted by the President Mr. Justice Northrop, Mr. Justice Gallop and myself.

On 19 May 1994, the Tribunal ordered that the appeal be allowed, that both convictions be quashed and that there be a new trial on both charges.

An application was then made on behalf of the appellant for an order for costs pursuant to s.37 of the Defence Force Discipline Appeal Act.

The President is of the opinion that an order should be made pursuant to subsection 37(1) of that Act that the Commonwealth pay to the appellant the sum of $11,142.52 to compensate him for expenses properly incurred by him in the prosecution of his appeal. I publish his reasons.

Mr. Justice Gallop is of the opinion that no such order should be made. I publish his reasons.

I agree with the opinion of the President and I publish my reasons for judgment.

The order is accordingly as I have indicated.

DEFENCE FORCE DISCIPLINE
APPEAL TRIBUNAL

DFDAT No 1 of 1993

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 :

LIEUTENANT COLONEL RUSSELL ALEXANDER STUART

Appellant

A N D :

CHIEF OF THE GENERAL STAFF

Respondent

TRIBUNAL: NORTHROP J (PRESIDENT)
GALLOP J (MEMBER)
BADGERY-PARKER J (MEMBER)

PLACE: SYDNEY

DATE: WEDNESDAY 27 JULY 1994

MINUTES OF ORDER

THE TRIBUNAL DIRECTS:

That pursuant to subsection 37(1) of the Defence Force Discipline Appeals Act 1955, the Commonwealth pay to the appellant the sum of $11,142.52 to compensate him for expenses properly incurred by him in the prosecution of his appeal.

DEFENCE FORCE DISCIPLINE
APPEAL TRIBUNAL

DFDAT No 1 of 1993

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 :

LIEUTENANT COLONEL RUSSELL ALEXANDER STUART
Appellant

A N D :

CHIEF OF THE GENERAL STAFF
Respondent

TRIBUNAL: NORTHROP J (PRESIDENT)
GALLOP J (MEMBER)
BADGERY-PARKER J (MEMBER)

PLACE: SYDNEY

DATE: WEDNESDAY 27 JULY 1994

REASONS FOR DECISION

NORTHROP J

On 19 May 1994, the Tribunal ordered that the appeal herein be allowed, that both convictions be quashed and a new trial be held on both charges. After the orders had been made and reasons for decision published, counsel for the respondent made submissions opposing the application previously made on behalf of the appellant that, pursuant to s37 of the Defence Force Discipline Appeals Act, the Tribunal direct the Commonwealth to pay the appellant's "costs of the appeal". Counsel for the appellant was not able to be present when the orders were made but had provided written submissions to the Tribunal and counsel for the respondent in support of the application. The Tribunal reserved its decision on the application.

Section 37 of the Defence Force Discipline Appeals Act provides as follows:

> "37. (1) 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, or in carrying on his defence against the charge or charges out of which the appeal arose.
>
> (2) The Minister for Finance shall pay to an appellant, out of moneys provided by the Parliament for the purpose, any sum which the Commonwealth is directed to pay to the appellant under the last preceding subsection.
>
> (3) Where the Tribunal dismisses an appeal or an application for leave to appeal, it may, if it thinks fit, order the appellant to pay to the Commonwealth the whole or any part of the costs of the appeal or application, including allowances paid to a witness under section 34 and the costs of copying or transcribing any documents for the use of the Tribunal.
>
> (4) An order made under the last preceding subsection may be enforced in such manner as is prescribed."

In the Appeal of Bridges, delivered 21 April 1989, the Tribunal refused to make an order under s37 in circumstances where an appeal had been allowed, convictions quashed but no order had been made for a new trial. In its reasons, the Tribunal said:

> "We also refused to make an order that the Commonwealth pay the appellant's costs of the appeal. Where the Tribunal allows an appeal, s37(1) of the Defence Force Discipline Appeals Act 1955 confers an unfettered discretion on the Tribunal to direct the payment by the Commonwealth to the appellant of such sums as appear to the Tribunal reasonably sufficient to compensate the appellant for expenses properly incurred by him in the prosecution of his appeal, and any proceedings preliminary or incidental to the appeal, or in carrying on his defence

against the charge or charges out of which the appeal arose.

Where the Tribunal dismisses an appeal, s37(3) confers a reciprocal discretion to order the appellant to pay to the Commonwealth the whole or any part of the costs of the appeal and expenses.

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

There is nothing in the provisions of s37 which replaces generally accepted principles in criminal matters. One of those generally accepted principles in criminal matters is that costs will not be awarded in favour of or against the Crown.

