JUDGMENT No. DF 3 of 94

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DEFENCE FORCE DISCIPLINE
APPEAL TRIBUNAL

DFDAT No 1 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 :

WARREN LESLIE PATRICK BARRY

Appellant

A N D :

CHIEF OF NAVAL STAFF

Respondent

TRIBUNAL: THE HON JUSTICE NORTHROP - PRESIDENT
THE HON JUSTICE COX - DEPUTY PRESIDENT
THE HON JUSTICE GALLOP - MEMBER

PLACE: SYDNEY

DATE: 26 AUGUST 1994

MINUTES OF ORDER

THE TRIBUNAL ORDERS THAT:

1. The appeal be dismissed.

2. There be no order as to costs.

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BETWEEN:

WARREN LESLIE PATRICK BARRY

Appellant

AND:

CHIEF OF NAVAL STAFF

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THE HON MR JUSTICE COX - DEPUTY PRESIDENT
THE HON MR JUSTICE GALLOP - MEMBER

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REASONS FOR DECISION

NORTHROP J

I would dismiss the appeal and I agree with the reasons as expressed by Cox J. I have nothing further to say on that issue.

COX J

The appellant was charged before a general court-martial on seven counts of which the first three were charges of committing an act of indecency upon three naval ratings without their consent, contrary to the *Defence Force Discipline Act* 1982, s61 and the *Crimes Act* 1900 (NSW) in its application to the Jervis Bay Territory, s92J. The fourth count alleged an assault upon a superior officer (*Defence Force Discipline Act* 1982, s25); the fifth disobedience of a lawful command (*Defence Force Discipline Act* 1982, s27); and the last two prejudicial behaviour contrary to the *Defence Force Discipline Act* 1982, s60, firstly, in that he attended a service function at HMAS Derwent in a dishevelled state and while intoxicated, and lastly in that he urinated from HMAS Derwent into Devonport Harbour. He was convicted on counts four, five and six and acquitted on count seven. His appeal is confined to his convictions on counts one and two.

His first complaint is that the judge-advocate misdirected the court-martial or alternatively failed to adequately direct the court-martial as to the need for the prosecution to establish that the appellant had the requisite *mens rea*. It was submitted, on the appellant's behalf,

that he was entitled to a direction that the prosecution had to satisfy the court that he intended to commit an act of indecency. As the submission was developed it involved the proposition that he must be shown to have known that the act was an act of indecency, that is, an act of a sexual nature which offended the standards of decency of ordinary members of the community, and that he intended to commit such an act. Reliance was placed on *Director of Public Prosecutions v Morgan* [1976] AC 182. In my view, that reliance is misplaced. What *Director of Public Prosecutions v Morgan* (supra) established was that in a prosecution for rape the Crown had to prove that the accused intended to commit rape, that is, he intended to effect penetration either knowing that the complainant was not consenting or being recklessly indifferent as to whether she was consenting or not. If there was a reasonable possibility that he subjectively believed she was consenting, albeit such belief was based on unreasonable grounds, he was entitled to an acquittal.

That, however is the extent of the *mens rea* necessary to establish rape and in respect of that crime, as proscribed by the *Crimes Act* (NSW) in its application to the Jervis Bay Territory, s92D, that is reproduced by the concluding words of the section defining the elements which require that the offender:

> "– knows that that other person does not consent or who is reckless as to whether that person consents."

These words likewise appear in s92J, which proscribes the offence of committing an act of indecency without consent, and reproduce the same element described in *Director of Public Prosecutions v Morgan* (supra). It is not necessary for the prosecution to prove that the offender appreciated that the act constituting the act of indecency would be regarded as indecent by the community at large. To do so would be to substitute for the objective standard of decency the statute seeks to uphold the personal predilections and moral attitudes of the person charged.

Unlike the element of dishonesty which, in such statutes as the *Theft Act* 1968 (UK), has been held to require the fact-finding tribunal to be satisfied not only that the conduct complained of was dishonest by the standards of ordinary and decent people but that the offender must have realised that what he was doing was by those standards dishonest, the element of indecency in the section presently under consideration is directed to the external act of the accused not to the state of his mind. In *R v Gosh* [1982] 3 WLR 110, the leading case on dishonesty, the Court of Appeal of England emphasised that dishonesty, for the purposes of the *Theft Act*, described the state of the accused's mind and not his conduct. In the *Crimes Act* the *actus reus* of the sexual assault sections is the fact of penetration while that of those relating to acts of indecency is the doing of an act which has the characteristic of being indecent upon or in the presence of another. In both species of proscribed sexual offences there is no mental element which requires an appreciation of the fact that some objective standard of decency is being breached.

