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IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. G 157 of 1982.
)
GENERAL DIVISION)

IN THE MATTER of an appeal against conviction by GLENNIS ROYDEN LAMPERD

AND IN THE MATTER of a case stated by the Courts-Martial Appeal Tribunal

AND IN THE MATTER of a transmission by the Attorney-General of a case stated to the Federal Court of Australia.

CORRIGENDA

Page 2, after Question 1(c)".....degree of negligence?"

insert:

"2. Whether the Judge Advocate should have told the Court-Martial that the act or omission relied upon would constitute negligence within the meaning of s.19 of the said Act only if there was a great falling short of the standard of care which a reasonable officer in the appellant's position would have exercised combined with a high risk that the stranding of the ship would follow from the breach?"

Julie Ward

JULIE WARD
Associate to the Chief Judge

CATCHWORDS

Defence Forces - Reference from Courts-Martial Appeal Tribunal - Degree of negligence required to support a conviction of negligent stranding - Whether degree similar to manslaughter - Context of disciplinary offences - Whether an intermediate degree of criminal negligence - Whether an additional element of blameworthiness required.

Courts-Martial Appeals Act 1955, ss.51 and 52.

Naval Defence Act 1910 (Cwth.) s.34.

Naval Discipline Act 1957 (Imp.) s.19(a), Part 1.

CASE STATED BY COURTS-MARTIAL APPEAL TRIBUNAL

No. G157 of 1982.

CORAM: Bowen C.J., Northrop, Lockhart, Ellicott and Fitzgerald JJ.

Sydney.

18 February, 1983.

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O R D E R

JUDGES MAKING ORDER: Bowen C.J., Northrop, Lockhart, Ellicott and Fitzgerald JJ.

WHERE MADE: Sydney.

DATE: 18 February, 1983.

THE COURT ORDERS THAT:

1. The two questions of law referred to this Court pursuant to a certificate of the Attorney-General of the Commonwealth under s.52(2) of the Courts-Martial Appeals Act 1955 be answered as follows:-

QUESTION 1: Whether the degree of negligence required to found a charge under s.19(a) of the Naval Discipline Act (1957) (Imp.) applicable to the Navy being other than a charge in respect of acting wilfully or with wilful neglect is:-

(a) the same degree of negligence as that required to found a charge of manslaughter; or

(b) that described as doing something which a reasonbly capable and careful person of the appellant's seniority and experience in the service would not have done or alternatively omitting to do something which a reasonably capable and careful person of the appellant's seniority and experience in the service would have done being an act the performance of which or an omission which in all the circumstances was blameworthy or culpable; or

(c) some other, and if so, what degree of negligence?

ANSWER: (a) No.

(b) No.

(c) That degree of negligence which can be described as - "doing something which in all the circumstances a reasonably capable and careful person of the appellant's seniority and experience in the service would not have done or alternatively omitting to do something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the service would have done".

QUESTION 2: Whether the Judge Advocate should have told the Court-Martial that the act or omission relied upon would constitute negligence within the meaning of s.19 of the said Act only if there was a great falling short of the standard of care which a reasonable officer in the appellant's position would have exercised combined with a high risk that the stranding of the ship would follow from the breach?

ANSWER: No.

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AND IN THE MATTER of a case stated by the Courts-Martial Appeal Tribunal

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CORAM: Bowen C.J., Northrop, Lockhart, Ellicott and Fitzgerald JJ.

REASONS FOR JUDGMENT

THE COURT: Two questions of law have been referred to this Court pursuant to aa certificate of the Attorney-General of the Commonwealth under sub-s.52(2) of the Courts-Martial Appeals Act 1955 that they are of exceptional public importance and that it is desirable in the public interest that they should be so referred. The questions are raised in a Case which was stated by the Courts-Martial Appeal Tribunal ("the Tribunal") after it gave a decision upholding an appeal by Commander Glennis Royden Lamperd against his conviction and sentence by a Court-Martial. The Tribunal was bound to state the case following a request by the Chief of Naval Staff to the Tribunal that it refer the questions of law to this Court (ss.51 and 52 of the Courts-Martial Appeals Act).

