DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

King v Chief of Army [2012] ADFDAT 4

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| Citation: | | King v Chief of Army [2012] ADFDAT 4 |
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| Appeal from: | | Defence Force Magistrate |
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| Parties: | | **STEPHEN JOSEPH KING v CHIEF OF ARMY** |
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| File number: | |  |
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| Judges: | | **- MEMBER** |
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| Date of judgment: | | 28 September 2012 |
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| Publication of reasons: | | 12 October 2012 |
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| Catchwords: | | **DEFENCE** – charges of disobeying lawful command, prejudicial conduct and giving false evidence – whether direction of an Assistant Inspector General of the Australian Defence Force was a lawful order – whether charges could be preferred under s 60 of the *Defence Force Discipline Act 1982* when conduct proscribed by specific offence in *Defence Force Discipline Act 1982* – whether conviction bad for latent ambiguity – whether substantial miscarriage of justice – whether charges duplicitous – adequacy of reasons – whether failure to comply with rule in *Browne v Dunn* (1893) 6 R 67 resulted in unfair rejection of appellant’s evidence or denial of procedural fairness – whether verdicts inconsistent  **EVIDENCE** – Admitting record of interview into evidence – evidence prima facie admissible – whether Defence Force Magistrate erred in not directing himself in accordance with s 165 of *Evidence Act 1995* (Cth) –application for Tribunal to receive and act on new evidence – quality of new evidence not such as to demand verdict of acquittal |
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| Legislation: | | *Army Act 1955* (UK)  *Crimes Act 1914* (Cth)  *Criminal Code 1955* (Cth)  *Defence Act 1903*  *Defence Force Discipline Act 1982*  *Defence Force Discipline Rules* *1985*  *Defence (Inquiry) Regulations 1985*  *Evidence Act* *1995* (Cth)  *Jervis Bay Territory Acceptance Act* *1915* (Cth)  *Supreme Court Act 1933* (ACT) |
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| Cases cited: | | *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 – cited, considered  *Bromet v Oddie* (2002) 78 ALD 320 – applied  *Browne v Dunn* (1893) 6 R 67 - considered  *Commonwealth v Quince* (1944) 68 CLR 227 – referred to  *CSR Ltd v Della Maddalena* (2006) 224 ALR 1 – cited  *Fleming v The Queen* (1998) 197 CLR 250 – cited  *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186 – cited, considered, applied  *Hannes v DPP (Cth) (No. 2)* (2006) 205 FCR 217 - cited  *Hembury v Chief of General Staff* (1998) 193 CLR 641 - cited  *Hoessinger v The Queen* (1992) 107 FLR 99 - cited  *Hoffman v Chief of Army* (2004) 137 FCR 520 – referred to  *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 - cited  *Johnson v Miller* (1937) 59 CLR 467 - cited  *Jones v Chief of Navy* (2012) 262 FLR 418 – referred to  *Jones* v *The Queen* (1997) 191 CLR 439 - distinguished  *Jones v Chief of Navy* [2012] FCAFC 125 - applied  *Kennedy v Wallace* (2004) 142 FCR 185 – distinguished  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 – cited  *Mobasa Pty. Ltd. v Nikic* (1987) 47 NTR 48 - cited  *MWJ v The Queen* (2006) 222 ALR 436 – considered  *Pearce v The Queen* (1998) 194 CLR 610 - cited  *Pettit v Dunkley* [1971] 1 NSWLR 376 - cited  *Precision* *Plastics Pty Ltd v Demir* (1975)132 CLR 362 – cited  *R v Beattie* (1996) 40 NSWLR 155 – cited, considered  *R v Morrow* (2009) 26 VR 526 - cited  *R v Taranto* [1999] NSWCCA 396 – cited, applied  *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat & Livestock Corporation* (1980) 29 ALR 333 - distinguished  *Resek v Federal Commissioner of Taxation* (1975) 133 CLR 45 - applied  *S v The Queen* (1989) 168 CLR 266 - cited  *Saraswati v The Queen* (1991) 172 CLR 1 – referred to  *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 - cited  *Walsh v Tattersall* (1996) 188 CLR 77 - cited |
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| Date of hearing: | 27 and 28 September 2012 | |
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| Date of last submissions: | 27 September 2012 | |
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| Place: |  | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 84 | |
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| Counsel for the Appellant: | MAJ J Hyde and Mr B Bellings | |
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| Solicitor for the Appellant: | Middletons | |
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| Counsel for the Respondent: | BRIG L McDade and LEUT M Lawrence | |
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| Solicitor for the Respondent: | Director of Military Prosecutions | |