The appellant further submitted that an act of indecency was one having sexual connotations as opposed to one which was merely an act likely to offend the community's sense of appropriate behaviour in the circumstances. His counsel submitted that if the acts of touching the complainants on their buttocks in the manner admitted to by the appellant, and which, if his version were accepted, could fairly be described as asexual, might have been regarded by the court as offensive, in that sense the verdicts could not be sustained.

Certainly the *Crimes Act*, PtIII of which s92J forms part, is directed to sexual offences and the acts of indecency proscribed no doubt have a sexual context; but I am satisfied that the judge-advocate made it quite clear in his summing-up that the acts upon which the prosecutor relied in respect of counts one and two, and in respect of which the court was instructed, its members "would have to be satisfied beyond reasonable doubt that the act occurred as alleged by

the prosecution", or if they were not they must acquit, were not the bland acts of a brief touching of the buttocks of each complainant as claimed by the appellant but, in relation to count one, the placing by him of his hand on the complainant's groin just above the pubic area and, in relation to count two, the grabbing of the complainant's buttocks "on the left-hand side in the crevice". In a re-direction given by the judge-advocate to the court at the request of the prosecutor he told the members that in relation to count one the two instances of contact with the buttocks prior to the groin incident and in relation to count two the instances of placing his arms around the complainant prior to the contact with the crevice of the buttocks were part of the circumstances which they were entitled to take into account in assessing whether the acts relied upon by the prosecutor were acts of indecency. This in my view served to further emphasise the need to focus on the sole act of indecency particularised in each count as the groin incident and the touching in the crevice of the buttocks respectively. The judge-advocate's comment, "the backside contact is the gravamen of the offence" was clearly a reference to the *actus reus* of count two and not to the preliminary touching of the buttocks of the complainant in count one which the appellant submits the court may have erroneously regarded as the *actus reus* of that count. There is, in my view, no reason for supposing that the members of the court assessed any other acts than the two particularised by the prosecutor as those constituting the essence of the two counts in question.

It was further submitted that in as much as the above two acts involved an assault to the extent that they were indecent they must be regarded as indecent assaults as distinct from acts of indecency. Reliance was placed on *Saraswati v The Queen* (1990-1991) 172 CLR 1. Suffice it to say that the legislation under consideration in that case is significantly different to the legislation under which the appellant was charged. In the first place the former legislation required that any prosecution for the defilement of a female under the age of 16 years or for an assault accompanied by an act of indecency should be commenced within a certain time, whereas no such restriction applied in the case of a prosecution for committing an act of indecency with or towards a person under the age of 16 years.

It is not surprising that a majority in the High Court took the view that an act which constituted either sexual intercourse or an assault accompanied by an act of indecency could not be charged as an act of indecency *simpliciter* thereby avoiding the limitation on prosecution. In the second place the wording of the latter legislation differs from the former in that a distinction is made not between an assault accompanied by an act of indecency on the one hand and an act of indecency committed with or towards a person under the age of 16 years on the other but separate provision is made in respect of an assault upon another person with intent to commit an act of indecency upon or in the presence of that person (s92H) and the commission of an act of indecency upon, or in the presence of another person (s92J). If, then, either of the appellant's acts could be fairly described in conventional language as an indecent assault, the appropriate vehicle for prosecution is s92J rather than s92H where an act of indecency is merely intended rather than performed. In my view it was open to the court to be satisfied that the acts particularised by the prosecutor and clearly having a sexual context, whether or not intended by the appellant as a form of sexual stimulation or perceived by him as having any sexual connotation, amounted to acts of indecency.

The appellant also challenges his convictions on counts 1 and 2 on the basis that they are unsafe and unsatisfactory. In relation to count one the complainant gave evidence that on three occasions while he was alone in the wardroom with the appellant the latter had physically assaulted him. On the first occasion he had felt the appellant's hand on his left buttock when he brought in some cartons of beer and bent down to place them on the floor. He had responded in a way clearly capable of being understood as a protest to that physical contact by saying that he was trying to do his job. On the second occasion the same activity had occurred when he deposited a

second load of beer cartons on the floor and a similar response or protest had been articulated by him. The appellant had, according to him, responded by raising his hands in a gesture of surrender and twice saying that he was sorry. On the complainant's return with a third armful of beer cartons he claimed that the appellant had placed his hand near his groin above the pubic area. At this, the complainant had uttered the words, "for fuck's sake" and had angrily left the wardroom. There were no witnesses to this episode but the appellant gave evidence that he had on the first two occasions gone round to the area where the complainant was depositing cartons of beer on the floor and had, in order to startle him, touched him on the buttocks. He also acknowledged that the complainant had responded by saying that he was only trying to do his job or to stock the fridge. He denied that on a third occasion he had made any physical contact with the complainant but acknowledged that the complainant, when he was in close proximity to him on the complainant's return with a third load of beer, had said "for fuck's sake" and had then walked or stormed out of the wardroom.