The two questions of law as stated in the Case are:-

1. Whether the degree of negligence required to found a charge under s.19(a) of the Naval Discipline Act 1957 (Imp.) applicable to the Navy, being other than a charge in respect of acting wilfully or with wilful neglect is:-

   (a) the same degree of negligence as that required to found a charge of manslaughter; or

   (b) that described as doing something which a reasonably capable and careful person of the appellant's (i.e. Commander Lamperd's) seniority and experience in the service would not have done or alternatively omitting to do something which a reasonably capable and careful person of the appellant's seniority and experience in the service would have done being an act the performance of which or an omission which in all the circumstances was blameworthy or culpable; or

   (c) some other, and if so what, degree of negligence?

The circumstances in which the questions of law arose may be stated briefly. In January 1981 Commander Lamperd was the Commanding Officer of Her Majesty's Australian Ship "Adelaide" ("the Ship") and subject to the Naval Discipline Act 1957 (Imp.) in its application to the Naval Forces of the Commonwealth by virtue of s.34 of the Naval Defence Act 1910 (Cwth.)

On 7 and 8 January 1981 the Ship was engaged in acoustic ranging trials in Carr Inlet near Seattle in the United States of America. At about 0233 local time on the morning of 8 January 1981 the Ship stranded on Fox Island on the north eastern shore of Carr Inlet.

Arising out of the events of 7 and 8 January a Court-Martial was duly convened to try Commander Lamperd on four

charges, three charges under s.7 and one charge under s.19(a) of the Naval Discipline Act. Only the charge under s.19 is directly relevant in the present proceedings as the questions of law stated make clear.

Section 19(a) reads as follows:-

> "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) .....
>
> 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".

The charge under s.19, as particularized, was as follows:-

> "On the eighth day of January 1981, he, Glennis Royden Lamperd, did by negligence cause Her Majesty's Australian Ship ADELAIDE to be stranded (Naval Discipline Act s.19(a)).
>
> PARTICULARS:
>
> 1. The accused failed to check the navigational plan of the Officer-of-the-Middle Watch for the safe conduct of the ship when the ship was conducting acoustic trials on the Carr Inlet Acoustic Range, and in particular, he failed to ensure that clearing ranges were drawn on the forward Bridge SPA-25 radar display;
>
> 2. The accused failed to ensure the setting of a watch appropriate to the ship's circumstances when the ship was conducting acoustic trials at night on the Carr Inlet Acoustic Range and, in particular, he failed to ensure that the following were closed up:
>
> (a) Special Sea Dutymen or any form thereof,
>
> (b) The Blind Pilotage Team or any modified version thereof;

3. The accused failed to ensure that the Navigation Officer was on the Bridge of the ship when the ship resumed high speed trials on the Carr Inlet Acoustic Range at about 0230 hours;

4. The accused failed to check that the alteration of course to starboard, which was ordered by the Officer-of-the-Watch, at about 0233 hours, did not place the ship in danger;

5. The accused directed the Officer-of-the-Watch to carry out a Williamson turn at about 0233 hours when, in all the circumstances, it was unsafe to carry out such a manoeuvre; and

6. The accused directed that the ship proceed at 25 knots prior to turning onto the course required to proceed up the Carr Inlet Acoustic Range, at about 0233 hours, a speed which was unnecessary and, in all the circumstances, excessive".

On 3 March 1981 the Court-Martial found Commander Lamperd guilty of the offences charged in all four charges. The Court-Martial ordered that Commander Lamperd be dismissed from the Ship.

Commander Lamperd appealed to the Tribunal against his conviction and sentence. On 30 October 1981 the Tribunal upheld the appeal, quashed the convictions of the Court-Martial and set aside the order dismissing Commander Lamperd from the Ship.

The Tribunal quashed the convictions on all charges on various grounds. We shall not trouble to refer to any grounds other than those relating directly to the two questions of law before us.

The Tribunal held that the direction by the Judge Advocate to the Court-Martial was inadequate on the question of negligence. The Judge Advocate instructed the Court-Martial in substantially the same form as that expressed in Question 1(b),

namely that, before Commander Lamperd could be convicted, it had to be satisfied not only that he had been negligent in that he failed to meet reasonable standards appropriate to an officer of his seniority and experience, but that he had departed from such standards to a degree which was "culpable or blameworthy". The Tribunal considered that the requisite degree of negligence was similar to that required to support a conviction for manslaughter. The Tribunal favoured a direction in the form contained in Question 2.

