DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Yewsang v Chief of Army [2013] ADFDAT 1

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| Citation: | Yewsang v Chief of Army [2013] ADFDAT 1 |
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| Appeal from: | Defence Force Magistrate |
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| Parties: | **ASHLEY YEWSANG v CHIEF OF ARMY** |
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| File number: |  |
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| Judges: |  |
|  |  |
| Date of judgment: | 21 March 2013 |
|  |  |
| Catchwords: | **DEFENCE** – Convictions relating to claims for reunion travel – whether Defence Force Magistrate incorrectly found that witness not confronted with certain allegation directly in cross examination – whether inadequate reasons given for accepting evidence-in-chief in preference to evidence given in cross examination – whether Defence Force Magistrate rejected evidence of witness on the basis of ill-founded assumption – whether inadequate reasons given for adverse credit finding and finding of dishonesty – whether conviction unreasonable, unsafe or unsatisfactory  |
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| Legislation: | *Criminal Code 1995* (Cth) – s 134.2*Defence Act 1903* (Cth) – s 58B*Defence Force Discipline Act 1982* (Cth) – s 61*Defence Force Discipline Appeals Act 1955* (Cth) – ss 20, 23 *Evidence Act 1995* (Cth) – s 161 |
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| Cases cited: | *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* (1983) 70 FLR 447 – cited *Browne v Dunn* (1893) 6 R 67 – considered, applied *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 – cited *King v Chief of Army* [2012] ADFDAT 4 – cited *M v The Queen* (1994) 181 CLR 487 – considered, followed *MFA v The Queen* (2002) 213 CLR 606 – cited, considered*Mobasa Pty Ltd v Nikic* (1987) 47 NTR 48 – cited *MWJ v R* (2006) 222 ALR 436 – considered, applied *Pettitt v Dunkley* [1971] 1 NSWLR 376 – considered, followed*Reid v Kerr* (1974) 9 SASR 367 – cited *SKA v R* (2011) 243 CLR 400 – considered  |
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| Date of hearing: | 6 & 7 February 2013 |
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| Place: |   |
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| Category: | Catchwords |
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| Number of paragraphs: | 77 |
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| Counsel for the Appellant: | GPCAPT C Ward & LTCOL H Dempsey |
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| Solicitor for the Appellant: | Director of Military Prosecutions |
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| Counsel for the Respondent: | LTCOL D McLure |
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| Solicitor for the Respondent: | Middletons |

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| DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL |  |
| on appeal from defence force magistrate |  |
|  | DFDAT 3 of 2012 |

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| BETWEEN: | ASHLEY YEWSANGAppellant |
| AND: | CHIEF OF ARMYRespondent |

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| JUDGES: | TRACEY, WHITE AND LOGAN JJ |
| DATE OF ORDER: | 21 MARCH 2013 |
| WHERE MADE: | MELBOURNE (HEARD IN BRISBANE)  |

THE TRIBUNAL ORDERS THAT:

1. The appellant be granted leave to the extent necessary to enable him to pursue all grounds appearing in his notice of appeal.
2. The appeal be allowed in part.
3. The appellant’s conviction on Charge 1 be quashed.
4. The appeal otherwise be dismissed.

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| BETWEEN: | ASHLEY YEWSANGAppellant |
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| PLACE: |  (HEARD IN BRISBANE) |

**REASONS FOR JUDGMENT**

The appellant, Sergeant Ashley Yewsang, appeals from two convictions recorded against him by a Defence Force Magistrate (“DFM”). Sergeant Yewsang had been presented on seven charges but he was found not guilty of four of them and the remaining charge was not proceeded with because it was an alternative charge to one of the charges on which he was convicted.

The charges related to claims which Sergeant Yewsang had made, in the course of 2011, for reunion travel. He was posted to Holsworthy in New South Wales. His wife and two children lived in Brisbane. He had an entitlement to be paid for the costs incurred in travelling between Holsworthy and Brisbane on up to six occasions each year. In order to obtain the payments it was necessary for Sergeant Yewsang to submit a claim. The claim was made on a prescribed form – PYO82 Travel Requisition/Order for Reunion Travel. Sergeant Yewsang completed the form on 10 October 2011. He left blank those parts of the form which related to travel by air. He completed a section headed “Own Means” which was to be completed if the applicant wished “to apply for permission to use a private motor vehicle.” Sergeant Yewsang provided the vehicle registration number of his car. He proposed that he would depart from Sydney at 0600 hours on 21 October 2011 and arrive in Brisbane at 1800 hours that night. He proposed that the return trip would commence at 0600 hours on 23 October 2011 and be completed by 1800 hours that night.

Sergeant Yewsang’s application was approved. On 13 October 2011 he was sent an e-mail which informed him that approval had been granted and that he would be paid $702.37 to cover the cost of his travel.