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| DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL |  |
| on appeal from defence force magistrate | DFDAT 2 of 2012 |

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| BETWEEN: | STEPHEN JOSEPH KING  Appellant |
| AND: | CHIEF OF ARMY  Respondent |

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| JUDGES: | TRACEY, MILDREN & COWDROY JJ |
| DATE OF ORDER: | 28 september 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL ORDERS THAT:

1. The appellant be given leave to file an amended notice of appeal with additional grounds 2A and 2B.

2. The appeal be allowed.

3. The convictions and punishments imposed on the appellant on Charges 1, 2, 4 and 5 by the Defence Force Magistrate each be quashed.

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| defence force discipline appeal tribunal |  |
| on appeal from defence force magistrate |  |

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| BETWEEN: | STEPHEN JOSEPH KING  Appellant |
| AND: | CHIEF OF ARMY  Respondent |

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| : |  |
| DATE: | 12 October 2012 |
| PLACE: | melbourne (heard in ) |

**REASONS FOR JUDGMENT**

1. On 28 September 2012 we pronounced orders quashing the convictions and punishments which had been imposed on the appellant. We advised the parties that we would publish our reasons at a later date. These are those reasons.
2. Following certain complaints against the appellant and his Commanding Officer, the Inspector General Australian Defence Force (“IGADF”) directed three Assistant IGADFs to assist him in conducting an inquiry into the complaints. One of the Assistant IGADFs was BRIG J.A.T. Dunn CSC.
3. At all relevant times the appellant was deployed as the Regimental Sergeant-Major (“RSM”) at Camp Phoenix, Dili, Timor Leste. The appellant was responsible for the maintenance of discipline within the Camp and was directly answerable to the Commanding Officer. The deployed contingent included a section of military police (“MP”) comprising four persons who answered directly to the appellant. The appellant exercised operational control over the MP section, but control over the manner in which the MPs carried out their tasks was the responsibility of the head of the MP section, SGT B.R. Larkin.
4. As a result ofthe directions issued by the IGADF, BRIG Dunn contacted the appellant by e-mail advising him of the impending inquiry and the terms of reference. Included in an e-mail dated 8 April 2011 to the appellant, BRIG Dunn wrote:

“I reiterate that you are not to discuss this matter directly with the Commander or any other person.”

The e-mail also advised that, as the Legal Officer at Camp Phoenix may be a witness, the appellant should ask him to provide the names of suitable officers to whom he could speak if he needed advice. The identity of other possible witnesses was not revealed in the e-mails which passed between BRIG Dunn and the appellant.

1. On 16 April 2011, the appellant participated in a taped record of interview with the three Assistant IGADFs. The appellant was advised inter alia that the inquiry was being conducted under the *Defence (Inquiry) Regulations 1985* (“the Regulations”), that the appellant was compelled to be present, that he was obliged to answer questions including questions the answers to which may be incriminating, and that giving false evidence to the inquiry was an offence. During the record of interview, the appellant was asked if he had spoken to anybody about the inquiry since he had received the e-mail of 8 April 2011, and in particular whether he had spoken to the Commanding Officer. The appellant denied speaking to anyone except a WO Barnham, who was apparently his support person.
2. Subsequently the appellant was charged with the following service offences:

Charge 1 Disobeying the lawful command of Brig. J.A.T. Dunn contained in the e‑mail of 8 April 2011 “not to discuss the matter directly with the Commander or any other person.” (*Defence Force Discipline Act 1982* (“DFDA”), s. 27 (1)).

Charge 2 Prejudicial conduct in that on or about 14 April 2011, with reference to the inquiry, he said to SGT Larkin “I need to know MPs are backing me up.” (DFDA s 60 (1)).

