JUDGMENT No. DF 1 / 92

DEFENCE FORCE DISCIPLINE)
)
APPEALS TRIBUNAL)

No. DFDAT 4 of 1991

IN THE MATTER OF THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955

AND

IN THE MATTER OF AN APPEAL AGAINST CONVICTION BY GENERAL COURT MARTIAL OF LIEUTENANT BRUCE RAYMOND VICTOR, ROYAL AUSTRALIAN NAVY

LIEUTENANT BRUCE RAYMOND VICTOR

Appellant

CHIEF OF NAVAL STAFF

Respondent

REASONS FOR JUDGMENT

Tribunal: The Hon. Mr Justice Northrop (President)
The Hon. Mr Justice Cox (Deputy President)
The Hon. Mr Justice Gallop (Member)

Date: 21 May 1992

Place: Sydney

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The Hon. Mr Justice Gallop (Member)

Date: 21 May 1992

Place: Sydney

MINUTE OF ORDER

THE TRIBUNAL ORDERS:

(1) That the appeal be allowed and the conviction be quashed.

DEFENCE FORCE DISCIPLINE)
APPEALS TRIBUNAL)

DFDAT No 4 of 1991

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AND

IN THE MATTER OF AN APPEAL AGAINST CONVICTION BY GENERAL COURT MARTIAL OF LIEUTENANT BRUCE RAYMOND VICTOR ROYAL AUSTRALIAN NAVY

LIEUTENANT BRUCE RAYMOND VICTOR

Appellant

AND

CHIEF OF NAVAL STAFF

Respondent

TRIBUNAL: THE HON MR JUSTICE NORTHROP (PRESIDENT)
THE HON MR JUSTICE COX (DEPUTY PRESIDENT)
THE HON MR JUSTICE GALLOP (MEMBER)

PLACE: SYDNEY

DATE: 21 MAY 1992

REASONS FOR JUDGMENT

This is an appeal against conviction by court martial for an offence of negligently causing or allowing a service ship to be hazarded contrary to s.39(3) of the Defence Force Discipline Act 1982 ("the Discipline Act").

In darkness during the early hours of the morning of 7 May 1990, the frigate H.M.A.S. Darwin, while engaging in exercises with units of the USA fleet and other ships, ran aground on a shoal off the north east coast of the island of

Oahu, Hawaii. At the time, the appellant, Lieutenant Bruce Raymond Victor, was the Navigation Officer on board Darwin. On 15 February 1991 the appellant was found guilty, convicted and reprimanded on the charge of negligently causing or allowing the ship to be hazarded contrary to s.39(3) of the Discipline Act.

Section 39 of the Discipline Act reads as follows:

> "39. (1) A defence member who intentionally causes or allows a service ship to be lost, stranded or hazarded is guilty of an offence for which the maximum punishment is imprisonment for 5 years.
>
> (2) A defence member who recklessly causes or allows a service ship to be lost, stranded or hazarded is guilty of an offence for which the maximum punishment is imprisonment for 2 years.
>
> (3) A defence member who negligently causes or allows a service ship to be lost, stranded or hazarded is guilty of an offence for which the maximum punishment is imprisonment for 6 months."

In addition to being charged with the offence under s.39(3) of the Discipline Act, the appellant was charged with an offence under s.35 of the Discipline Act which reads;

> "35. A defence member who, by act or omission, negligently performs a duty that he is required by his office or appointment to perform is guilty of an offence for which the maximum punishment is imprisonment for 3 months."

The second charge was heard by the court martial at the same time as the first charge, but upon the appellant being found guilty on the first charge, the second charge was not

proceeded with and the court martial did not record a finding thereon.

The appellant has, pursuant to s.20(1) of the Defence Force Discipline Appeals Act 1955, appealed to this Tribunal against his conviction, but under that sub-section an appeal is limited to a question of law "except by leave of the Tribunal".

The offence of which the appellant was convicted was in the following terms:

"First Charge	Hazarding Service Ship
DDFD Act Section 39	Between 0001 and 0445 on 7 May 1990 while on board HMAS Darwin and off the coast of Oahu did negligently cause or allow the ship to be hazarded.

Particulars

1. Failing to prepare an adequate and safe navigation plan for use at the time and place aforesaid in the passage of HMAS Darwin around the coast of Oahu and/or alternatively preparing a navigation plan for use at the time and place aforesaid which was unsound and unsafe in that:

    1.1 It failed to provide all relevant and available hydrographic information for the assistance of the officer of the watch and in particular failed to specify on the chart on which the plan was drawn:

    1.1.1 The presence of a second long-range light on Kaena Point.

    1.1.2 Guidance on the possible presence of currents off both Kaena Point and Kahuku Points.

    1.2 It utilised a planned track on course 150 degrees requiring the ship to pass within 1.5

nautical miles of a poorly defined lee shore and within one nautical mile of shoal water at relatively high speed.

1.3 It failed to provide the officer of the watch any information on the times and ranges at which it might be expected lights could be raised or dipped.

1.4 It failed to provide any or any proper or adequate clearing bearings and radar clearing ranges.

1.5 It failed to provide any minimum depths to be monitored by the officer of the watch using the echo-sounder or otherwise.

1.6 It failed adequately or sufficiently to identify appropriate radar conspicuous objects or features suitable for use in fixing the ship.

2. Failing to provide proper guidance and supervision to unqualified and inexperienced officers of the watch in the execution of the navigation plan.

3. Failing to provide any or any proper or sufficient night orders to officers of the watch and principal warfare officer to ensure the safe conduct and passage of the ship."