This response, on the appellant's evidence, was not precipitated by any conduct on his part but by the mere fact of his proximity to the complainant. In my view the court-martial was entitled to regard the appellant's acknowledgment of his previous conduct and of the complainant's response on the third occasion of his entry to the wardroom as supportive of the complainant's allegations of a further assault of the type he alleged. Although the complainant might have uttered some anticipatory protest to contact which might not have occurred or had not then occurred, the court-martial was entitled to regard the complainant's admitted subsequent action of storming out of the wardroom as indicative of disapproval of the activities he claimed had in fact occurred. Indeed, there seems little reason why after such an unwarranted protest, if that were the case, the complainant should then have stormed out of the room. In my view there is nothing about the quality of the complainant's evidence which should occasion any concern that it might have been unreliable and for the above reasons I am of the view that the court-martial could properly regard it as strengthened by some aspects of the appellant's own version of events.

In respect of count two there were other persons present. The complainant complained to have been subjected to non-sexual assaults where the appellant had flung his arms around his shoulders in what might be regarded as an exaggerated display of mateship and that thereafter the appellant had grabbed his buttocks in the crevice and had squeezed and or rubbed in that area. The appellant acknowledged that he had touched him on the buttocks but only in the same bland way in which he acknowledged touching the complainant in the first charge on the buttocks. Two other ratings were called and gave evidence that they had seen the appellant fling his arms around the complainant. One did not claim to have seen any contact between the appellant's hand and the complainant's buttocks, although the appellant did not dispute that that had occurred; and the second rating gave evidence that he saw the appellant's right arm go on to the complainant's left buttocks before he, the witness, left the wardroom. In these circumstances I am of the view that the court-martial was entitled to regard the evidence of the complainant as corroborated in a material respect implicating the appellant.

It was submitted that because the complainant in the second count was the sole witness who claimed to have seen the appellant urinate from the ship into the harbour and because the court-martial acquitted the appellant of that charge, he denying it, the complainant's evidence in respect of count two was in some way tainted or found unreliable by the court-martial and that the only safe inference this tribunal could draw was that the appellant's account in respect of count two had been accepted by the court-martial and that in some unexplained way they had erroneously assessed his version of the incident as an act of indecency. This conclusion does not follow as a matter of logic. The court-martial may well have entertained some doubts about the reliability of the complainant's evidence of the incident of urinating over the side of the ship, an event which occurred after sunset in circumstances where the witness' ability to observe may well have been

subject to some limitations. The court's refusal to convict on that count, however, could not in all fairness be said to require the conclusion that the complainant's evidence concerning matters directly affecting the contact he claimed the appellant had made with his body that the court-martial did or ought to have entertained equal doubts about the reliability of that evidence.

In my view the admissions of the appellant of the limited physical contact he made and the evidence of the other eye witness were capable of supporting the evidence of the complainant and there is no good reason to suppose that a conviction based on his evidence was unsafe or unsatisfactory, having regard to the principles expressed in *Chidiac v The Queen* (1991) 171 CLR 432; *Whitehorne v The Queen* (1983) 152 CLR 657; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521; *Morris v The Queen* (1987) 163 CLR 454 and more recently, *Knight v The Queen* (1992) 175 CLR 495.

The last challenge to the appellant's convictions is based on alleged irregularities in the trial process, leading to a miscarriage of justice. First it is claimed that the judge-advocate wrongly declined to close the court and prevent the media from publishing reports of or incidental to the trial. *Prima facie*, trials ought to be conducted publicly, a failure to do so can undermine the public's confidence in the judicial process and I refer to *Russell v Russell* (1976) 134 CLR 495 and *R v Tait & Bartley* (1979) 24 ALR 473, particularly at 487 and 488. The *Defence Force Discipline Appeal Act*, s140 recognises this principle and confines the President's power to conduct a trial in camera to situations where this is necessary in the interests of national security, public morals or the administration of justice. There was no warrant for an order of closure on the first two bases and as to the basis of the administration of justice, I am unpersuaded that closure of the court was required for that reason. The members of the court were officers of equal or senior rank to the appellant, who had sworn to render an impartial verdict in accordance with the evidence and there was no reason to suppose that the ability of the media to publish even lurid accounts of the court-martial would have influenced their decision.