It is appropriate to equate the convening authority who convened the general court martial for the trial of the appellant on the charges set out above to the position of the Crown in criminal proceedings in a civil court. Accordingly, it would not be appropriate to order that the Commonwealth pay the appellant's costs merely on the ground that he has been successful in the present appeal. This is not to say that costs could not be awarded against the Commonwealth in an appropriate case. If, for instance, it should appear to this Tribunal that a prosecutor's presentation of a case to a court martial contributed to a mistrial, an appropriate case might be made for this Tribunal to make an award of costs against the Commonwealth. Such considerations, however, do not arise in this appeal. Likewise, if the present appeal had been dismissed, the Tribunal would not have made an order that the appellant pay the Commonwealth's costs in the absence of any strong and compelling reasons for such an order.

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

In the present appeal, counsel for the respondent contended that the Tribunal should follow the decision in the Appeal of Bridges, apply the same reasoning and refuse the application. They distinguished the decision of Latoudis v Casey (1990) 170 CLR 534, which, they contended, had no application to the costs of an appeal. Counsel for the appellant relied on the reasoning in Latoudis to support the application.

Before turning to consider the application of s37, reference should be made to its setting in the structure of the legislative provisions relating to discipline in the Defence Force.

With minor amendments not relevant for present purposes, s37 is in the same form as it was when it appeared in the Courts Martial Appeals Act 1955. Attention is drawn to the last part of subsection 37(1), namely expenses properly incurred by a successful appellant "in carrying out his defence against the charge or charges out of which the appeal arose". There is no corresponding provision contained in subsection 37(3). The provision must relate to "costs" incurred at trial which are treated differently from the "costs" on the appeal.

The Defence Force Discipline Act 1982 constitutes a codification of the law relating to the discipline of the Defence Force. It constituted a dramatic change from the earlier statutory provisions, but for present purposes

reference need be made to a limited number only of the provisions of that Act. A number of the sections create criminal offences and the Act contains provisions creating service tribunals to try charges brought against members of the Defence Force. A service tribunal means a court martial, a Defence Force magistrate or a summary tribunal. Part VIII prescribes the procedures to be followed by service tribunals. Section 136, which is within Part VIII, provides that a person shall not represent a party before a court martial or a Defence Force magistrate unless that person is, for present purposes, a member of the Defence Force or a legal practitioner. A legal practitioner is defined to mean a person who is enrolled as a barrister, a solicitor, a barrister and solicitor or a legal practitioner of a civil court. Thus, a member of the Defence Force on trial before a service tribunal could be represented, at personal expense, by a legal practitioner who is not a member of the Defence Force. Section 137 is of importance and is set out in full:

> "**137.** **(1)** A convening authority shall if, and to the extent that, the exigencies of service permit, cause an accused person awaiting trial by a court martial or by a Defence Force magistrate to be afforded the opportunity to be represented at the trial, and to be advised before the trial, by a legal officer.
>
> **(2)** An accused person who is advised or represented in accordance with subsection (1) shall be so advised or represented without expense to him.
>
> **(3)** Nothing in this section prevents the operation of any scheme of legal aid, advice or assistance under a law of the Commonwealth or of a State or Territory."

For the purposes of the Act, a legal officer means an officer who is a legal practitioner. It follows, therefore, that the Defence Force Discipline Act ensures that an accused person awaiting trial by a court martial or by a Defence Force magistrate has the right to be represented at the trial without expense to the accused. In these circumstances, it is not surprising that the Act does not empower a service tribunal to award "costs" in favour of a party appearing before a defence tribunal.

A person convicted by a court martial or a Defence Force magistrate has a right of appeal to the Tribunal, see s21 of the Defence Force Discipline Appeals Act and the definitions of "convicted person" and "conviction" contained in s4. Under s42, a chief of staff is required to undertake the defence of an appeal. Normally the chief of staff is named as the respondent to the appeal and prepares the documents in a form to enable the appeal to be presented to the Tribunal. The Defence Force Discipline Appeals Act continues the policy apparent in the Defence Force Discipline Act of easing the financial burden on persons, being defence members, charged with offences. Under s60 of the Defence Force Discipline Appeals Act, the Governor-General is empowered to make regulations for the provision of legal aid to appellants and persons desiring to appeal to the Tribunal. Reg 11 of the Defence Force Discipline Appeal Regulations is such a regulation. Under Reg 11(3), if the Tribunal is satisfied that an appellant has insufficient means to enable the appellant to

prosecute the appeal and that it appears desirable in the interests of justice that legal aid should be granted, the Tribunal must approve the granting of legal aid. The Commonwealth meets the costs of the legal aid so granted. The application for legal aid normally is heard and determined by a single member of the Tribunal, see paragraph 17(1)(d) of the Defence Force Discipline Appeals Act. Legal aid should not be approved if the appeal is frivolous.