The second charge on which the court martial did not record a finding was in the following terms:

"<u>Second Charge</u>	<u>Negligent Performance of Duty</u>
DFD Act Section 35	Between 2000 and 0445 hours on 6 and 7 May 1990 on board HMAS Darwin and off the coast of Oahu did negligently perform the duty required of him as navigating officer in the proper and safe navigation of the ship.

<u>Particulars</u>

1-3. The particulars set out in relation to the first charge are referred to and repeated.

4. Failing to ensure that the chart in use at the time, the ship's log and officer of the watch notebook were adequately maintained and completed so as to

> enable the ship's track to be accurately reconstructed".

The grounds of appeal, as amended pursuant to leave granted on 27 November 1991, were as follows:

> "1. That the conviction is unreasonable, or cannot be supported having regard to the following matters of evidence:
>
> (a) that there was no evidence or no sufficient evidence that the appellant's conduct had caused the ship to be hazarded;
>
> (b) that there was no evidence or no sufficient evidence that the navigation plan prepared by the appellant was -
>
> (i) defective;
> (ii) less than the standard contemplated by the Defence Force Discipline Act, s.11;
>
> (c) the fact that the appellant had complied with all directions and orders given to him;
>
> (d) his special circumstances at and prior to the date of the incident in terms of fatigue and duties required of him;
>
> (e) the fact that the appellant was standing watches in the Operations Room;
>
> (f) the fact that the Executive Officer, an experienced navigator, was in command and excused the appellant from further duty prior to the incident.
>
> 2. That in all the circumstances of the case the conviction is unsafe or unsatisfactory.
>
> 3. The Judge Advocate should have ruled in favour of the submission made to him that the appellant had no case to answer.
>
> 4. The Judge Advocate should have withdrawn the prosecution case against the appellant at the conclusion of the evidence.
>
> 5. The Judge Advocate should have ruled that the charge sheet was bad for duplicity and oppressive."

Counsel for the appellant argued the last ground of appeal first. It is desirable to consider ground 5 first.

Although the appellant was charged with three other accused of the offence of negligently causing or allowing his ship to be hazarded and the offence of negligent performance of duty, no objection was taken to the identical charges against the other accused on the grounds of duplicity. It is quite clear, however, that counsel for the appellant took the point and submitted that the prosecution should elect upon which offence it intended to rely. That submission was overruled by the Judge Advocate who held that the charge of negligently causing or allowing his ship to be hazarded did not involve any duplicity and he rejected the application.

The relevant provisions of the Discipline Act are contained in s.66(1) and s.141A which are in the following terms:

> "66(1) Each punishment imposed, and each order made, by a service tribunal shall be imposed or made, as the case may be, in respect of a particular conviction and no other conviction."
>
> "141A(1) Where it appears to -
>
> (a) a summary authority, before dealing with or trying a charge or at any stage of dealing with or trying a charge;
>
> (b) a convening authority, at any stage when a charge is before him under section 103;
>
> (c) the judge advocate of a court martial, before the court martial tries a charge or at any stage of the trial of a charge; or

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

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

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

The Defence Force Discipline Rules are quite specific, particularly the following:

"8. (1) A charge against an accused person shall be entered on a charge sheet.

(2) A charge sheet for the hearing of a proceeding before a summary authority may contain more than one charge.

(3) A charge sheet for the trial of a person by a court martial or a Defence Force magistrate may contain more than one charge if the offences charged -

(a) form, or are part of, a series of offences of the same or a similar character;

(b) are founded on the same or closely related acts or omissions;

(c) are founded on a series of acts done or omitted to be done in the prosecution of a single purpose; or

(d) are alternative to other charges in the charge sheet.

(4) At the hearing of a proceeding before a summary authority, not more than one person shall be charged in the one charge sheet.

(5) At the trial before a court martial or a Defence Force magistrate, 2 or more accused persons may be charged in the same charge sheet with offences alleged to have been committed by them separately if the acts or omissions on which the charges are founded are so connected that it is in the interests of justice that they be tried together."

(6) Nothing in sub-rule (4) prevents a summary authority, at the hearing of a proceeding, from directing that 2 or more accused persons be dealt with or tried jointly in those proceedings in respect of -

(a) an offence alleged to have been committed by them jointly; or

(b) offences alleged to have been committed by them separately if the acts or omissions on which the charges are founded are so connected that it is in the interests of justice that they be dealt with or tried together."

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

(2) A charge shall consist of 2 parts, namely -

(a) a statement of the offence which the accused person is alleged to have committed; and

(b) particulars of the act or omission constituting the offence.

(3) A statement of an offence shall contain -

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

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

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

(5) Particulars of an offence shall contain a sufficient statement of the circumstances of the offence to enable the accused person to know what it is intended to prove against that person as constituting the offence.

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

The submission on behalf of the respondent to the appellant's objection on the ground of duplicity was the same submission as was accepted by the Judge Advocate at the court

martial, namely that the charge stated one offence only and therefore complied with the above statutory provisions.

Whether a statutory provision creates one or more than one offence is a matter of construction. In Romeyko v Samuels (1972) 19 FLR 322 at 345, Bray CJ adverted to such statutes in the following terms:

> "The true distinction, broadly speaking, it seems to me, is between a statute which penalizes one or more acts, in which case two or more offences are created, and a statute which penalizes one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow."