On 13 October 2011, he booked a return air fare from Sydney to Brisbane at a cost of $350.00. The evidence did not disclose whether the booking had been made before or after Sergeant Yewsang had received notification that his request had been approved and that payment would be made. Sergeant Yewsang travelled from Sydney to Brisbane on 20 October 2011 on a Qantas flight and returned on another Qantas flight on 23 October 2011. He did not complete an after travel certification in relation to this claim. It was not disputed that Sergeant Yewsang would not have been entitled to have been paid $702.37 had he advised that he proposed to travel by air. His only entitlement would have been to the costs of the air fare and cab and rail related fares to and from airports.

It was this conduct which led to the two convictions. The DFM found Sergeant Yewsang guilty of an offence against s 134.2(1) of the *Criminal Code 1995* (Cth) (“the Criminal Code”) and s 61(3) of the *Defence Force Discipline Act 1982* (Cth) (“the DFDA”) in that, by deception, he dishonestly obtained a financial advantage from the Commonwealth. He was also convicted of an offence under s 56(1) of the DFDA of making a false statement in relation to an application for a benefit.

The DFM imposed the same punishments in respect of each conviction: Sergeant Yewsang was reduced in rank to Corporal and severely reprimanded.

Sergeant Yewsang appeals from these convictions, and to the extent necessary, seeks leave to do so. There are six grounds of appeal. Five allege errors of law on the part of the DFM and the sixth contends that the conviction was unreasonable, not supported by the evidence or is unsafe or unsatisfactory.

Each of the grounds related to what counsel for Sergeant Yewsang described as the “core issues” which had been contested at trial. One of those core issues arose in relation to both charges on which Sergeant Yewsang was convicted. It was whether, at the time at which he signed the requisition form, he knowingly or recklessly made a false statement that he intended to travel in his own car. The other only arose in relation to the charge of obtaining financial advantage by deception. It was whether Sergeant Yewsang’s conduct was dishonest according to the standards of ordinary people and whether he knew this.

Sergeant Yewsang gave evidence in his defence to the effect that, at the time at which he completed the form, he had intended to travel by car. He had subsequently changed his mind when he realised that air travel would give him much more time with his family. He also gave evidence that he was unaware of the details of payments made to his account and that he proceeded on the assumption that he was entitled to use any allowance which was paid to him as a result of a successful application in anyway that he chose.

Before turning to the grounds it will be convenient to deal with one issue which is common to three of them. Three of the five “error of law” grounds allege that the DFM failed to provide adequate reasons for some of his important findings. The respondent denies that any such errors have occurred but concedes that, were the Tribunal to decide that any or all of these grounds had substance, such an error would warrant a quashing of the convictions.

This concession is properly made. There is a common law obligation which falls on all judicial officers to provide reasons for their decisions which contain sufficient detail to enable any court which is called on to hear an appeal from the decisions to understand how the judicial officer reached the conclusion that he or she did. The principle was expounded by Asprey JA in *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382 at follows:

“In my respectful opinion the authorities to I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved then, in the absence of some strong compelling reason, the case is such that a judge’s findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law.”

See also: *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 at [18]; *Mobasa Pty Ltd v Nikic* (1987) 47 NTR 48.

In our view the same obligation falls on DFM’s when exercising jurisdiction under the DFDA. Their function is relevantly indistinguishable from that of a Magistrate or a trial judge sitting without a jury in a criminal proceeding.

Although the charges on which Sergeant Yewsang was convicted related to events which had occurred in October 2011, he had made a number of reunion visits to Brisbane earlier in the year and, on one occasion, his wife and children had travelled from Brisbane to Sydney to spend time with him. Sergeant Yewsang asserted that his experience in dealing with these earlier arrangements had led him to the view that he had an entitlement to the $702.37 which he had been paid in October 2011. It is, therefore, necessary to examine some of the detail of the arrangements made for Sergeant Yewsang’s earlier travel and some of the provisions of the relevant Defence Determinations under which his entitlement to reunion travel arose.

# DEFENCE DETERMINATION 2005/15

The entitlement of service members to undertake reunion travel was provided for in Defence Determination 2005/15 as subsequently amended by Defence Determination 2008/17 (“the Determination”). These determinations were made pursuant to s 58B of the *Defence Act 1903* (Cth). The Determination provided that the Chief of the Defence Force could approve a written application for reunion travel at Commonwealth expense from a member who, by reason of his duties, was separated from his family: see paragraph 9.3.25. By paragraph 9.3.26 it was provided that:

“1. An eligible member may apply for a maximum of six reunion visits a year …

2. For each reunion visit, the Commonwealth will pay no more than the cost of a return economy class air fare from the member’s place of duty to their dependants’ home location in Australia.

3. For reunion purposes, the travel assistance is to be provided on a ‘door-to-door’ basis.

4. If a member travels (or has their dependants travel) by a means of transport other than air, the normal departmental liability is used to work out the cost that the Commonwealth would otherwise have paid for the airfare.”

The Determination provided that a service member undertaking travel at Commonwealth expense was “entitled to travel by the most economical means of public transport available to the Commonwealth”: paragraph 9.1.2. It was, therefore, necessary for a comparison to be made between the costs of various forms of public transport which might be available. Where air travel was an option the relevant cost was to be “the lowest practical fare” available for the day of travel: see paragraph 9.1.3AA. If the service member applied for and was approved to travel “by their own means” the Commonwealth was to pay the lesser of two amounts: “the normal departmental liability” or the actual cost of travel: see paragraph 9.1.3A. The “normal departmental liability” was “what the Commonwealth would pay for a journey made by a member and any dependants authorised to travel to a place at Commonwealth expense” including the costs of travel by the most economical means and transfers to and from airports: see paragraph 9.1.4.