At the hearing of an appeal before the Tribunal, the appellant may be represented by a legal practitioner, see subsection 39(1). In that section legal practitioner is defined in subsection 39(4) as meaning, for present purposes, a barrister or solicitor of the High Court or of a Supreme Court of a State or Territory. This means that the legal practitioner need not be a legal officer under the Defence Force Discipline Act. In this respect, the legal practitioner is to be equated to a legal practitioner, not being a legal officer, engaged privately by a person being tried by a court martial or a Defence Force magistrate, see s136 of the Defence Force Discipline Act. In each case, the legal practitioner is entitled to payment of legal fees by the accused or appellant as contrasted with a legal officer acting under s137.

The proper construction and application of s37 of the Defence Force Discipline Appeals Act must be considered having regard to the particular nature of the relevant statutory provisions applicable to the discipline of the Defence Force.

The principles of law applied in civil courts exercising criminal jurisdiction have been discussed in many cases. In the absence of a statutory power to order costs to be paid, the courts had no power to award costs. When costs are ordered, normally the costs are to be paid by the unsuccessful party. The fact that an order for costs against a prosecutor acting in a public capacity makes that person liable personally for the amount of costs was a factor influencing the judges who dissented in Latoudis, see Brennan J at pp545-6 and Dawson J at pp560-1. The latter passage contained the following sentence:

> "Clearly, where there is a statutory provision for costs awarded to a successful defendant to be met out of public funds, it is a matter to be taken into account and may, depending upon the nature of the provision, be a determinative factor in the exercise of the discretion."

In the present case, there is a statutory provision for the "costs" of a successful appellant, if awarded in favour of the appellant, to be met out of public funds. These "costs" extend both to those occurred by the appellant with respect to the appeal and to those occurred at the trial out of which the appeal arose if the appellant had been represented by a legal practitioner under s136 of the Defence Force Discipline Act and not by a legal officer in conformity with s137.

Since the Tribunal gave its decision in the Appeal of Bridges, the High Court in Latoudis has clarified the law relating to costs being awarded against an unsuccessful

prosecutor in a summary proceeding. The position is stated clearly by Mason CJ at p542:

> "By conferring on courts of summary jurisdiction a power to award costs when proceedings terminate in favour of the defendant, the legislature must be taken to have intended to abrogate the traditional rule that costs are not awarded against the Crown. Yet in Victoria and Queensland, the emphasis given by the courts to the unfettered nature of the discretion to award or withhold costs has resulted in practice in costs not being generally awarded against a police officer who is an informant, a result which could scarcely have been intended by the legislature when it enacted s97(b) of the Act. Once that proposition is accepted, as in my view it must be, there is no sound basis for drawing a distinction in relation to the award of costs against an unsuccessful informant between summary proceedings instituted by a police or other public officer and those instituted by a private citizen. In the case of proceedings commenced by a private prosecutor which terminate in favour of the defendant, the private prosecutor should in ordinary circumstances be ordered to pay the costs, even if he or she initiates the proceedings for a public rather than a private purpose."

In my opinion, having regard to the judgment in Latoudis, no distinction can be drawn between a statutory provision conferring a discretion on a court of summary jurisdiction to award costs against an unsuccessful informant exercising a public office and the discretion conferred by s37 of the Defence Force Discipline Appeals Act. Under that Act, an order for costs in favour of a successful appellant is not made against a party to the appeal. In these circumstances, the fact that the party is to be equated to the Crown is irrelevant. The order for "costs" is a direction that the Commonwealth pay the "costs" of the successful appellant. With appropriate alterations from "defendant" to "appellant" and

consequential alterations, what Mason C said in Latoudis at pp542-3 is apposite to the present case:

> "In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs. As the *Report of Committee on Costs in Criminal Cases* (N.Z.) (1966), par 30, stated:
>
> > "Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences."
>
> It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli v Abbott* (1981) 53 FLR at p111. Most of the arguments which seek to counter an award of costs against an informant fail to recognize this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings."