Romeyko v Samuels was cited with approval by Woodward J in the Australian Industrial Court in Bowling v General Motors Holden (1975) 8 ALR 197 at 217. See also Heidt v Chrysler Australia Ltd (1976) 26 FLR 257 per Northrop J at pp 260-261 and O'Brien v Fraser (1990) 66 NTR 9 at pp 11-12.

As a matter of construction, s.39 of the Discipline Act creates a number of different offences. In particular s.39(3) creates offences of negligently causing a service ship to be lost, negligently allowing a service ship to be lost, negligently causing a service ship to be stranded, negligently allowing a service ship to be stranded, negligently causing a service ship to be hazarded, and negligently allowing a

service ship to be hazarded.

We are clearly of the opinion that the Discipline Law Manual, Volume II, correctly reflects the proper construction of s.39(3) under notes to the provision and under the heading "Alternative Charges""

> "... where the principal charge alleges that the accused negligently caused the stranding or hazarding it may be appropriate to include an alternative charge of negligently allowing the stranding or hazarding (as the case may be)."

It is interesting to note that the predecessor to s.39(3) of the Discipline Act which was s.19 of the Naval Discipline Act 1957 (Imp) was in the following terms:

> "19. Every person subject to this Act who, either wilfully or by negligence -
>
> (a) causes or allows to be lost, stranded or hazarded any of Her Majesty's ships or vessels; or
>
> (b) causes or allows to be lost or hazarded any of Her Majesty's aircraft,
>
> shall be liable, if he acts wilfully or with wilful neglect, to imprisonment for any term or any less punishment authorised by this Act, and in any other case to imprisonment for a term not exceeding two years or any less punishment so authorised."

Likewise, that section was construed as creating a number of alternative offences. In notes to s.19 in the Admiralty Memorandum on Naval Court Martial Procedure (BR 11), which is now obsolete, there appears:

> "4. 'Causes or allows'; the ordinary dictionary meaning must be given to these words (causes - effects or brings about, allows - permits) except that a person is not to be convicted of allowing an occurrence unless some act or omission on his part has contributed to it."

The Manual of Naval Law, Chapter 8, (the successor to BR 11 and also now obsolete) construed s.19 as follows:

> "8. 'Causes or allows'; the ordinary dictionary meaning must be given to these words (causes - effects or brings about, allows - permits) except that a person is not to be convicted of allowing an occurrence unless some act or omission on his part has contributed to it. The following examples will help to illustrate the difference between 'causes' and 'allows':
>
> (a) if the Captain were on the bridge personally directing operations when a disaster occurred he should be charged with 'causing' and not with 'allowing';
>
> (b) if the Captain were on the bridge when some error in an order given by the Navigation Direction Officer caused the ship to run ashore, 'allowing' might be the more appropriate charge against the Captain, with the direct charge of 'causing' the grounding against Navigating Officer, but this must depend on the circumstances;
>
> (c) if a Captain were below at the time of a disaster and the prosecution merely contend that he ought to have been on the bridge, he should normally be charged under section 7 with neglect of duty in leaving the bridge in circumstances which should be stated, or in not being on the bridge when he should have been; and
>
> (d) if the Captain (or Navigation Direction Officer) were to be tried for a disaster to his ship while in charge of a pilot when a 'common degree of attention' on his part 'would have prevented the disaster' see RI Article 3573 a charge of 'allowing' would be correct.
>
> The above examples are intended merely to give general guidance. Whether to charge the accused with 'allowing' or 'causing' the occurrence can only be decided upon the circumstance and merits of each particular case.

> However, if during the course of a trial, it becomes clear that a charge of 'causing HMAS ... to be lost etc' should have been more properly drawn as allowing HMAS ... to be lost', a court may approve the amendment of the charge under the provisions of Article 1336. Similarly, a court would be entitled to bring in an alternative finding of 'not guilty of causing' but guilty of 'allowing HMAS ... to be lost' if that was its view of the evidence - under the provisions of NDA section 68(3)(b)."

That the verbs "to cause" and "to allow" have different meanings is fully demonstrated by reference to English and judicial dictionaries. It is further illustrated by reference to the authorities. Counsel for the appellant provided a list of those authorities but it is unnecessary to refer to all of them.

In O'Sullivan v Truth and Sportsman Limited (1956) 96 CLR 220, the High Court had to consider in a statutory provision the words "cause to be offered for sale". After reviewing some of the earlier English authorities, the High Court (Dixon CJ, Williams, Webb and Fullagar JJ) said at p 228:

> "On the authority of these cases in the article on Criminal Law in Halsbury's Laws of England, 3rd ed., vol 10, par 519, p 279, what amounts to causing is laid down as a proposition of law as follows: 'If the charge is of causing an act to be done it must be shown that the accused had knowledge of the facts (Lovelace v Director of Public Prosecutions (1954) 3 All ER 481; (1954) 1 WLR 1468). Before a man can be convicted of causing he must be in a position of dominance and control so as to be able to decide whether the act should be done or not (Shave v Rosner (1954) 2 QB 113); Lovelace v Director of Public Prosecutions (1954) 3 All ER 481; (1954) 1 WLF 1468)'. This appears to mean that when it is made an offence by or under statute for one man to 'cause' the doing of a prohibited act by another the provision is not to be understood as referring to any description of antecedent event or condition produced by the first man

> which contributed to the determination of the will of the second man to do the prohibited act. Nor is it enough that in producing the antecedent event or condition the first man was actuated by the desire that the second should be led to do the prohibited act. The provision should be understood as opening up a less indefinite inquiry into the sequence of anterior events to which the forbidden result may be ascribed. It should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act will ensure."