The written applications for reunion travel were to be made on the form PYO82.

# THE EARLIER APPLICATIONS

On 17 February 2011, Sergeant Yewsang lodged a form PYO82. He sought approval of reunion travel from Holsworthy to Brisbane between 26 March and 16 April 2011. He nominated “own means” transport in his private motor vehicle. His application was approved and he undertook the travel using his own motor vehicle. After he returned to Holsworthy he did not complete the after travel certification part of the form. No charges were laid in respect of this period of leave.

On 9 March 2011, Sergeant Yewsang completed a form PYO82 in which he applied for reunion leave between 22 April and 1 May 2011. He completed the “own means” section of the form. The leave was approved. A vehicle allowance calculation form was raised. It fixed the cost of a return journey between Holsworthy and Brisbane by private vehicle at $1,375.98. It also calculated the cost of an alternative means of travel. That cost was $702.37 made up of a Sydney to Brisbane return airfare of $606.82 and additional amounts for rail and cab fares to and from the airports. The amount of $702.37 was identified, on the form as the “normal departmental liability” and was paid into Sergeant Yewsang’s bank account. Sergeant Yewsang did not complete the after travel certification section of the form after he returned to Holsworthy. Sergeant Yewsang made the return journey from Sydney to Brisbane by air. This claim led to the laying of Charges 4 and 5 of which Sergeant Yewsang was acquitted.

On 6 July 2011, Sergeant Yewsang signed another PYO82 form. In that form he sought reverse reunion travel for his wife and two children to come from Brisbane to Sydney. The application was approved. The travel was to occur between 30 June and 5 July 2011. A vehicle allowance calculation form was raised which calculated the cost of return air travel together with airport transfer costs at $700.09. Again the cost of air travel was fixed at $606.82. The $700.09 was credited to Sergeant Yewsang’s account. Mrs Yewsang made the travel bookings and paid for the tickets for herself and her children. Sergeant Yewsang did not complete the after travel certification after his family had returned to Brisbane. No charges were laid in respect of this reverse reunion travel claim.

On 10 August 2011, Sergeant Yewsang completed another PYO82 form. He sought approval for travel between 15 and 19 September 2011. He completed the “own means” section of the form advising that he sought permission to travel using his own private vehicle. His application was approved. A vehicle allowance calculation form was raised. The cost of private vehicle use was fixed at $1,351.84. The cost of return air travel, together with the cost of travel to and from the airports was calculated at $702.37. Again, the cost of the airfare was fixed at $606.82. The amount of $702.37 was credited to Sergeant Yewsang’s account. Sergeant Yewsang made the return journey by air. Though the evidence of both Sergeant Yewsang and his wife on this subject was imprecise, Sergeant’s evidence as to his belief that his wife made the bookings and paid for the tickets accorded with his wife’s recollection that she had definitely booked one and possibly another of the return air tickets. On his return to Holsworthy Sergeant Yewsang failed to complete the after travel certification section of the form. This claim was the subject of Charges 6 and 7 of which he was acquitted.

# EVIDENCE OF WO1 ROBERTS (GROUNDS 2.1 AND 2.2)

One issue which assumed importance at the trial was how Sergeant Yewsang’s conduct had become known to his superiors. This was said to have occurred when he was planning further travel later in 2011. On 1 December 2011, Sergeant Yewsang had a conversation with his Wing Sergeant Major, WO1 Lee Roberts. On 2 December 2011, WO1 Roberts made a statement which recounted the conversation. He said that:

“SGT Yewsang was speaking to me about whether the CO would approve four days short leave as he wanted to add it on to his reunion leave that commenced on 24/12/11. That would extend his leave to 7 January ’12. This short leave was to take his leave up to the commencement of long service leave and he would be returning to work sometime in February 2012. During this conversation I said to him something about booking airline flights, to which SGT Yewsang replied that he completes his PYO82 to travel home by private motor vehicle to Queensland, collects his money allocated for the vehicle mileage and then books air travel in lieu. He mentioned that he had done this for his other instances of travel this year. I did not question SGT Yewsang any further, but reported the matter to my command.”

In his evidence-in-chief at trial WO1 Roberts said that the conversation had occurred on the afternoon of 1 December 2011 in the unit instructor’s hut. He had been speaking with another member of staff. His evidence continued:

“… I proceeded to go to the investigation section which passes by the area where SGT Yewsang works. SGT Yewsang then asked me as I walked past if I knew the – if the CO would approve an extension to his leave over Christmas. I said that the member would have to – SGT Yewsang would have to apply for an extension or for an extension of short leave through the normal system, through the chain of command. SGT Yewsang then asked me if I knew when he would be paid the money for his Christmas leave for his travel. I said, ‘I don’t know. Why is that?’ SGT Yewsang said to me to (sic) words to the effect that he was going to pay for his air tickets to fly home to Brisbane. I said, ‘What do you mean by fly home to Brisbane?’ and he stated to me that he took the money he received for reunion travel to purchase tickets to fly home.”