In the present case, at the trial before the Defence Force magistrate, the appellant was represented by a legal officer under s137 of the Defence Force Discipline Act at no expense to himself. He was convicted, wrongly, on two charges. Those convictions have been set aside on appeal. A new trial has been ordered at which the appellant is entitled to the benefit of the provisions of s137. The appellant did not seek legal aid to prosecute his appeal. His appeal has succeeded. Any "costs" ordered to be paid will be paid by the Commonwealth. Having regard to all the circumstances, there is no reason why the order for costs should not be made. The Defence Force magistrate made an error of law even though that error was made at the insistence of the legal officer appearing for the appellant. The appellant, himself, did nothing of a factual nature, or engage in other conduct, which led the Defence Force magistrate into error. The appellant should not have to bear the financial burden of exculpating himself from the result of the error of law made by the Defence Force magistrate.

The appellant and respondent have agreed that if the Tribunal determines to grant the application and make an order for "costs", under s137 of the Defence Force Discipline Act the amount of the "costs" should be $11,142.52.

Accordingly I would, by order, direct the Commonwealth to pay to the appellant the sum of $11,142.52 to compensate him for expenses properly incurred by him in prosecuting his appeal.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Decision of The Honourable Mr Justice R.M. Northrop.

Associate: Jane Moore

Date: 15 July 1994

ATTACHMENT

Counsel for the Appellant:	Mr P. Willee QC
Solicitor for the Appellant:	George W. Vassis
Counsel for the Respondent:	Mr D.S. Wilkins with Mr J.H. McDonagh
Solicitors for the Respondent:	Directorate of Army Legal Services
Date of Hearing:	17 May 1994
Dates of Judgment:	19 May 1994 27 July 1994

Signed: Rae Moore

Dated: 15 July 1994

IN THE DEFENCE FORCE)
DISCIPLINE APPEAL TRIBUNAL) No. DFDAT 1 of 1993
SYDNEY)

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: Wednesday 27 July 1994

PLACE: Sydney

REASONS FOR JUDGMENT

GALLOP J:

This appeal was heard by the Tribunal on 17 May 1994 and judgment delivered on 19 May 1994. The orders that the Tribunal made were that the appeal be allowed, both convictions be quashed and a new trial ordered on both charges.

On the hearing of the appeal counsel for the appellant applied for an order for costs in the event of the appeal being allowed. That application was opposed on behalf of the respondent and, after delivering judgment on 19 May 1994, the Tribunal considered written submissions on behalf of the appellant and heard oral submissions on behalf of the respondent. The Tribunal reserved its decision on the application for costs.

It was common ground on the hearing of the application for costs that the appellant had not applied for, and hence had not been granted, legal aid for the purposes of the appeal. Further, it was agreed that in the event of the Tribunal exercising its discretion in favour of the appellant on the application for costs, those costs were agreed at $11,142.52.

As appears from the reasons for judgment, the appeal was allowed because the learned magistrate at the trial misdirected himself about mens rea being an element of the offence created by s.44(1) of the Defence Force Discipline Act (the Act). The Tribunal held that there had been an error of law and accordingly the conviction for an offence against s.44(1) of the Act should be quashed. The appellant had also been convicted of an offence against s.60 of the Act (behaving in a manner likely to prejudice the discipline of the Defence Force). Because the appellant's trial had been conducted on the footing that the two charges must stand or fall together, the Tribunal also quashed the conviction for an offence against s.60 of the Act.

It is important to have regard to the conduct of the trial on the question of costs. The appellant's written submissions to the Tribunal on the application for costs included the following:

> "5.1 It may be that the tribunal takes the view that some of the blame for the result before the learned Defence Force Magistrate should be laid at the door of the applicant. On the basis that considerations of the Proudman v Dayman defence tended to distract him from his consideration of the issues and or lead him into error. In so far as that may now be apparent to the tribunal and it may be thought, should have been obvious to me; I accept that criticism. However, it may be that considerations of, the less than satisfactory working conditions, and the exceedingly long sitting hours (It was close to 21:30 at night when the finding was delivered) together with the knowledge that the wrongful categorisation of the offence escaped not only the attention of everyone involved in the proceedings but also that of the Solicitor-General for Western Australia (who reviewed the proceedings); may make that fault more understandable. Moreover, that defence was applicable to the second charge. It is also submitted that overall, the apparent errors in

the finding were much more fundamental than anything which it might be argued, was introduced by the defence."