The meaning of "to allow" has been discussed in other authorities which demonstrate that to allow a thing to be done or omitted there must be some direct or indirect sanction of it. See, for example, DeKuyper v Crafter [1942] SASR 238. Richards J referred to the definition of the word in Stroud's Judicial Dictionary and went on to observe that to allow is at least as wide as to permit, if not wider.

In Gilbert v Gulliver [1918] VLR 185 at 189 Cussen J said that ordinarily speaking, before a person can be said to "allow" anything, there must be something in the nature of actual knowledge or connivance or in some cases extensive delegation of authority. Cussen J went on to observe that the meaning of the word "allow" may vary having regard to the circumstances and in some cases to the class of enactment in which it is found.

What is clear from all the authorities is that "to cause" and "to allow" have different meanings. As stated earlier,

the different meanings are recognised in the Discipline Law Manual, Volume I, in the examples of specific offences against s.39 of the Discipline Act and the reference to the behaviour of the accused consisting of something done by him or a failure by him to act.

The submission on behalf of the appellant is correct, namely that the word "cause" refers to an act or actions or antecedent conditions which bring about or produce in a positive sense a certain effect or consequence, whereas the word "allow" refers to permitting or standing by as someone else causes that effect or consequence.

Where an offence is charged in the alternative there is duplicity (Cotterill v Lempriere (1890) 24 QBD 634). It is a fundamental rule that the conviction itself shall be free of duplicity (Iannella v French (1968) 119 CLR 84; Burton v Samuels (1973) 5 SASR 201).

Accordingly, the first charge against the appellant that he did negligently cause or allow the ship to be hazarded contrary to s.39(3) of the Discipline Act and the conviction recorded on that charge were both bad for duplicity.

We turn to consider what the consequences are and whether the conviction must be set aside. The statutory prohibition in r.9 of the Defence Force Discipline Rules that a charge shall state one offence only is not a mere matter of pleading.

A contravention of that prohibition is positively illegal.

The history of statutory provisions such as r.9 was expounded by Isaacs CJ in Munday v Gill (1930) 44 CLR 38 at pp 62 et seq. Isaacs CJ, after referring to decided authorities, observed that trying an accused person for many different offences is not a matter of mere irregularity and that a provision there under consideration (s.57 of the Justices Act 1902 (NSW)) in similar terms to r.9 separates offences from first to last by the necessary implication of its prohibitory words.

Apart from statutory prohibition, it is well settled law that but one offence can be proved under one charge. Except to prove intent or system or to exclude accident or mistake, evidence that an accused person committed other like offences is seldom relevant to the issue of guilt. That is the reason that a prosecutor can be compelled to specify which act is the subject of the charge.

In Johnson v Miller (1937) 59 CLR 467 Dixon J (as he then was) said at p 489 that a prosecutor clearly should be required to identify the transaction upon which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised

not only of the legal nature of the offence with which he is charged, but also of the particular act, matter or thing alleged as the foundation of the charge.

In the same case, Evatt J agreed that in dismissing a complaint on the ground that it was defective in substance and that the defendant was prejudiced by the defect, the magistrate was warranted by law in acting as he did apart from any statutory provision. Evatt J. approved the observations of Napier J in Tucker v Noblet (1924) SASR 326 at p 340 that at the outset of the hearing the prosecutor may be called upon to select his charge and particularise his complaint and that, in the absence of the necessary information and as a last resort, the Court has inherent power to dismiss the complaint. The ultimate sanction is and must be dismissal of the complaint.

In Ex parte Graham; Re Dowling (1968) 88 WN(Pt 1) NSW 270 at 282, Asprey JA extended the operation of the prohibition in s.57 of the Justices Act 1902 to cases where evidence is led to prove conduct which comprises a continuity of action or a series of connected acts. He said that in cases of this type where the evidence adduced bases both proof of conduct of the kind so described, and calls upon a defendant to answer two or more separate offences upon the single information, a conviction upon the offence charged in the information is bad. The case under consideration was a charge of negligent driving where the prosecution sought to prove three different

incidents as constituting one continuing offence. But for present purposes, Ex parte Graham; Re Dowling confirms that a failure to comply with a statutory requirement in terms prohibiting a charge stating more than one offence is not a mere irregularity and if a conviction thereon is recorded, it must be held bad for duplicity and set aside.

The authorities even go so far as to assert that such a conviction must be set aside by an appellate court even though the point was not taken by the appellant at the trial (see, for example, Rex v Molloy (1921) 2 KG 364).

The appellant's conviction for an offence of negligently causing or allowing his ship to be hazarded is wrong in law and a substantial miscarriage of justice has occurred.

Having come to that conclusion, the question arises as to what should be done. In this regard the provisions of sub s.23(1) and s.24 of Defence Force Discipline Appeals Act are relevant. Those provisions are as follows:

> "23. (1) Subject to subsection (5), where in an appeal it appears to the Tribunal:
>
> (a) that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;
>
> (b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;
>
> (c) that there was a material irregularity in the course of the proceedings before the court martial or the

Defence Force magistrate and that a substantial miscarriage of justice had occurred; or

(d) that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory;

it shall allow the appeal and quash the conviction or the prescribed acquittal."

Sub-section (5) has no relevance to this appeal.

"24. Where the Tribunal quashes a conviction, or a prescribed acquittal, of a person of a service offence, the Tribunal may, if it considers that in the interests of justice the person should be tried again, order a new trial of the person for the offence."