WO1 Roberts said that he had asked Sergeant Yewsang about flying home because he had earlier seen Sergeant Yewsang’s application form for his reunion travel in which he had declared that he was proposing to drive home in his private motor vehicle.

Under cross-examination WO1 Roberts was asked a series of questions about the differences between his evidence-in-chief and what he had said in his earlier statement. He accepted that he had said nothing in his statement about Sergeant Yewsang asking him when his (Sergeant Yewsang’s) benefit was going to be paid or that he (WO1 Roberts) had responded that he didn’t know and then asked “Why is that?”. Nor was there any reference in the statement to Sergeant Yewsang having responded to the question by saying: “Because I am going to pay for my air tickets and fly home to Brisbane.” WO1 Roberts also accepted that he had made no mention in his original statement of having seen Sergeant Yewsang’s application form prior to his conversation with Sergeant Yewsang.

The following exchange then occurred:

“DEFENDING OFFICER – Given the differences between what you’ve said in your evidence today and what’s set out in your statement of 2 December 2011, would you accept that your statement is more likely to be correct?

ANSWER – Yes, Sir, that’s the statement that was recorded closer to the date of the incident.

DEFENDING OFFICER – But to the extent that are (sic) differences between the evidence you’ve given today and what’s set out in your statement, you would prefer what is set out in your statement. Is that correct?

ANSWER – Yes, it’s closer to what’s happened at the incident, sir.

DEFENDING OFFICER – Is it the case that the best recollection you can give of the conversation you say you had with SGT Yewsang on 1 December 2011 is what is set out in paragraphs 7, 8 and 9 of your statement of 2 December 2011?

ANSWER – Sir, yes.”

The defending officer then invited WO1 Roberts to read out paragraphs 7, 8 and 9 of his statement. WO1 Roberts read out the passage which is quoted above at [21]. The defending officer then moved on to another matter.

Sergeant Yewsang made a number of complaints about the way in which the DFM had dealt with these parts of WO1 Roberts’ evidence. The DFM had quoted the relevant passages from WO1 Roberts’ original statement and continued:

“The defending officer stressed the unlikelyhood of SGT Yewsang volunteering to a superior his method of claiming the reunion travel if he thought that what he was doing was wrong. I have given this submission careful consideration. I am of the view that the inferences to be drawn from this conversation depend to a considerable extent on how it came about and whether the admissions made by SGT Yewsang were deliberate or inadvertent.”

The DFM then summarised the evidence in chief given by WO1 Roberts and continued:

“If accepted, this evidence suggests that SGT Yewsang was awaiting notification that his travel allowance had been processed which can be contrasted with his evidence that he had no knowledge of such payments. Furthermore, it presents a credible way in which the subject arose. WO1 Robers would naturally be perplexed if having seen SGT Yewsang’s PYO82 nominating own means travel by private vehicle, SGT Yewsang was awaiting payment so he could fly home to Brisbane.

Having already told WO1 Roberts that he needed the travel allowance to purchase air tickets to fly home, it was not much of a step when questioned by a superior to add that he used money from reunion travel to fly home. In my assessment, the admission made by SGT Yewsang was inadvertent rather than deliberate. But once he said that he needed the money to pay for airfares his situation was plain whether or not he added the words that he used the money from reunion travel.

I have taken into account the cross-examination of WO1 Roberts in which he admitted that this testimony did not appear in his statement. However, he was not challenged that these words were never said. If it was to be submitted that his testimony was either false or wrong, it needed to be put directly to him in cross-examination. I accept the evidence of WO1 Roberts which I found to be truthful and reliable.”

Sergeant Yewsang complained (Grounds 2.1 and 2.2) that the DFM was wrong in holding that WO1 Roberts had not been confronted directly in cross-examination with the allegation that his evidence-in-chief had been false or wrong and that the words were never spoken. Sergeant Yewsang further complained that the DFM had failed to give adequate reasons for accepting WO1 Roberts’ evidence-in-chief in preference to the evidence which he had given under cross-examination.

In our view the defending officer did all that was required of him in dealing with the important differences between the two accounts which had been given by WO1 Roberts. Once he had obtained concessions from WO1 Roberts that his recollection of the conversation was more accurate on 2 December 2011 than it was at trial, that he would prefer the evidence given in the statement to the evidence given in evidence-in-chief and that WO1 Roberts’ ‘best recollection’ of the conversation was that contained in the statement, it was not necessary for the defending officer to confront WO1 Roberts with the bald allegation that his evidence-in-chief had been false.

We do not, however, consider that the DFM gave inadequate reasons for preferring the evidence-in-chief of WO1 Roberts over what appeared in the statement. Although the reasons were shortly stated, they were sufficient to enable us to understand the DFM’s process of reasoning and to detect what we, with respect, consider to have been the error which has led us to uphold Ground 2.1. We would, therefore, dismiss Ground 2.2.