In so far as that submission asserts that the wrongful categorisation of the offence escaped the attention of everyone involved in the proceedings, it is wrong and contrary to what in fact transpired. In his opening to the Defence Force magistrate at the trial, the prosecutor asserted that an offence created under s.44 of the Act is one of strict liability and that mens rea is not an element of the offence created by s.44(1). He said:

> "It is the prosecution's submission and it is part of my case that an offence created under section 44 is a strict liability offence. And if I can show to you the Defence member had service property that was entrusted to his care and that that property is subsequently lost, then prima facie the responsibility for that loss is founded upon the accused and he is liable for an offence against section 44.
>
> In relation to the question that may arise if the defence wish to run a statutory defence, a question of reasonableness is spoken of in the Act. A statutory defence to this charge under section 44 is that under section 44(2) 'That it is a defence if a person charged with an offence under this section took reasonable steps for the safekeeping of the property to which the charge relates.' It is my submission that that question of reasonableness is determined objectively by the court."

There was no assertion to the contrary by counsel for the defendant at the trial until a no case submission at the end of the prosecution case. It was then submitted on behalf of the defendant at the trial that mens rea is an element of the offence created by s.44(1) and that, whatever else is required, the defendant would have had to have had knowledge that what he was doing was contrary to what he should be doing. Alternatively, the defendant would be entitled to an acquittal based upon what was referred to as a **Proudman v Dayman** defence.

In his submissions in reply to the no case submission, the prosecutor maintained that the offence created by s.44(1) was an offence of

strict liability not requiring proof of mens rea, and that the only defence available is that provided by s.44(2), which defence is to be considered objectively. He submitted that the question of honest and reasonable belief (the **Proudman v Dayman** defence) could not properly be considered on a no case submission.

In the course of ruling on the no case submission, the magistrate held that the offence created by s.44 of the Act falls into the second of the categories set out in the case of **He Kaw Teh** (1985) 157 CLR 523. The relevant ruling is set out at p.5 of the Tribunal's reasons for judgment. As appears from those reasons for judgment, that ruling was wrong and led directly to the miscarriage of justice and the quashing of the convictions.

It appears to me to be relevant on the question of costs that the error made by the magistrate was contrary to the submissions made on behalf of the prosecution and arose directly from the submissions made on behalf of the appellant at the end of the prosecution case.

The power to award costs is provided in s.37 of the Defence Force Discipline Appeals Act:

> "37.(1) 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, or in carrying on his defence against the charge or charges out of which the appeal arose.
>
> (2) The Minister for Finance shall pay to an appellant, out of moneys provided by the Parliament for the purpose, any sum which the Commonwealth is directed to pay to the appellant under the last preceding subsection.
>
> (3) Where the Tribunal dismisses an appeal or an application for leave to appeal, it may, if it thinks fit, order the appellant to pay to the Commonwealth the whole or any part of the costs of the appeal or

application, including allowances paid to a witness under section 34 and the costs of copying or transcribing any documents for the use of the Tribunal.

(4) An order made under the last preceding subsection may be enforced in such manner as is prescribed."

In the appeal of **Bridges** (unreported decision of the Tribunal, 21 April 1989) the Tribunal had to consider the exercise of the discretion to award costs to a successful appellant pursuant to s.37(1). The Tribunal said:

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

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

It is appropriate to equate the convening authority who convened the general court martial for the trial of the appellant on the charges set out above to the position of the Crown in criminal proceedings in a civil court. Accordingly, it would not be appropriate to order that the Commonwealth pay the appellant's costs merely on the ground that he has been successful in the present appeal. This is not to say that costs could not be awarded against the Commonwealth in an appropriate case. If, for instance, it should appear to this Tribunal that a prosecutor's presentation of a case to a court martial contributed to a mistrial, an appropriate case might be made for this Tribunal to make an award of costs against the Commonwealth. Such considerations, however, do not arise in this appeal. Likewise, if the present appeal had been dismissed, the Tribunal would not have made an order that the appellant pay the Commonwealth's costs in the absence of any strong and compelling reasons for such an order.

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

Since that decision the High Court, by a majority of three to two, has declared a different approach to the exercise of the discretion to award costs in summary proceedings (see **Latoudis v. Casey** (1990) 170 CLR 534). The decision of the majority (Mason CJ, Toohey and McHugh JJ) was that in the exercise of the discretion conferred by s.97(b) of the Magistrates (Summary Proceedings) Act 1975 (Vict.), authorising the court when it dismissed an information to order the informant to pay to the defendant such costs as it thought just and reasonable, in the ordinary circumstances an order for costs should be made in favour of the defendant.