For the reasons already given, and as a result of the wrong decision on a question of law, the appellant's conviction for an offence of negligently causing or allowing his ship to be hazarded is wrong in law and a substantial miscarriage of justice has occurred. Accordingly, the appeal should be allowed, the conviction quashed and the penalty set aside. It remains to consider whether in these circumstances and in the interests of justice, the appellant should be tried again. On the facts of this case, this is not an easy question to determine.

Whilst s.24 of the Defence Force Discipline Appeals Act 1955 provides a very wide discretion and is in different language to the provision considered by the High Court in DPP (Nauru) v Fowler (1984) 154 CLR 627, we think it not inappropriate in this case to apply the test propounded by the High Court. The dominant consideration remains the interests

of justice. In the judgment of the Court it was said (at p 630):

> "The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial to be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case ... Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused."

In the present case, if the appellant had engaged in conduct which could constitute an offence against s.39(3) of the Discipline Act, he should stand trial for the offence according to law, but on the facts of this case, there are strong reasons why, in the interests of justice, the Tribunal should not order a new trial.

It must be remembered that the offence for which the appellant was charged was bad in law. If a new trial is ordered, it is not clear with what offence the appellant will be charged. It is not clear whether he will be charged with more than one offence under s.39 of the Discipline Act. It is not clear whether he will be charged again with an offence against s.35 of the Discipline Act. It is not clear what particulars would be given to any charge laid. Reference has

already been made to Rule 9 of the Defence Force Discipline Rules. It must be remembered that the purpose of particulars is to inform the person charged of "the particular act, matter or thing alleged as the foundation of the charge"; see Johnson v Miller (1937) 59 CLR 467 per Dixon J. at 489. Thus, particulars have a twofold effect. First, they notify the person charged of the facts alleged which are said to constitute the offence charged, and second, they limit the evidence to be given to the proof of facts that are relevant to proving the offence charged. In the absence of any offence charged and in the absence of particulars, it is difficult for the Tribunal to form any opinion on the substantive matters argued on the appeal. It is clear, however, that the essential nature of the offence relates to an allegation that the appellant negligently hazarded a service ship. The Tribunal considers it necessary to consider some aspects of this issue in order to determine whether, in the interests of justice, it should order a new trial.

The Discipline Act was assented to on 31 December 1982. Parts I and XI, which are not relevant for these purposes, came into operation on that day, but the substantive provisions did not come into operation until 2 July 1985. The long title to the Discipline Act is "An Act relating to the discipline of the Defence Force and for related purposes". In substance, the Discipline Act in many respects constitutes a

code of the law relating to criminal offences by members of the Australian Defence Force. Thus in the Discipline Act, a distinction is made between an offence under that Act and what is described as an "old system offence" which, under s.3 is defined as meaning "an offence under previous service law that was committed by a member of the Defence Force at any time during the period of three years that ended on the day immediately before the proclaimed date", namely 2 July 1985. In the same section, the phrase "previous service law" is defined to mean a miscellany of laws relating to criminal offences by members of the Defence Force in operation at any time during the period of three years that ended on the day immediately before the proclaimed date. It must be remembered that the provisions of the Discipline Act are to be applied. In cases of ambiguity it can be helpful to consider earlier statutory provisions and legal authorities but the clear words of the code must be given their proper effect. At the same time it is noted that the Discipline Act appears to equate service offences with criminal offences tried in the civil courts. Thus the jurisprudence of criminal law in its application to trials in civil courts may now have more relevance in the consideration of service offences than it did when service offences were considered within the jurisprudence applicable to military law. Under the latter jurisprudence, there appeared to be accepted a principle that if a service ship ran aground on a charted reef or shoal, of necessity, the navigating officer negligently caused or allowed the ship to be hazarded or, by act or omission, negligently performed a

duty required of him as navigation officer in the proper and safe navigation of the ship. This type of quasi presumption of guilt can have no place in the jurisprudence of criminal law in its application to trials in civil courts. At the same time, under the Discipline Act, a system exists which provides for the review of convictions and penalties imposed by service tribunals, a system which is foreign to the practice and procedures of criminal trials in civil courts.

The Discipline Act is lengthy and covers a wide range of matters from criminal liability, offences, punishments, investigations of service offences, procedures, service tribunals, review of proceedings of service tribunals and other matters. Part II of the Act comprises sections 10 to 14 and is headed "Criminal Liability". Section 10 provides that the principles of the common law with respect to criminal liability apply in relation to service offences. Hence the doctrine of duplicity at common law has application, as well as the specific Defence Force Discipline Rules mentioned earlier in these reasons. Section 12 makes it clear that in a proceeding before a service tribunal, the prosecution has the onus of proving a service offence "beyond reasonable doubt". Under s.11(2) where a member of the Defence Force is charged with a service offence arising out of activities upon which the member was engaged in the course of his duty, a service tribunal, in deciding whether the member, by act or omission, behaved negligently, is required to have regard to the standard of care of a reasonable person, the tribunal shall

have regard to the standard of care that would have been exercised by a reasonable person who:

> "(a) was a member of the Defence Force with the same training and experience in the Defence Force or other armed force as the member charged; and
>
> (b) was engaged in the relevant activities in the course of his duty or in accordance with the requirements of the Defence Force, as the case may be."

Part III, comprising sections 15 to 65 of the Discipline Act is headed "Offences". Many services offences are created under Part III. Section 35, which has been set out earlier in these reasons, is within Division 4 of Part III. That Division is headed "Offences relating to performance of duty" and a reference to the penalty attached to s.35, shows that it is a less serious offence than those created by s.39. It is noted that that section refers to a defence member "who, by act or omission, negligently performs a duty ...".