# FINDING ABOUT SERGEANT YEWSANG’S INTENTION (GROUND 2.3)

As already noted, Sergeant Yewsang made the relevant claim for reunion travel to Brisbane on 10 October 2011. On the afternoon of 13 October 2011, a customer service officer from Defence Support sent an e-mail to Sergeant Yewsang to which was attached his “Travel Itinerary.” The attachment provided certain details of Sergeant Yewsang’s travel arrangements. One of them was that the “normal department liability” for his travel had been costed at $702.37. There were agreed facts that the sum of $702.37 was subsequently paid to Sergeant Yewsang and that, on 13 October 2011, Sergeant Yewsang had booked return Qantas flights from Sydney to Brisbane at a cost to him of $350.00.

During cross-examination Sergeant Yewsang was asked a series of questions which appeared to be designed to elicit an admission that, at the time he made the flight bookings, he was aware of the amount that he was to be paid in respect of his trip to Brisbane. He replied that, at the time he made his booking, he did not know whether the allowance would or would not cover the cost of the return airfare. He did accept that he had a general understanding that he would be paid an amount equal to the cheapest cost that the Defence department would incur were he to travel by air.

At no point during his cross-examination was Sergeant Yewsang asked whether he had seen the e-mail and attachment on 13 October 2011. Nor was he asked whether he had ever subsequently seen these documents.

The DFM recorded that the e-mail had been sent on 13 October 2011 and that it had attached to it a document which advised that Sergeant Yewsang would be paid $702.37. He continued:

“That day – the evidence does not show whether it was before or after this e-mail was sent – the accused booked a return Qantas flight to Brisbane for the period 20-23 October for a total cost of $350.”

Shortly afterwards the DFM said:

“In evidence-in-chief the accused stated that he changed his mind about driving after realising that it was his birthday that weekend and that for such a short period it was better to make the most of it by flying rather than driving. In evidence-in-chief he was reminded that it was an agreed fact that he had paid $350 for the airfare. The accused said he had no understanding of how much he would be paid by the Commonwealth for the trip. He said, ‘I’m not familiar with how much I was paid for previous trips. It didn’t occur to me that the allowance I would be paid would be more than I paid for the flights.’ *I repeat he was sent an e-mail on 13 October informing him of how much he would be paid for this particular trip*.” (Emphasis added).

The DFM did not accept this evidence. He explained his reasons as follows:

“After completing two previous travel requisitions where he had nominated own means of travel and had been paid accordingly, he nevertheless travelled by plane, to then put in a request for a three-day journey to Brisbane, two days of which would be spent on the road, forgetting that the day in between was his birthday, and then to book return flights at half the cost of his allowance three days later, *being the same day he was notified of his travel allowances* leads me to reject his evidence and to conclude beyond reasonable doubt that he had no intention of using own means for this journey.” (Emphasis added).

Sergeant Yewsang submitted that the DFM had failed to have regard to the rule in *Browne v Dunn* (1893) 6 R 67 when finding that he had been made aware, by the attachment to the e-mail, of the amount of travel allowance he was to be paid at the time at which he made the flight bookings. This finding had formed part of the reasoning which led the DFM to conclude that Sergeant Yewsang had no intention of using his own motor car to travel to Brisbane at the time at which he made his application on 10 October 2011.

The substance of the rule of practice, known as the rule in *Browne v Dunn*, was formulated in *MWJ v R* (2006) 222 ALR 436 at 448, as:

“essentially that a party is obliged to give appropriate notice to the other party, and any of that person’s witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party’s or a witness’ credit.”

This rule applies to hearings before DFM’s: see *King v Chief of Army* [2012] ADFDAT 4 at [48]-[49].

The rule is essentially one of fairness: see, for example, *Reid v Kerr* (1974) 9 SASR 367 at 373-4. It is intended to prevent one party from inviting the tribunal of fact to make findings which are prejudicial to the other party without that other party being provided with the opportunity of dealing with the allegations. In such cases the trier of fact will decline to make the adverse findings sought. The policy of fairness which underpins the rule also operates to prevent the trier of fact from making findings which are adverse to one party, even when not invited to do so, if the party has not had the opportunity to deny or otherwise respond to the allegations.

In our view, fairness required that, if the prosecutor was proposing to invite the DFM to find that Sergeant Yewsang had received and read the 13 October 2011 e-mail and its attachment and, in doing so became aware of the amount which the Commonwealth was proposing to pay him, before he made his air travel bookings, those matters should have been put to him in cross-examination. The prosecutor did not raise these matters with Sergeant Yewsang and, fairly, did not subsequently invite the DFM to find that this is what had occurred.

Though the 13 October 2011 email was in evidence, there was no statutory presumption that it had been received and read by Sergeant Yewsang. Though not mentioned by the DFM, the effect of s 161 of the *Evidence Act 1995* (Cth) was that, at most, that email, as an “electronic communication”, had been:

* + - 1. sent by a customer service officer from Defence Support at 14:48 on 13 October 2011; and
			2. received at Sergeant Yewsang’s email account at 14:48 that day.