It has often been said, and it appears that in the absence of statutory provision it is still the law, that in criminal prosecutions on indictment, no order for costs will be made against the Crown or in favour of it because of the rule that the Crown neither pays nor receives costs (see, for example, **R. v Jackson** [1962] WAR 130 at 131 per Virtue J; **R. v Judge Kimmins; Ex parte Attorney-General** [1980] Qd R 524 at 524-5 per Douglas J; **R. v J.** (1983) 49 ALR 376 at 379 per Gallop J; **Latoudis v Casey** (1990) 170 CLR 534 per Mason CJ at 538 and per McHugh J at 567; and compare **R. v Goia** (1988) 81 ALR 656 per Foster and Pincus JJ) at 657-660).

There may be different views as to why that rule persists. In **Wright v Judge Keon-Cohen and Others** (unreported decision of the Full Court of Victoria delivered 18 September 1992) Brooking J advanced the fundamental reason that, in the absence of statute, there is no power to award costs. He said that the common law knew nothing of costs in civil cases, and as regards the courts of common law, costs were entirely the creature of statute and this is so also in relation to criminal proceedings: **R. v Beadle** (1857) 7 El. & Bl. 492; 119 ER 1329, especially per Lord Campbell CJ; **Barnett v Raynor** (1968)

VR 386 at p.387 per Winneke CJ; **R. v Judge Kimmins, ex parte Attorney-General**, supra, at p.525 per Douglas J; **Short and Mellor, Crown Practice**, 1st Ed., 1980, p.238; **Kenny, Outlines of Criminal Law**, 1st ed., 1902, pp.486-7; **Halsbury**, 1st ed., vol.9, p.445; **Encyclopaedia of the Laws of England with Forms and Precedents**, vol.4, pp.97-98 (article on Costs in Criminal Proceedings contributed by W.F. Craies); **Archbold's Criminal Pleading Evidence & Practice**, 23rd ed., pp.144 and 246. Accordingly, in the absence of some statute enabling courts to order payment of costs in prosecutions for indictable offences, the fundamental operative principle was not that the Sovereign did not pay costs, as it was her prerogative not to pay them to a subject, and did not receive costs, because that was beneath her dignity, or some differently expressed principle concerning the Crown (3 **Blackstone Commentaries** 400; and see **Coldham v R.** (1880) 6 VLR (L) 102 at p.105 and **Affleck v R.** (1906) 3 CLR 608 at p.630), but that, costs being the creature of statute, the court had in the absence of statute no power to order payment of costs either by or to the accused, whether the prosecution was for the Queen or for a private prosecutor. The special position of the Crown arose for consideration only where the prosecution was for the Queen and some statute did provide for the payment of costs: it was then a question whether the statute authorised the making of an order for costs in favour of or against the Crown.

In **Latoudis v Casey**, supra, Dawson J (with whose judgment Brennan J agreed) said that in criminal proceedings the basic common law principle applied that the Crown neither pays nor receives costs, but the judgment (at pp.557 and 559) accepts that in criminal prosecutions there is no power to award costs to either side in the absence of some statute. This

absence of any power at common law to award costs to or against any prosecutor, public or private, must be regarded as the fundamental principle.

The rule that costs are not awarded to or against the Crown has been displaced in jurisdictions where a statutory power to award costs has been conferred when the court dismisses an information or complaint, or makes an order in favour of a defendant. Mason CJ said in **Latoudis v Casey** (at p.538) that the rule could not survive once courts of summary jurisdiction were given a statutory discretion to award costs in criminal proceedings. To similar effect are the observations of McHugh J (at p.567):

> "The purpose of enacting statutory provisions such as s.97 of the **Magistrates (Summary Proceedings) Act** 1975 (Vict.) ('the Act'), however, is to reverse the historic rule: **Acuthan v. Coates** (1986) 6 NSWLR 472, at p.480, per Kirby P. Once a legislature abolishes the rule that the Crown and those who institute summary proceedings in the public interest neither pay nor receive costs, the various rationales of that rule cannot be used to justify the exercise of the discretion to refuse to order the payment of costs of a successful defendant in summary proceedings. To use them in that manner is to ignore the purpose of the legislature in enacting the legislation."

The issue in **Latoudis v Casey** was whether in summary criminal proceedings a successful defendant should ordinarily be awarded his or her costs. The view of the majority was (although differently expressed in their separate judgments) that in ordinary circumstances an order for costs should be made in favour of a defendant against whom a prosecution has failed. Such a defendant in summary proceedings has a reasonable expectation of obtaining an order for costs against the informant and the discretion to refuse to make the order should not be exercised against him except for a reason directly connected with the charge or the conduct of the proceedings.