The relevant part of the Tribunal's reasons for decision is as follows:-

> "Negligence
>
> The appellant submitted that the direction in respect of negligence was inadequate. In directing the jury on the question of negligence the learned Judge Advocate told the court that they had to consider whether the negligent failure or performance of a duty was culpable or blameworthy. In doing so the Judge Advocate may have thought that he was following what was said by this Tribunal in Dean's Appeal 13 F.L.R. 247. We think, however, that Dean's Case is distinguishable in that it was concerned basically with a charge of neglect and not with a charge of negligence as such.
>
> In our opinion this direction was inadequate. The negligence alleged here constitutes an offence which may be punishable by imprisonment for up to two years. In those circumstances we think that the degree of negligence requisite to found these charges is the same as that required to support a charge of manslaughter - see R. v Shields (1981) 2 A. Crim. R. 237 and R. v Leskinen (1978) 36 F.L.R. 414 and the authorities therein cited. Consequently, in relation to the degree of negligence required to establish the charge, the court should have been told that the act or omission relied upon was the breach of the duty of care which a reasonable officer in the appellant's position would have exercised; that the act or omission would constitute negligence only if it merited punishment under the criminal law; and it would do so only if there was a great falling short of the standard of care

> combined with a high risk that the stranding of the ship would follow from the breach - cf. Shield's Case at p.244.
>
> The direction which in our opinion is the correct one, is substantially more favourable to the accused than the one which was given. Most negligence is culpable or blameworthy; and we do not think that to describe it in that fashion indicated sufficiently to the court the very high degree of negligence necessary to found a conviction on the first charge. Consequently we think this ground has been made out. This direction relates to the principal ingredient of the first charge. It occurred in combination with a somewhat unsatisfactory direction on a matter as basal as the onus of proof. In the circumstances we do not feel any confidence that the court would necessarily have convicted on the first charge if adequate directions had been given as to these two matters.....Consequently we are of the view that the first charge should be quashed".

Counsel for Commander Lamperd submitted that the word "negligence" in s.19(a) refers to a degree of negligence similar to that necessary for manslaughter at common law, that is, gross negligence, to choose one of the very many epithets which have been applied. A similar degree of negligence was necessary to breach s.19, it was argued, in light of the serious consequences of a conviction for this offence.

The policy underlying the high degree of negligence required in cases of manslaughter was briefly stated by Atkin L.J. in Andrews v Director of Public Prosecution [1937] A.C. 576 at p. 582 as follows:-

> "...manslaughter is a felony, and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence".

The same caution found expression in R. v Bateman (1925) 19 Cr. Appeal Reports 8 and Nydam v R. [1977] V.R. 430 at p. 445. A similarly high degree of negligence has been seen as necessary to support a conviction for negligent driving causing grievous bodily harm in Shield's Case [1981] V.R. 717 and R. v Leskinen (1978) 36 F.L.R. 414, and for some other statutory criminal offences involving negligence in the operation of motor vehicles; see e.g. Callaghan v R. (1952) 87 C.L.R. 115.

However, not all criminal offences dependent on negligence have been held to require the same high degree of negligence: see, e.g. Dabholkar v R. [1948] A.C. 221 (P.C.); Winticlich v Lenthall [1932] S.A.S.R. 61; and Neale v Watch [1932] S.A.S.R. 429.

It is clear from the cases referred to that there is no absolute rule that where negligence is the basic element of a statutory offence, the degree of negligence to be proved is that required to found a charge of manslaughter. It is a question of construing the statute in each case. In assessing the standard set by a particular provision, it will be appropriate to have regard to various considerations; for example, whether as in Callaghan's Case the provision is "in a criminal code dealing with major crimes involving grave moral guilt", and to the "nature and consequences" of the offence created (Dabholkar's Case).

The policy considerations underlying the high degree of negligence required for manslaughter do not warrant the like conclusion in respect of the negligence necessary to support a

charge against s.19 and the statutory context is to the contrary. Section 19 is not confined to negligence causing loss of life or indeed even to negligence producing injury or damage. It extends to merely "hazarding" a vessel by negligence.

