Defence Force Discipline Appeal Tribunal

Kantibye v Chief of Army [2022] ADFDAT 2

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| Appeal from: | Defence Force Magistrate |
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| File number: | DFDAT 2 of 2022 |
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| Judgment of: | **LOGAN J (PRESIDENT), BRERETON JA (DEPUTY PRESIDENT) AND PERRY J (MEMBER)** |
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| Date of judgment: | 22 July 2022 |
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| Cases cited: | *Liberato v The Queen* (1985) 159 CLR 507 |
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| Number of paragraphs: | 1 |
|  |  |
| Date of hearing: | 22 July 2022 |
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| Counsel for the Appellant: | Mr J Nottle |
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| Solicitor for the Appellant: | David Healey Solicitors |
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| Counsel for the Respondent: | Mr A Johnson |
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| Solicitor for the Respondent: | Office of the Director of Military Prosecutions |

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| **Table of Corrections** |  |
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| 11 August 2022 | In appeal from field on the cover page the words “Defence Force Magistrate” have been inserted in the place of “General Court Martial” |

ORDERS

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|  | | DFDAT 2 of 2022 |
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| BETWEEN: | SHADI ABDU KANTIBYE  Appellant | |
| AND: | CHIEF OF ARMY  Respondent | |

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| order made by: | LOGAN j, BRERETON jA AND PERRY J |
| DATE OF ORDER: | 22 JULY 2022 |

THE COURT ORDERS THAT:

1. There be no publication of any matters that identify or are likely to identify the complainant.
2. The appellant be granted the requisite extension of time within which to appeal and the appeal be heard instanter.
3. Insofar as the same may be necessary, having regard to the grounds pleaded in the notice of appeal, the appellant be granted leave to appeal.
4. The appeal be allowed and the conviction of the appellant by a Defence Force Magistrate on 10 December 2021 be quashed.
5. There be a new trial of the appellant in respect of the service offence charged.

REASONS FOR DECISION

(REVISED FROM TRANSCRIPT)

THE TRIBUNAL:

1. For reasons which will be elaborated and published in due course, and in circumstances where the appellant no longer presses the grounds that the conviction was unreasonable or unsafe and unsatisfactory, the Tribunal is of the view that the Defence Force Magistrate erred in the application of the *Liberato v The Queen* (1985) 159 CLR 507 direction in that he did not address the second limb and did not disbelieve the accused, as distinct from finding his evidence unconvincing, before proceeding to the third limb. The Tribunal is, therefore, satisfied that the appeal must succeed, at least on that ground and that there ought to be a new trial. In so doing, it records that this does not reflect the slightest on the credibility of the complainant.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justices Logan, Brereton and Perry. |

Associate:

Dated: 8 August 2022