In the light of the High Court's decision in **Latoudis v Casey**, it is apparent that the observations made by the Tribunal, differently constituted,

in **Bridges**, supra, were too broadly expressed. The discretion to award costs to a successful appellant is provided in s.37 and the Tribunal cannot decline to exercise it because of reliance upon the rule which has been displaced by s.37.

Nevertheless, it needs to be stressed that costs in appeals to this Tribunal do not follow the event, and that a successful appellant in such proceedings, like a successful party in civil proceedings, has no right to an order. The discretion, like any other discretion, must, of course, be exercised judicially and the Tribunal ought not to exercise it against the successful appellant except for some reason connected with the case (adapting the words of Viscount Cave LC in **Donald Campbell & Co. v Pollak** [1927] AC 732 at 811-812).

As Toohey J observed in **Latoudis v Casey**(at p.562), the trend of Australian authority, certainly as found in decisions of the Federal Court of Australia, the Supreme Court of the Australian Capital Territory and the Supreme Court of South Australia, favours an award of costs to a successful defendant in summary proceedings unless the defendant's own actions have precipitated the prosecution (for instance, refusal to give an account to the police when it would be reasonable to do so, or failure to tell police of a witness who could support the defendant's account of the instance); or the defendant has prolonged the proceedings unnecessarily by his or her approach to the conduct of the litigation; or some other relevant consideration is present which makes it unjust to award costs to him or her.

Some of the considerations relevant to the exercise of the discretion in this appeal need to be addressed. First, the prosecution correctly identified the elements of the offence created by s.44(1) of the Act.

Secondly, the prosecution established by evidence a prima facie case which should have cast upon the defendant at the trial the onus of establishing the statutory defence provided in s.44(2) and relied upon by him. Thirdly, the **Proudman v Dayman** defence of an honest and reasonable belief in a set of circumstances which, if true, would have exculpated the appellant was, if not an obfuscation, an irrelevant and extraneous matter.

Because of the appellant's conduct, through his counsel, the real issue, as stated in the reasons for judgment of the Tribunal allowing the appeal, 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 facie 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. By the appellant's conduct of the case at trial the magistrate was diverted from his function of determining that real issue.

In the circumstances of this appeal, I would refuse the application to direct the payment by the Commonwealth to the appellant of any sums to compensate him for expenses incurred in the prosecution of his appeal or otherwise.

I certify that this and the preceding nine pages are a true copy of the Reasons for Judgment herein of his Honour Mr Justice Gallop.

Dated: 22.7.94

P Munnelly

Associate

DEFENCE FORCE DISCIPLINE

APPEAL TRIBUNAL DFDAT No. 1 of 1993

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

BETWEEN:

LIEUTENANT COLONEL RUSSELL ALEXANDER STUART
Appellant

AND:

CHIEF OF THE GENERAL STAFF
Respondent

COURT NORTHROP, J. (President)
GALLOP, J. (Member)
BADGERY-PARKER, J. (Member)

PLACE SYDNEY

DATE WEDNESDAY 27 JULY 1994

REASONS FOR JUDGMENT

BADGERY-PARKER, J: This appeal was heard by the Tribunal on 17 May 1994. On 19 May 1994, the Tribunal allowed the appeal and ordered that both convictions be quashed and a new trial be held. The circumstances which led to that outcome are stated in the judgment of Gallop, J. which I have had the privilege of reading in draft, and there is no need for me to repeat them.

This judgment deals with the application of the appellant for an order for costs, pursuant to s.37 of the Defence Force Discipline Appeals Act.

There is no doubt, as Gallop, J. has pointed out, and as the Tribunal noted in the **Appeal of Bridges** (unreported 21 April 1989) that it is a generally accepted principle in criminal matters that costs will not be awarded in favour of or against the Crown. However, that rule may be and often has been displaced by statute. In **Latoudis v. Casey** (1990) 170 CLR 534, the High Court considered the discretion conferred on a court of summary jurisdiction to award costs where proceedings terminate in favour of the defendant. Mason, CJ. at 542 pointed out that:-

> "The legislature must be taken to have intended to abrogate the traditional rule that costs are not awarded against the Crown."

McHugh, J. observed that:-

> "Once a legislature abolishes the rule that the Crown and those who institute summary proceedings in the public interest neither pay nor receive costs, the various rationales of that rule cannot be used to justify the exercise of the discretion to refuse to order the payment of costs of a successful defendant in summary proceedings. To use them in that manner is to ignore the purpose of the legislature in enacting the legislation."