Further, Part 1 of the Act, in which s.19 is to be found, contains an extensive and detailed catalogue of offences which may be committed by members of the Royal Australian Navy and of the punishments which such offences may attract. The provisions of Part 1 impose a code of conduct for times of peace and war in respect of both officers and sailors and are plainly concerned with discipline as well as criminality. The offences covered range from those dealt with under such sub-headings as "Misconduct in action and assistance to enemy" and "Mutiny" to "Fighting and quarrelling" (s.13) "Malingering" (s.27), "Drunkenness" (s.28), and negligence which is the subject not only of ss.7 and 19 but also s.30 (waste of service property) and s.31 (pawning decorations). Although, for some offences, a greater punishment is permissible, nowhere in Part 1 of the Act is the maximum punishment in respect of any offence fixed below that for negligence which, by paragraph 43(1)(d), is "imprisonment for a term not exceeding two years". Further, the punishment attracted by the offence of negligence may be as little as a reprimand. It appears incompatible with the high standards of performance required of naval officers that only gross departues from those standards should constitute negligence in the statutory sense and it seems incongruous to suggest that gross negligence should be necessary before conviction of an

offence the punishment for which may be merely a reprimand. On the other hand, the seriousness of a charge, e.g. of negligence under s.19, is recognized by the application of the criminal onus of proof beyond reasonable doubt and provisions such as s.58 of the Act.

Part 1 of the Act cannot be considered to be confined to conduct which involves moral guilt so grave as to be characterized as criminal. There is no good reason for importing into the provisions which make negligence an offence a requirement that such negligence be "gross" or otherwise culpable to a degree sufficient to attract criminal responsibility at common law or, indeed blameworthy to any higher degree than is necessarily involved in the particular negligent conduct. On the contrary, it seems clear that the degree of deviation from the duty of care, whether or not that duty be of a high standard such as that required of a ship's commander, is not relevant to the question whether an offence has been committed but is one of the matters relevant to the punishment which is appropriate to meet that offence.

Although we are not persuaded that the High Court accepted in Callaghan's Case that there is an intermediate degree of negligence which is appropriate for some criminal offences, there is authority that that is so: see the judgment of Atkin L.J. in Andrew's Case, supra, at p. 583 and Dabholkar's Case, supra, at pp.224-225.

However, we are unable to accept that what is required to sustain a conviction under s.19 is appropriately described as the degree of negligence necessary for civil liability with the additional requirement that there be an element of culpability or blameworthiness. Any attempt to specify some sort of "half-way house" standard of negligence for the operation of s.19 would, in our opinion, do no more than introduce imprecision and uncertainty into an area of the law which is already sufficiently confused. In the factual context in which s.19 is operative, a want of due care seems to us inevitably blameworthy. The better approach is to seek to define the standard of care required, departure from which will be negligent, rather than to nominate a degree of departure which is necessary to make the negligence an offence.

In Archbold Criminal Pleadings, Evidence and Practice, 40th Ed. paragraph 1443, the following definition of negligence in indictable offences apart from manslaughter, is set out:-

> "A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise".

No more is necessary for the purpose of a direction in proceedings for a charge against s.19 than to give "negligence" a meaning consistent with its ordinary usage in everyday life expressed in terms appropriate to its service context. Emphasis to the special context is, of course, appropriate. The duty of care of a member of the armed forces may be influenced by special circumstances and cannot always simply be defined by reference to

the duty owed to one's neighbour as has been appropriate for ordinary civil and criminal purposes: cf. Groves v The Commonwealth (1982) A.L.J.R. 570.

We would favour a direction as to negligence in s.19 in the following terms:-

> "That degree of negligence which can be described as doing something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would not have done or alternatively omitting to do something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would have done".

To attribute such a meaning to "negligence" in s.19 allows "negligence" to be interpreted consistently throughout the code of offences in the Naval Discipline Act. In our view, it accords with the policy underlying the section. It may be noted that it accords generally with the statements in the British and Australian Manuals of Naval Law.

We would answer the questions stated:-

1. (a) No.

   (b) No.

   (c) That degree of negligence which can be described as - "doing something which in all the circumstances a reasonably capable and

careful person of the accused's seniority and experience in the Service would not have done alternatively omitting to do something which in all the circumstances a reasonably capable and careful person of the accused's seniority and experience in the Service would have done.

2. No.

I certify that this and the eleven preceding pages are a true copy of the reasons for Judgment herein of the Court

J Ward
Associate

Dated 18 February 1983