Charge 3 Prejudicial conduct in that on or about 15 April 2011, with respect to the inquiry then underway, he said to SGT Larkin words to the effect “I’ve called you as a witness and you’re going to have to back me up.”(DFDA s 60 (1)).

Charge 4 Prejudicial conduct in that on or about 15 April 2011, with respect to the inquiry then underway he said to CPL Butler words to the effect “If you do not confirm the story, I will shoot you.” (DFDA s 60 (1)).

Charge 5 Giving false evidence in that on 16 April 2011 he gave false evidence before a Court of Inquiry by stating that he had not spoken to any person other than the command Warrant Officer about the inquiry when, in fact, he had spoken to SGT Larkin and CPL Butler about the inquiry. (DFDA s 61(3) and the Regulations*,*Reg. 56).

Charge 6 This was pleaded in the alternative to Charge 5 as prejudicial conduct. (DFDA, s 60(1)).

1. Following a trial by a Defence Force Magistrate (“the DFM”), the appellant was convicted of Charges 1, 2, 4 and 5. He was found not guilty on Charge 3. Charge 6 was not proceeded with.

# GROUND 1 OF THE APPEAL

1. The appellant contends that the learned DFM erred in finding that the subject of the first charge was a lawful order.
2. It was submitted that there was no power within the *Defence Act 1903* (“the Act”) or other legislation for the IGADF or anyone appointed by him to issue such a command. It was not contended by the respondent that the power to issue such a command could be found by reference to any specific legislative source of power, such as Defence Instructions to the Australian Defence Force (“the ADF”) other than the power to issue a command through the rank structure. Counsel for the respondent distinguished General Orders from lawful commands via the rank structure, pointing out that the failure to comply with a General Order is a separate offence under s 29 (1) of the the DFDA from the offence of disobeying a lawful command contrary to s 27(1) of the DFDA. This is clearly correct. In *Bromet v Oddie* (2002) 78 ALD 320 at 331, Finn J held that the power of a superior officer to command a person lower in rank derived from the common law, citing inter alia *Commonwealth v Quince* (1944) 68 CLR 227 at 254-255 per Williams J. In the latter case, Williams J said, at 255:

“Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.”

Finn J’s view was upheld on appeal: *Bromet v Oddie* [2003] FCAFC 213 at [110]-[114]per Dowsett J (Spender J concurring). Madgwick J, although in dissent, also recognised the power to give lawful orders through the command structure at [46]. Of course, not all commands given by a superior officer are lawful, especially in peace time. For example, it would not be a lawful command for a superior officer to order the execution of a prisoner of war, absent some lawful authority.

1. In the present case, BRIG Dunn was one of the officers appointed to conduct the inquiry, which was a military duty to be carried out under Part VIIIB of the Act. The obvious purpose of the order was to ensure that the inquiry was not tainted by the appellant speaking to other potential witnesses including his commander, who was also the subject of the inquiry, in particular. In our opinion the order related to military duties and was lawful.
2. Counsel for the appellant submitted that the order was such a serious interference with the appellant’s right to communicate, that if Parliament intended that such a power should be given to the IGADF and his deputies, Parliament would have expressly so provided either in the Act, the DFDA or in some other legislative instrument. We do not accept this submission. The order itself clearly contemplated that the appellant had the right to obtain legal advice, and plainly to the extent that it may have been necessary for the appellant to canvas the subject matter of the inquiry with his legal advisor, this was in contemplation. We do not consider that the order was of such a kind that it so interfered with the appellant’s rights of freedom of communication to warrant the inference for which counsel for the appellant agitated.
3. We also refer to s 110C(1) of the Act, which states:

“**Functions of the Inspector-General ADF**

(1) The Inspector-General ADF has the following functions:

(a) to inquire into or investigate matters concerning the military justice system;

(b) to conduct performance reviews of the military justice system, including internal audits, at the times and in the manner the Inspector-General ADF considers appropriate;

(c) to advise on matters concerning the military justice system, including making recommendations for improvements;

(d) to promote military justice values across the Defence Force;

(e) to do anything incidental or conducive to the performance of any of the preceding functions.