Section 39 comes within Division 5 of Part III of the Discipline Act. That Division is headed "Offences relating to ships, vehicles, aircraft, weapons or property". In all probability 18 separate offences are created by that section ranging in seriousness from intentionally causing (or allowing) a service ship to be lost (or stranded or hazarded) to recklessly and to negligently causing (or allowing) a service ship to be lost (or stranded or hazarded). The present case relates to negligently causing (or allowing) a service ship to be hazarded. The maximum punishment is

imprisonment for six months. It is noted that on a charge for an offence under sub-sections 39(1) and (2) a defence member may be convicted of an alternative offence pursuant to s.142 and Items 21 and 22 of Schedule 6 of the Discipline Act but there is no provision for a conviction for an alternative offence where a defence member is charged with an offence under s.39(3).

Although under sub-section 39(3) the maximum penalty that can be imposed is imprisonment for six months, the service tribunal, in this case the court martial, has power to impose a lesser penalty. Section 68 of the Discipline Act lists the punishments that may be imposed by a service tribunal in decreasing order of severity. Some 13 punishments are listed, the least severe being a reprimand. In the present case, the penalty imposed on the appellant was a reprimand. For present purposes, it is not necessary to consider the extent of the obligations imposed by s.70(1)(a) of the Discipline Act and the applicability of s.16A of the Crimes Act 1914 and the nature of the powers conferred by s.75 of the Discipline Act, but it is noted that one of the officers charged with the offence of negligently causing or allowing HMAS Darwin to be hazarded was found guilty by the court martial of that offence and a conviction recorded without punishment; see s.75.

Earlier in these reasons the Tribunal said that the essential nature of the offence with which the appellant was charged relates to the allegation that the appellant

negligently hazarded a service ship. The word "hazarded" is not defined in the Discipline Act. In s.39, the word "hazarded" is used in contra-distinction to the words "lost" and "stranded". In this context, the word "hazarded" seems to have a more general meaning than the other two words. The relevant meaning given to the word "hazard" in the Shorter Oxford Dictionary, when used as a verb, is to expose to hazard or risk, to endanger (any person or thing). When used as a noun, hazard is defined to mean risk of loss or harm, peril, jeopardy. Usually, the word is associated with a game of chance, or gaming. The adjective "hazardous" has the connotation of being fraught with hazard or risk, perilous. In its context in s.39, the word "hazarded" is to be construed as meaning exposing the service ship to risk, endangering the service ship, exposing the service ship to the risk of loss or harm or peril or placing the service ship in jeopardy. On the facts of this case, therefore, the fact that HMAS Darwin ran aground of itself is not determinative of the allegation that the appellant hazarded a service ship. The prosecutor was fully aware of this. Thus the offence with which the appellant was charged was that between 0001 and 0445 on 7 May 1990, while on board HMAS Darwin and off the coast of Oahu did negligently cause or allow the ship to be hazarded. Darwin ran aground at about 0427 hours on 7 May 1990. The offence charged was of a continuing nature, but limited to the times specified.

It is neither necessary nor desirable to refer to the

evidence in any detail. The court martial extended over some 20 days and the transcript of the proceedings before the court martial, excluding the parts relating to pleas in mitigation of punishment, comprises 2906 pages. In addition there were many exhibits before the court martial. The court martial heard and determined the charges against the appellant and at the same time, heard and determined charges against three other officers of HMAS Darwin all arising from the same series of events. This added to the length and complexity of the court martial. The commanding officer of Darwin was convicted of the following offence:

> "Between 2359 and 0445 on 7 May 1990 while on board HMAS Darwin and off the coast of Oahu did negligently cause or allow the ship to be hazarded".

The executive officer of Darwin was convicted of the following offence:

> "Between 0001 and 0445 on 7 May while on board HMAS Darwin and off the coast of Oahu did negligently cause or allow the ship to be hazarded."

With respect to each of these officers, upon the conviction being recorded, an alternative charge under s.35 of the Discipline Act was not proceeded with. The third officer was the principal warfare officer on watch in the operations room during the crucial watch. He was charged as follows:

> "Between 0200 and 0445 on 7 May 1990 while on board HMAS Darwin and off the coast of Oahu did negligently cause or allow the ship to be hazarded."

He was charged also with the alternative charge under s.35 of the Discipline Act. At the end of the case for the prosecution, each of the charges against him was dismissed.

For some days before 7 May 1990, Darwin had been engaged in the naval exercises known as Operation Rimpac. As a result, many of the officers on board Darwin had spent long periods on duty and long periods without rest or sleep. In particular, this applied to the commanding officer of Darwin and to the navigation officer, the appellant. In addition it was contended that the commanding officer had relieved the appellant of many of his duties as navigation officer to enable him to undertake and perform duties as principal warfare officer in the operations room. It was to be expected that because of the duties admittedly being performed by the appellant as principal warfare officer, he was not expected, or for that matter, able, to perform many of the duties normally imposed upon a navigation officer. In fact, the appellant had been on duty for some nine hours in the operations room before 0200 hours on 7 May 1990.

At about 1930 hours on 6 May 1990, Darwin was well to the west of the island of Oahu. She had been directed by the command ship, USS Missouri, to engage in a mission as a silent covert unit ahead of the main force. She was to attempt to remain undetected by the "enemy" and to be a target reporting unit for the other friendly ships against any enemy amphibious

group expected to be in the area off Bellows Beach at dawn on 7 May 1990. Bellows Beach is on the eastern side of Oahu Island towards the southern end of the island. It is to the south of Mokapu Peninsula which extends to the north and east of Bellows Beach. At the same time, care had to be taken to avoid detection by other "enemy" ships which might be in any area around the island.