Sergeant Yewsang argued that the DFM, nonetheless, proceeded to make a material and adverse finding that Sergeant Yewsang had received and read the e-mail and attachment before he had made the flight bookings.

The DFM did not, in terms, make such findings. He did, however, identify the fact that Sergeant Yewsang had made the flight bookings on “the same day he was notified of his travel allowances” as one of the factors that led to his rejecting Sergeant Yewsang’s evidence that he had intended to travel by private vehicle when he made his application on 10 October 2011 and only subsequently changed his mind. This could not have been a relevant consideration unless it was founded on the assumption that Sergeant Yewsang received and read the documents.

It was, however, by no means the only reason which led to the DFM rejecting Sergeant Yewsang’s evidence about his intention when he signed the application on 10 October 2011. Had it been the only reason, this ground would have had stronger prospects of success: see *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* (1983) 70 FLR 447 at 472-3. A failure to comply with the rule in *Browne v Dunn* does not, inevitably, lead to the conclusion that a resulting conviction cannot stand. As the DFM’s reasons make clear, there were other factors, such as the inherent improbability that Sergeant Yewsang would have overlooked the fact that travel time by motor vehicle would have taken up two of three days of his proposed leave period, which led the DFM to make his adverse finding about Sergeant Yewsang’s state of mind when he completed the application form on 10 October 2011. It will, therefore, be necessary to examine the consequences of making adverse findings in the absence of relevant cross-examination, having regard to the nature and course of the proceedings and the evidence as a whole: see *MWJ v The Queen* at 441; *Allied Pastoral* at 472-3.

For this reason it will be convenient to return to this issue in the course of dealing with Ground 2.6.

# INADEQUATE REASONS FOR ADVERSE CREDIT FINDING (GROUND 2.4)

The DFM’s reasons contain a single paragraph reflecting adversely on Sergeant Yewsang’s credibility. It appears between the sections which deal with WO1 Roberts’ evidence and the passage quoted above at [36]. The paragraph reads:

“My assessment of the credibility of the accused is that he was remarkably evasive and vague. He paused over questions that should have been easy to answer. He was frequently unable to recall or was unsure of matters, and I am not referring to details of his past travel movements which would be easily forgotten. In short, he made a singularly unfavourable impression upon me.”

Sergeant Yewsang complained that this adverse finding relating to his credit failed adequately to expose the DFM’s reasons for the opinion which he expressed. He objected that the DFM had failed to identify any instance in which he had been evasive in cross‑examination or given “vague” evidence. No instances of the appellant being unable to recall particular matters were cited by the DFM.

Although the DFM did not cite examples of Sergeant Yewsang being evasive or vague in his response to questions asked of him in cross-examination, a reading of the transcript provides many examples which could have been cited. Sergeant Yewsang was, for instance, extremely vague about what had transpired when he had consulted a staff member at the customer service centre about the details of his claim and his entitlements.

The DFM did, albeit shortly, explain his reasons for forming an adverse view of Sergeant Yewsang’s credibility. His failure to cite examples to support his general statements does not render his reasons on this issue, inadequate.

This ground must fail.

# INADEQUATE REASONS FOR FINDING OF DISHONESTY (GROUND 2.5)

The appellant argued that the DFM had given no or no adequate reasons for his conclusion that Sergeant Yewsang knew that his conduct which was the subject of Charge 1 was dishonest according to the standards of ordinary people.

It will be convenient to deal with this ground in conjunction with Ground 2.6 to which we now turn.

# CONVICTION UNREASONABLE, UNSAFE OR UNSATISFACTORY (GROUND 2.6)

Sergeant Yewsang submitted that his conviction was unreasonable or that it could not be supported having regard to the evidence and/or was unsafe or unsatisfactory.

Although expressed as a single ground, it is, in fact, an amalgam of the grounds provided for in s 23(1)(a) and (d) of the *Defence Force Discipline Appeals Act 1955* (Cth) (“the DFDAA”). The multiple grounds, as there expressed, are:

“(1)(a) that the conviction … is unreasonable, or cannot be supported, having regard to the evidence;

…

(d) that, in all the circumstances of the case, the conviction … is unsafe or unsatisfactory.”

By s 20(1) of the DFDAA leave is required to pursue these grounds. We considered that such leave should be granted.

The grounds are related. The words and phrases “unreasonable”, “cannot be supported, having regard to the evidence” and “unsafe or unsatisfactory” have all at times been equated: see *MFA v The Queen* (2002) 213 CLR 606 at 623-4 (McHugh, Gummow and Kirby JJ).

In *MFA* Gleeson CJ, Hayne and Callinan JJ said (at 614-5) that:

“Where it is argued that the verdict of a jury is unreasonable, or cannot be supported, having regard to the evidence, the test to be applied is that stated by Mason CJ, Deane, Dawson and Toohey JJ in their joint judgment in *M v The Queen*. … Speaking of cases where what is in question is whether a verdict is unreasonable, or cannot be supported having regard to the evidence, the joint judgment said:

‘Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.’”