1. In our view, s 110C(1)(e) would allow the IGADF to issue an order not to discuss an ongoing investigation, as it is incidental to the function stated in s 110C(1)(a). That would refute the appellant’s argument that there was no basis in law for such a command. We would dismiss Ground 1 of the appeal.

# GROUNDS 2, 2A and 2B

1. The appellant argues that the prejudicial conduct charges were not available in the circumstances, because the conduct the subject of the first charge was proscribed by a specific offence. It was also submitted that his conviction on Charge 1 was bad because of latent ambiguity; alternatively that the convictions on Charges 2 and 4 could not stand as the elements of these offences were wholly included in Charge 1.
2. The learned DFM found that the appellant was guilty of Charge 1 solely because he was guilty of the conduct complained of in Charges 2 and 4. It is a well established principle that a person cannot be convicted twice in respect of the same conduct where the elements of both offences are identical, or where the elements of one offence are wholly included in another: *Pearce v The Queen* (1998) 194 CLR 610 at 618 [24]. Subsection 4C (1) of the *Crimes Act 1914* (Cth) (“the Crimes Act”) specifically provides that:

“Where an act or omission constitutes an offence:

(a) under 2 or more laws of the Commonwealth; or

(b) both under a law of the Commonwealth and at common law;

the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those laws of the Commonwealth or at common law, but shall not be liable to be punished twice for the same act or omission.”

Oddly, s 3C of the Crimes Act defines “offence” to specifically exclude offences against the DFDA. There is no equivalent provision in the DFDA or the *Criminal Code 1955* (Cth).

1. However, there is a more fundamental problem, which relates to the conviction on Charge 1. In order to explain this, it is necessary to turn to the precise findings of the learned DFM. In relation to Charge 1, the learned DFM said:

“I am satisfied beyond reasonable doubt that the defendant was given a lawful command, he knew of the command and that the command was given by a superior officer. The defendant disobeyed the command by his conduct with respect to Charge 2 and Charge 4. Accordingly, I find the defendant guilty of Charge 1.”

1. In relation to Charge 2, the finding was that the learned DFM accepted the evidence of SGT Larkin that the appellant had said to him in the Camp Phoenix mess on 14 April 2011 that “I need to know my MPs are backing me up”, and thatthe appellant was referring to the complaint that was then under investigation by the IGADF.
2. In relation to Charge 4, the findings of the learned DFM were that he accepted the evidence of CPL L.M. Butler that at about 1645 hours on 15 April 2011, she was in the DVD hut, and when she was alone with the appellant, he said to her that he was going to be interviewed by the IGADF, and that he would call her as a witness, and that if she did not confirm his story, he would shoot her. The story to which he referred related to a conversation between CPL Butler and the appellant in February 2011, “and it later involved a [New Zealand] MP.”
3. It is clear that the offences in relation to Charges 2 and 4 were distinct offences involving different individuals, on different days and at different locations. The finding of guilt in relation to Charge 1 is therefore that the appellant disobeyed the lawful command of his superior officer on two separate occasions, each of which constituted a separate offence. Rule 9(1) of the *Defence Force Discipline Rules* *1985* reflects the common provision that a charge shall state one offence only. Whilst the actual charge as drafted did not offend that rule, it was clearly void for latent ambiguity, and a conviction which is latently ambiguous cannot stand: *Johnson v Miller* (1937) 59 CLR 467; *Walsh v Tattersall* (1996) 188 CLR 77; *S v The Queen* (1989) 168 CLR 266; *Hannes v DPP (Cth) (No. 2)* (2006) 205 FCR 217, and this is so even if the point is not taken at trial: see *Hoessinger v The Queen* (1992) 107 FLR 99 at 102-106; 112-113.
4. It was conceded by the respondent that the conviction on Charge 1 resulted from a material irregularity, but it was put that no substantial miscarriage of justice occurred. A conclusion that a substantial miscarriage occurred within the meaning of s 23(1) of the Act does not require a finding that a different result would necessarily have been reached in the absence of the material irregularity: *Hembury v Chief of General Staff* (1998) 193 CLR 641. A departure from the essential requirements of the law such as occurred here necessarily results in a substantial miscarriage of justice: *Hembury*, at 649. We would therefore allow the appeal in relation to Charge 1, and quash the conviction and sentence.
5. In view of this conclusion it is strictly unnecessary to rule on whether Charges 2 and 4 cannot stand because the elements of the offence in relation to those charges and in relation to Charge 1 are the same. Had it had become necessary to decide that issue, we would have found for the appellant in accordance with the reasoning in *Pearce* *v The Queen,* in relation to Charge 2 because the elements of the offence in relation to Charge 2 were wholly included in the elements of the offence in relation to Charge 1. It is difficult to see how the conduct could be said to be prejudicial except upon reliance on the order, the subject of Charge 1. Charge 4 is different because the threat made to a subordinate, even if not made seriously, is, as the learned DFM found, the gravamen of the prejudicial conduct on that charge, and does not rely on the relevant order. This is an added reason for concluding that a substantial miscarriage of justice occurred in relation to Charge 1.
6. Counsel for the appellant also submitted that the prosecution could not, as a matter of construction, charge the appellant with an offence against s 60(1) of the DFDA because the conduct the subject matter of those charges was covered by the offence charged against s 27(1). The argument, simply put, is that s 60(1) is a general provision, whilst s 27(1) is a special provision, and, therefore, as a matter of construction, the general provision was not intended to apply in circumstances where the conduct fell within the circumstances dealt with by s 27 (1). The maximum penalty fixed for an offence against s 27(1) is imprisonment for two years, whereas the maximum penalty for an offence against s 60(1) is imprisonment for three months.
7. Discipline Law Manual Vol 3, page 6C-156, reads:

“It was the intention of the framers of the DFDA that charges should not be laid under s 60 if they could properly be laid under some other section of the Act. To encourage this approach and to restrict the application of s 60 in practice to minor infractions of discipline, a low maximum punishment was provided. However, there is no specific prohibition in the Act against laying a charge under s 60 in respect of behaviour that could properly be the subject of a charge under another section and a charge under s 60 will not necessarily fail on that account. Charges under s 60 should not be brought against aiders and abettors, inciters and accessories after the fact in respect of offences under the other offence provisions.”

There is nothing in the Minister’s second reading speech which throws any additional light on the matter.

1. We note also that s 40 of the *Army Act* (UK), the predecessor of the DFDA, provided for the offence of “conduct to the prejudice of good order and military discipline” had a specific proviso as follows:

“Provided that no person shall be charged under this section in respect of any offence for which special provision is made in any other section of this Act, and which is not a civil offence; nevertheless a conviction of a person so charged shall not be invalid by reason only of the charge being in contravention of this proviso, unless it appears that injustice has been done to the person charged by reason of such contravention; but the responsibility of any officer for that contravention shall not be removed by the validity of the conviction.”

This would tend to support the conclusion that we have reached. The DMP could charge under s 60 even if the matter could be the subject of a specific charge against another provision in the Act, but it would not always be possible to charge the specific offence as well as s 60, unless s 60 was pleaded in the alternative.

1. Counsel for the appellant relied in support of this submission on the decisions in *Saraswati v The Queen* (1991) 172 CLR 1 and *Hoffman v Chief of Army* (2004) 137 FCR 520. We are unable to find anything in the reasoning of either of those decisions which supports the appellant’s argument. The most recent decision in this area of the law is *Jones v Chief of Navy* [2012] FCAFC 125. In that case, the appellant argued that the prosecution could not lay a charge under s 60 of the Crimes Actbecause the prosecution could have laid a charge under s 33 (c) of the DFDA. As was pointed out by the Full Court, there are two reasons why this argument is misconceived. First, in both *Saraswati* and in *Hoffman*, the prosecution sought to circumvent an otherwise applicable limitation provision by laying a general charge rather than a specific one. That does not arise here. Secondly, the elements of both offences are different. That which is prejudicial conduct is wider in scope than that which amounts to disobedience of a lawful command. It may not be necessary to prove, as an element of an offence against s 60 (1), that the conduct amounted to a breach of a lawful command. The conduct may be prejudicial, as the learned DFM found in relation to Charge 4, irrespective of whether or not a lawful command has been given not to speak to them. Furthermore, the maximum penalties are different. By laying a charge under s 60 (1) instead of s 27 (1) the appellant faced a much less serious charge because the maximum penalty was considerably less.
2. Counsel for the appellant referred us to *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat & Livestock Corporation* (1980) 29 ALR 333.That case dealt with the principle of statutory construction expressed in the Latin maxim *generalia specialibus non derogant.* Deane J expressed the principle of construction in these terms, (at 347):