It must follow that the earlier decision of this Tribunal in **Bridges** must be regarded as wrong insofar as it was stated:-

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

I have had the benefit also of reading in draft the judgment prepared by the President. Like his Honour, I see no relevant distinction between a statutory provision conferring a discretion on a court of summary jurisdiction to award costs to a successful defendant and the discretion conferred by s.37 of the Defence Force Discipline Appeal Act to award costs in favour of a successful appellant. In **Latoudis** (supra), Mason, CJ. said:-

> "In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal

> charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling ... In exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant."

The Act contemplates that although defence members on trial before a service tribunal will be afforded legal aid and if convicted may seek legal aid for an appeal, there may nevertheless be cases when a defence member exercises a right to be represented by a legal practitioner who may not be a legal officer under the Defence Force Discipline Act and is entitled to payment of legal fees. The very fact that a discretion exists to award costs (which would not be appropriate where the appellant was legally aided) shows that the legislature contemplated private representation in at least some appeals. The costs of appeal of a defence member wrongly convicted may be very substantial, so much so as to discourage a defence member from appealing in some instances: which would be a most undesirable thing. It seems to me that the presence in the Act of a power to award costs is indicative of a legislative policy that such should not occur and that any defence member who perceives that he or she has been wrongly convicted should have access to the Tribunal. To a degree, that access is protected by the availability of legal aid, but legal aid may not be always available: Reg.11 of the Defence Force Discipline Appeals Regulations involves, in part at least, a merit test. The single member exercising the powers of the Tribunal with respect to the granting of legal aid may not perceive merit which, upon the hearing of the appeal, is demonstrated to the Tribunal. In my view, the approach to the discretion conferred by s.37 should be, as indicated by Mason, CJ. in **Latoudis**, an approach which looks at the matter primarily from the perspective of the defendant. The discretion to award costs ought be exercised in favour of an appellant unless some good reason appears for not making an order in his or her favour. That reason must be a reason connected

with the case, that is to say connected with the way in which the case was conducted at first instance by or on behalf of the defendant.

The contention on behalf of the defendant at the trial was that he had a belief on reasonable grounds that his conduct in relation to the property which was eventually lost was not criminal. That was irrelevant. The only defence which was available to him, once the loss of the property was proved beyond reasonable doubt was that he had taken reasonable precautions for the safe keeping of that property, a defence the proof of which rested upon him. The difference is one of onus. The trial was run on the basis that the Crown had the onus of disproving any such belief; it should have been run on the basis that it rested upon the defendant to establish that he had taken reasonable precautions. The substance of the evidence, however, would have been no different. The trial miscarried because the Defence Force magistrate was led, notwithstanding the contrary submissions on behalf of the prosecution, to accept the submission advanced on behalf of the defence that the offence under s.44 was one to which a **Proudman v. Dayman** defence was available.

Gallop, J. has identified the manner in which the Defence Force magistrate came to fall into error. I accept his Honour's analysis which shows how counsel for the appellant (then defendant) contributed to that error. The ultimate question is whether the conduct of the case by counsel ought be regarded as conduct of the defendant himself so as to warrant refusal of an order for costs of the appeal. A defendant in summary proceedings may be deprived of costs if his own actions have precipitated the prosecution (per Toohey, J., in **Latoudis** at p.562). The examples his Honour extracts from the cases involve personal fault on the part of the defendant. It is true that in other circumstances, the conduct of counsel binds his or her client (**Birks** (1990) 48 A. Crim. R. 385), though not in every case (see per Gleeson, CJ. at 392). It must, however, be remembered that the question in **Birks** was whether a mistake by counsel should warrant a conviction being set aside, and the principles were stated in that

context. **Birks** does not compel a conclusion that counsel's error is to be attributed to the client for the purpose of the exercise of the discretion to award costs. I am of the view that before a successful appellant should be deprived of an order for costs, it would be necessary to find that the appellant personally was in some way at fault. In some cases, the conduct of the proceedings by counsel may properly be laid at the feet of the defendant, because counsel is compelled to a particular course by the client's instructions: but that is not the case here, where the trial miscarried not because of anything said or done by the appellant himself but only because of counsel's misconceptions as to the legal effect of his client's instructions.

For the foregoing reasons I agree with the order proposed by the President.

I certify that this and the 4 preceding pages are a true copy of the reasons for judgement herein of the Honourable Mr. Justice Badgery-Parker

Gabrielle O'Loo

Associate

Dated 27-7-94