In *M v The Queen* (1994) 181 CLR 487 the joint judgment provided guidance to appellate tribunals which are called on to apply this test. Their Honours said (at 494-5) that:

“In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. Although the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above.”

More recently, in *SKA v R* (2011) 243 CLR 400 French CJ, Gummow and Kiefel JJ stressed (at 406) that “by applying the test set down in *M* and restated in *MFA*, the Court is to make ‘an independent assessment of the evidence, both as to its sufficiency and its quality’”. Elsewhere in their reasons (at 408-09) their Honours said that the appellate court “was required to determine whether the evidence was such that it was open to a jury to conclude beyond reasonable doubt that the applicant was guilty of the offences with which he was charged” and that the appellate court’s task “was to make an independent assessment of the whole of the evidence, to determine whether the verdicts of guilty could be supported.” Heydon J and Crennan J, while dissenting as to the result, reaffirmed that the test propounded in *M v The Queen* should continue to be applied.

Although, in the course of argument, this amalgam of grounds was relied on in respect of both convictions, we consider that a clear distinction must be drawn, when applying the grounds to the disparate convictions.

Charge 1 was the more serious charge. In particular, it alleged dishonesty on the part of Sergeant Yewsang. Dishonesty was not an element of Charge 3.

## Charge 1

Proof that Sergeant Yewsang was not, in terms of Defence Determination 2005/15 as subsequently amended by Defence Determination 2008/17, entitled to obtain the travel allowance paid to him as a consequence of his signing and submission of the form PY082 was but one of the necessary proofs in respect of this charge. In order for a conviction on Charge 1 to be recorded it was also necessary that the DFM be satisfied beyond reasonable doubt that Sergeant Yewsang obtained the travel allowance paid to him (or part of it) dishonestly, that is, knowing that he was not entitled to it.

Having considered the whole of the evidence we do not consider that it was open to the DFM to so conclude.

We have set out above the evidence as to the circumstances attending Sergeant Yewsang’s signing and submission, on 10 October 2011, of a form PY082 nominating travel by “own means” (private vehicle), the departure and arrival times which he specified on that form and his booking of air travel on 13 October 2011. The improbability that Sergeant Yewsang had, three days before booking air travel, seriously contemplated that he would spend in travel by road the whole of the daylight hours of two of the three days of a short leave visit to his family was a feature of the reasoning that led the DFM to convict him in respect of Charge 1. Taken in conjunction with the evidence as to the course which Sergeant Yewsang had followed in undertaking reunion travel in March and August that year of likewise nominating “own means” travel but in fact travelling by air, it was open to the DFM to be satisfied beyond reasonable doubt that the statement made by him on the application form on 10 October 2011 as to the means of travel was not just false but knowingly false.

Satisfaction beyond reasonable doubt that Sergeant Yewsang had also dishonestly obtained the payment of an allowance to which he knew he was not entitled was not, either in law or on the evidence, a necessary corollary of a conclusion that he knew when completing the application form that it was false. That Sergeant Yewsang knew the application form to be false was certainly relevant in relation to such a conclusion but that had to be balanced against other evidence relevant to a conclusion as to whether the allowance was dishonestly obtained. And that evidence was by no means all or even predominantly one way.

By the time Sergeant Yewsang came to complete his application form on 10 October 2011, and then obtained the calculated “normal departmental liability” amount, he had already twice received that amount in circumstances where he had nominated “own means” travel but later chosen to travel by air. He had never, on these occasions, been required to certify that he had in fact undertaken return travel as nominated, even though there is provision for after travel certification on a form PY082, much less had he been required to refund any amount to the Commonwealth based on a difference between the “normal departmental liability” and the actual air travel cost incurred by him.

His posting to Holsworthy was the first occasion in what was by then over a decade of military service when Sergeant Yewsang had encountered the reunion travel allowance scheme. The evidence was that Sergeant Yewsang had never received any formal guidance or instruction about that scheme. The evidence disclosed that his only other experience of allowance schemes was of meal allowance and incidental allowance schemes. In respect of these, his experience was that he was paid a fixed amount for meals or, as the case may be, incidentals with how he expended the amount of the allowance being left to his discretion and with no obligation to refund any surplus.

The evidence as to Sergeant Yewsang’s prior encounters with the reunion travel scheme also included his receipt in July 2011 of the “normal departmental liability” in respect of the air travel to Sydney booked and undertaken by his wife as “reverse reunion” travel. On this occasion also he had not been required to certify that travel had been undertaken as nominated.

Sergeant Yewsang’s experience was of a scheme in which a comparison was made as between the cost of return economy air travel at a departmentally fixed rate and the cost of private motor vehicle travel, also at a departmentally fixed rate, with whichever was the lesser cost, known as the “normal departmental liability”, then being paid to him without any later attempt at post-travel acquittal. In this sense, Sergeant Yewsang’s experience of the administration of the reunion travel scheme was in accordance with his experience of the administration of the meal and incidental allowances schemes that he had earlier encountered in his military service. In his experience of the administration of the reunion travel scheme, air travel was taken into account in a comparative calculation before payment of an allowance. His experience was that, in its administration of the scheme, the Commonwealth was indifferent as to whether he actually travelled by vehicle or air, because his allowance entitlement had always been quantified and paid according to whatever was the lesser, calculated, theoretical cost. When in the past he had nominated “own means” vehicle travel, it was not the calculated cost of that means of travel he received but, because it was the lesser amount, the calculated cost of return economy air travel.