Having regard to the tactical position, the appellant was required to prepare a navigation plan to have Darwin off the east coast of the island near the Mokapu Peninsula at dawn on 7 May. If possible, Darwin had to remain undetected by the "enemy". The appellant prepared the navigation plan while on duty as principal warfare officer in the operations room. The plan was approved and ratified by the commanding officer and the executive officer. The plan brought Darwin close to the island. The plan which forms the basis of the charge against the appellant is charted on United States Chart 19357, being a chart of the island of Oahu in Hawaii. Apparently, there may be differences between the British Admiralty Chart of the area and the United States Chart, but for present purposes nothing turns on these differences.

The navigation plan prepared by the appellant showed the approach course on Chart 19357 as Darwin came close to the western coast of Oahu. The navigation plan showed the shallow water being the 10 fathoms line, by hatching, and the existence of lights that could be used for the taking of

bearings. Areas for the use of echo soundings were shown and areas for sector radiating were also marked. This was done in an attempt to avoid detection by other ships in the vicinity and the sector radiating was towards the land only. The lights were shown by a circle with lines radiating from the circumference of the circle. The watchkeepers were directed to take fixes every six minutes. The course to be followed was marked and the bearing to take on each course was denoted. Essentially the plan provided for Darwin to keep close to the shoreline but well clear of the 10 fathoms line. The course to be followed once Darwin came close to the shore of the island was to sail on a generally north-westerly course to a point west of Kaena Point which is the most westerly point of the island and near the northern most point of the island; then on a generally north-easterly course for a short distance to round Kaena Point; then on a more easterly course followed by a north-easterly course to hug the north-west shore of the island to a point north-west of Kahuku Point being the northern most point of the island; then on an easterly course to pass the northern part of the island and then on a generally south-easterly course at 150 degrees towards Mokapu Peninsula. Lights were marked on the chart at Kaena Point, on a radio mast just south-east of Kaena Point, a stack at Waialua about half way along the north-west coast of the island, and a stack at Kahuku a short distance to the south east of Kahuku Point and at Pyramid Rock on the north-west end of the Mokapu Peninsula. There was some suggestion at the court martial that a light marked on the chart as being an

aero beacon south of the Pyramid Rock light should have been marked but was not and that this could have caused confusion to the officers on the watch. No further comment is made on this aspect. In fact the navigation plan was departed from in major respects because of the exigencies of the tactical situation.

The commanding officer had retired to sleep and had placed the command of the ship in the executive officer. The executive officer was working in the war-room as well as on the bridge. The appellant was working mainly in the war-room but between 0001 and 0218 on 7 May he spent about half an hour on the bridge where he discussed the chart with the then officers of the watch and checked three fixes taken at the six minute intervals between 0200 and 0218. He was then given permission to retire to his cabin to rest having been on duty continually for a very long time. He remained in his cabin until the time Darwin grounded.

Darwin sailed further to the west of the island than the navigation plan showed. This was done for the purpose of picking up her helicopter which had been despatched for observation purposes. She then kept well away from the navigation plan until she was due to commence the east course at the north of the island. It appears that there was some confusion by the officers of the watch in fixing the actual position of Darwin and from a reconstruction it appears that when Darwin was on the east course north of Kahuku Point she

was closer to shore than the navigation plan permitted and that she turned to the 150 degree course before reaching the point at which she should have so turned. As a result Darwin came in much closer to the north-east shore of the island and struck the shoal. She received damage but was able to float free from the grounding.

Of necessity, this outline of the facts does not give a complete picture. No reference is made to other matters which formed a large part of the evidence before the court martial. For example, the duties of a navigation officer and the facts relevant to particulars 2 and 3 of the particulars to the charge under s.39 of the Discipline Act are not discussed. Difficult questions in relation to causation, whether of negligently causing a service ship to be hazarded or of negligently allowing a service ship to be hazarded are not discussed. The relationship between negligently hazarding a service ship and negligently stranding a service ship is not discussed. The concept of negligence in this context is not discussed. It is noted that the commanding officer and executive officer were each found guilty and convicted of an offence essentially the same as that of the appellant, but the different time span mentioned in the charge against the commanding officer is difficult to understand. In any event, the navigation plan prepared by the appellant extended beyond the plan drawn on Chart No 19357. The plan brought Darwin towards the island of Oahu and then provided for the course around the island which commenced at about 0200 hours. The

particulars to each of the charges against the two senior officers were essentially the same as against the appellant except in particular 1 reference was made to examining the navigation plan, not preparing the plan. In addition to particulars 1, 2 and 3, additional particulars were given with respect to the other two officers, but the essence of the particulars was the same.

A reference to the particulars given to the charge against the appellant illustrates very starkly the difficulties caused to him in having to answer a charge which was bad for duplicity. As discussed earlier in these reasons, the words "to cause" and "to allow" have different meanings. It is not clear whether the particulars given should be treated as relating to "to cause" or "to allow". In the opening paragraph of particular 1 the use of the words "and/or alternatively" creates difficulties. At no stage was there any doubt that the appellant had prepared the navigation plan. Insofar as it was relevant, that particular should have been given and further particulars should have been given of the fact that that plan was causally connected with negligently causing (or allowing) the service ship to be hazarded. Further particulars of the hazarding should have been given, but this, to some extent, depends upon the link or causation between the plan as prepared, possibly as executed, and also other factors as contained in the particulars. Particulars 2 and 3 are not directly related to the plan but to other aspects of the duties of a navigation officer. All these

observations illustrate the difficulties arising in charging a defence member with a service offence of the kind referred to in s.39 of the Discipline Act particularly having regard to the equating of service offences with criminal offences to be tried in civil courts. These observations illustrate further the difficulties facing the appellant in attempting to answer a charge which was bad for duplicity.