For the same reason I am unpersuaded that the judge-advocate erroneously exercised his discretion not to vacate or postpone the hearing because a senate inquiry into allegations of sexual harassment on another vessel was about to begin at the time this court-martial commenced. The coincidence of that inquiry does not lead to any reasonably perceptible risk that the members of the court-martial might have failed to apply themselves impartially to the task they had sworn to perform. It was a matter for the discretion of the judge-advocate and it has not been shown that he failed to take account of the matters urged upon him or in any other way that he failed to exercise his discretion according to law. No complaint is made about the consequential directions he gave to the members of the court-martial.

Finally, it was submitted that the charges of indecency should have been tried separately from those disciplinary charges in respect of some of which the appellant was convicted and does not challenge his conviction. I am satisfied that the trial of the appellant on all charges contemporaneously cannot be said to be an irregularity let alone that it lead to any miscarriage of justice. The evidence relating to the appellant's disobedience of orders, his prejudicial conduct and his assault on the officer of the day was for the most part, in my view, relevant and admissible in respect of the counts of indecency as part of the *res gestae*. To the extent that it may not have been, as, for example, the charge of urinating from the ship into the harbour, his acquittals on that count and on the third count of indecency, demonstrate the ability of the court-martial to discriminate in respect of individual charges. I find it impossible to conclude that the inclusion of the disciplinary charges, some of which were not seriously disputed, engendered any undue prejudice against him in respect of the charges, his convictions for which he now challenges. For these reasons I would dismiss the appeal.

GALLOP J

I also agree and have nothing to add.

NORTHROP J

The appeal is accordingly dismissed.

Counsel for the respondent then sought an order that the appellant pay the costs of the appeal.

NORTHROP J

I would refuse the application made by counsel for the respondent that the appellant pay the respondent's costs. The application was based upon the *Defence Force Discipline Appeals Act* 1955, s37(3). There is no doubt that the Tribunal has power to award costs, a power which must be exercised judicially and pursuant to appropriate considerations. In my opinion, as a matter of discretion, this is not such a case where the Tribunal should make such an order.

Attention is drawn to the *Defence Force Discipline Appeals Act* 1955, s22 which contains provisions dealing with what are described as frivolous or vexatious appeals. It is not suggested by counsel for the respondent that this appeal was frivolous or vexatious. Reference is made also to the fact that in this case the appellant did receive the benefit of an order for payment of costs of the appeal under the *Courts Martial Appeals Regulation*, reg11. One of the requirements for such an order being made which is relevant to the present case is that if the Tribunal is satisfied that it appears desirable in the interests of justice that legal aid should be granted to the appellant under this regulation the Tribunal may make such an order. One of the considerations to be taken into account in the exercise of that discretion is whether the appeal is frivolous or vexatious or has some merit to it. That was done in this case.

In all circumstances although the appeal was dismissed without calling upon counsel for the respondent it cannot be said that this was an appeal which was completely unmeritorious. it did raise a number of difficult and arguable points and in all the circumstances this is a case where I would not exercise my discretion in favour of the respondent.

COX J

I agree with what has fallen from the learned President. Before such a discretion can be exercised there should exist some sound reason for doing so and in my view no sound reason has been established. In the exercise of my discretion I would decline to make such an order.

GALLOP J

I also agree. There is nothing about the conduct of the appellant which has brought about this appeal in any way, that is conduct in the course of the trial or conduct between conviction and appeal to this Tribunal. True it is there is a discretion in s37(3) but in the absence of some such circumstances of the kind to which I have averted and I do not by any means purport to be able to indicate in these short oral reasons what other circumstances could justify the making of an order for costs against an unsuccessful appellant who has been convicted by court martial, in my opinion the implementation of s37(3) should not be such as to require an appellant such as the present appellant to bear the financial burden which might be quite substantial of trying to exculpate himself by succeeding on an appeal and having his convictions set aside unless, as I say, in some way he has contributed to the necessity to appeal. I would commend to the Chief of Naval Staff that one of his officers in a position such as this appellant should not have to expose himself to financial burden in order to test the legality and correctness of his trial at court martial.

There are important questions of principle involved on this application for costs and in the exercise of my discretion I would likewise refuse an order for costs.

NORTHROP J

The Tribunal refuses the application.

I certify that this page and the preceding six pages are a true copy of the Reasons for Decision of the Tribunal.

Associate: 

Date: 10 March 1994

ATTACHMENT

Counsel for the Applicant:	Mr P.E. King
Solicitor for the Applicant:	Withnell & Co
Counsel for the Respondent:	Mr T.M. Howe
Solicitor for the Respondent:	Director of Public Prosecutions
Date of Hearing:	26 August 1994