Against this background of Sergeant Yewsang’s past experience of his encounters with the reunion travel allowance scheme itself and of other military allowance schemes, the evidence the DFM chose to accept as to his volunteering to WO1 Roberts in December 2011 that he, “took the money he received for reunion travel to purchase tickets to fly home” had a very particular significance in terms of whether the DFM could be satisfied beyond reasonable doubt that Sergeant Yewsang had in October dishonestly obtained a payment to which he was not entitled. Viewed in light of his experience, before October 2011, of a system administered in a way in which there was no requirement for after travel certification and no related requirement, by adjustment having regard to the means and cost of the travel actually undertaken, to refund any part of the “normal departmental liability” sum, which was no different to his experience of the meal and incidentals allowances schemes, what Sergeant Yewsang said to WO1 Roberts at least admitted of a doubt as to any dishonest intent on his part in relation to the obtaining of the travel allowance payment. Necessarily implicit in his exchange with WO1 Roberts was an understanding on the part of Sergeant Yewsang, based on past experience, of an entitlement on his part, once the “normal departmental liability” based payment was calculated and received, to expend that amount at his discretion in such manner as he thought fit in undertaking reunion travel without a need later to acquit any surplus. That the admission was, as the DFM classified it, “inadvertent rather than deliberate” did not detract from its significance. If anything, the reverse was true. There can hardly be any element of contrivance in the insight as to an understanding of entitlement revealed by an inadvertent admission of past practice to a superior.

The admission ought, in light of the other evidence which we have mentioned, to have underscored a doubt in the DFM’s mind about whether a dishonest intention had been proved beyond reasonable doubt. That it did not was, as the DFM’s reasons reveal, based on an unwarranted extrapolation of a conclusion that Sergeant Yewsang had knowingly signed a false form PY082 into a conclusion that he had knowingly obtained a payment to which he was not entitled. It was also based on the DFM’s assumption, impermissible for the reasons given above, that, on 13 October 2011, Sergeant Yewsang had received and read the email advice approving his travel allowance prior to his making his flight bookings.

Sergeant Yewsang’s conviction on Charge 1 should be quashed.

## Charge 3

The DFM held that Sergeant Yewsang had made a false statement on 10 October 2011 when he stated, on his application form, that he intended to travel from Holsworthy to Brisbane by private car.

Having considered the whole of the evidence and for reasons which we have set out in the course of our reasons in respect of Charge 1, we have concluded that it was open to the DFM to be so satisfied beyond reasonable doubt.

There is no necessary antipathy between this conclusion and our conclusion that it was not open on the whole of the evidence for the DFM to be satisfied that Charge 1 had been proved beyond reasonable doubt. As he had encountered it in practice, Sergeant Yewsang’s experience was of a scheme which did not mandate air or vehicle travel but which entailed the comparative calculation we have mentioned and the payment to him of no more than the lesser of departmentally calculated amounts for air or vehicle travel. In the scheme as encountered and experienced by him, it was immaterial as to which option he nominated because he could never receive more than the lesser of the departmentally calculated alternatives for return travel to and from nominated places. On this understanding of the scheme, accuracy as to means of travel in the form PY082 was of no moment for Sergeant Yewsang in terms of an entitlement one might honestly expect to obtain and retain, for even had he truthfully nominated his means of travel on the form PY082 of 10 October 2011, he would have not expected to receive any different amount of allowance. In short, one could know that the means of travel specified on the form PY082 was false yet still honestly expect to be entitled to the same amount of allowance as if the true means had been specified on the form. That, according to the determination, had air travel been nominated on the PY082 only a ground connection travel amount would have been paid with air travel being booked by staff on the basis of the lowest practical fare on the day is nothing to the point for Sergeant Yewsang had no experience of this and the question is relevantly wholly one of intention, not of absolute entitlement.

No basis for interfering with the conviction on Ground 3 has been established.

#  CONCLUDING OBSERVATIONS

The Tribunal does not have jurisdiction to entertain appeals against penalties imposed by service tribunals. Review of punishments is a matter for the Reviewing Authority: see DFDA s 162. It is, nonetheless, appropriate that we should observe that, as a result of Sergeant Yewsang’s partial success in this appeal, his conviction of the more serious of the two offences with which we have been concerned has been set aside. While we can understand why the DFM may have chosen to impose the same penalties in respect of both of the offences of which he had found Sergeant Yewsang guilty, it may well be that he would have taken a different course had he only convicted Sergeant Yewsang on Charge 3. This is a matter which ought properly be drawn to the attention of the Reviewing Authority so that he may take such action (if any) which he considers appropriate in the light of the Tribunal’s decision.

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| I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, White and Logan. |

Associate:

Dated: 21 March 2013