In all the circumstances of this appeal, the Tribunal does not consider that in the interests of justice, the appellant should be tried again. The commanding officer and the executive officer of HMAS Darwin have both been convicted of negligently causing or allowing the ship to be hazarded. Neither objected to the charges as being bad for duplicity. Neither has appealed against the conviction. The appellant has had to face a long and difficult trial. His objection to the charge being bad for duplicity was not accepted by the prosecutor who could have sought leave to allege the two charges of causing or allowing to be made in the alternative. Instead he contended that the charge specified one offence only. The Judge Advocate rejected the objection made by counsel for the appellant and wrongly ruled in favour of the prosecutor's submission. As a result the appellant was faced with great difficulties in defending the one bad charge brought against him in which it was not clear just what particulars were relevant. The appellant should not be required to face another charge or charges which cannot be identified at this stage.

There are other circumstances which would render it unjust to the appellant to make him stand trial again. It is to be noted that upon conviction, the penalty imposed was the most lenient penalty available for the alleged offence, namely a reprimand. It was not disputed that on the happening of the grounding the appellant was immediately removed from his ship and has not had the opportunity to undertake navigation duties since. It was submitted, and there was no contrary submission, that the appellant may have lost his career as a navigator regardless of the result of this appeal. Having regard to those matters, the expense involved in the retrial of a complex matter, and the stress which the appellant would be obliged to undergo, it would be disproportionate to the service interest in the public administration of justice to order a new trial.

During the course of submissions, some reference was made to the provisions of s.26 of the Defence Force Discipline Appeals Act. Those provisions are as follows:

> "26. (1) Where the Tribunal quashes the conviction of a person of a service offence (in this section referred to as 'the original offence') but considers -
>
> (a) that the court martial or the Defence Force magistrate could in the proceedings have found the person guilty of another service offence, being -
>
> (i) a service offence that is an alternative offence, within the meaning of section 142 of the Defence Force Discipline Act 1982, in relation to the original offence; or
>
> (ii) a service offence with which the person was charged in the alternative and in respect of which the court martial or the Defence Force

magistrate did not record a finding; and

(b) that the court martial or the Defence Force magistrate, by reason of its or his finding that the person was guilty of the original offence, must have been satisfied beyond reasonable doubt of facts that prove that the person was guilty of the other service offence,

the Tribunal may substitute for the conviction of the original offence a conviction of the other service offence.

Sub-sections (2) and (3) deal with matters affecting punishment."

Although not at the forefront of the submissions made by counsel for the respondent, it was suggested that if the appeal was successful and the conviction quashed, the Tribunal should exercise the power conferred by s.26(1)(a)(ii) and (b). In these reasons, the charge under s.39 of the <u>Discipline Act</u> has been referred to at times as the first charge and the charge under s.35 has been referred to as the second charge. Applying the facts of the charges to s.26 of the <u>Defence Force Discipline Act</u>, the first charge is the original offence and the other service offence is that alleged in the second charge. On the facts of this appeal, the Tribunal has quashed the conviction of the appellant of the first charge, being the original offence, on the basis that the charge was bad for duplicity. The defect in the first charge resulted in the fact that the Tribunal was not required, and in fact could not, consider the other grounds of appeal. Before exercising the power conferred by s.26, of the <u>Defence Force Discipline Act</u>, the Tribunal must consider that the court martial could,

in the proceedings, have found the appellant guilty of the second charge, and that the court martial by reason of its finding that the appellant was guilty of the first charge "must have been satisfied beyond reasonable doubt of facts that prove" that the appellant was guilty of the offence alleged in the second charge.

The terms of the second charge have been set out earlier in these reasons. They contain their own difficulties. The charge alleges that the offence occurred between 2000 and 0445 hours on 6 and 7 May 1990, a much longer period than that alleged in the first charge. The same particulars are given, but as observed earlier in these reasons, those particulars contain their own difficulties. Normally, particulars to a charge based on s.35 of the Discipline Act should state the relevant duties that a defence member is required by his office or appointment to perform and then the facts, whether acts or omissions which, it is alleged, constitute the negligent performance of these duties. The particulars given with respect to the second charge do not appear to be adequate, but no submissions were directed to this aspect of the charge.

In these circumstances, the Tribunal has doubts whether the court martial could have found the appellant guilty of the second charge. Of more importance, the Tribunal has very grave doubts whether the court martial, by reason of its finding that the appellant was guilty of the first charge,

must have been satisfied beyond reasonable doubt of facts that prove the appellant was guilty of the second offence. Since the first charge was bad for duplicity, the appellant should not have been required to plead to it. The hearing of this charge, which was bad, constituted a material irregularity in the course of the proceedings before the court martial and so tainted the whole of the trial that it is not possible to be satisfied that the court martial by finding that the appellant was guilty of the first charge, must have been satisfied beyond reasonable doubt of facts that prove the appellant was guilty of the second charge. Accordingly, the Tribunal should not exercise the power conferred by s.26 of the Defence Force Discipline Act.

In the result, the Tribunal allows the appeal and quashes the conviction.