“As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. “The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative…”(per Romilly MR*: Pretty v Solly* (1859) 26 Beav 606 at 610). Repugnancy can be present in cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter. A more fundamental example of such repugnancy is where the particular provisions prescribe or encourage conduct which the general provisions would render prima facie, though not irremediably, unlawful or where the particular provisions assume to be lawful conduct which the general provisions would render prima facie unlawful.”

1. There is no repugnancy in the sense discussed by Deane J. Section 27 (1) does not purport to make lawful conduct which s 60 (1) makes unlawful. As was said by Stephen J in *Resek v Federal Commissioner of Taxation* (1975) 133 CLR 45 at 53, “[s]uch a rule of construction has its place where contrariety is manifest.” The only “contrariety” which the appellant can point to is the different maximum penalties. That argument would have force if the maximum penalty for a breach of s 60 (1) of the DFDA was greater than the maximum penalty for a breach of s 27 (1), but that is not the case. We do not consider that the principle of interpretation upon which the appellant relies is applicable in the circumstances. We would reject this argument.

# GROUNDS 4 AND 5

1. We shall deal with these grounds first, because Ground 3 in part relies upon Ground 4. The appellant complains that the appellant, when he gave evidence, was not cross‑examined on his evidence which related to the physical elements of the offences as charged in relation to Charges 2, 3 and 4. As the appellant was found not guilty in relation to Charge 3, we only have to consider the argument in so far as it relates to Charges 2 and 4. It follows, so the appellant’s argument goes, that the rejection of the appellant’s evidence was perverse, or unfair, or unreasonable. Counsel for the respondent submitted that the appellant was cross-examined on both of those charges. Alternatively it was put that there was a failure to accord procedural fairness to the accused by failing to put the prosecution case to the accused in cross-examination. In order to understand this ground of appeal, it is necessary to summarise briefly the appellant’s evidence-in-chief.
2. After giving evidence about his career and posting to Timor Leste, and his duties in relation to the MPs, the appellant said that there had been no tensions between himself and SGT Larkin, the team leader of the MPs until April 2011 when he became aware of an e-mail which SGT Larkin had sent to various persons. The e-mail in question was referred to by SGT Larkin in his evidence in chief, and cross-examined upon by the Defending Officer. It was tendered in the prosecution case by counsel for the appellant and became Ex D 1.
3. The e-mail, sent on 15 April 2011, concerned the command and control structure of deployed MPs, including those serving overseas. The purpose of the e-mail was to draw attention to the fact that the appellant had asserted authority normally reserved for a Force Provost Marshall by exercising operational command and technical control of deployed MP assets, and recommended that the appellant be removed from the chain of command. Further, it alleged that the appellant, in a number of instances, had given instructions to service police which would have resulted in unlawful acts if they had been carried out.
4. The appellant said that he was not initially sent a copy of the e-mail and first became aware of it when he was told about it by the Chief of Staff. He was surprised that a copy of the e-mail was not sent to him, as he was in the chain of command. He said he was disappointed, but thought that this might have been an oversight and decided to approach SGT Larkin about it.
5. At about 0900 or 0930 hours the same day he approached SGT Larkin near the mess and because there were a lot of people around, he called him over to a smoking area. He then asked him why he had not copied him into the e-mail. SGT Larkin said that he did not think it necessary.
6. The appellant then explained to him the chain of command, and that he was entitled to receive a copy of the e-mail. SGT Larkin did not accept this, and the discussion became heated, so the appellant adopted a more formal approach to emphasis his point. The appellant denied ever saying anything about the pending inquiry, or that he had said to him that he had called him as a witness, and that he was going to have to back him up, although he did use the word “loyalty” at some point towards the end of the conversation. This related to Charge 3, but it also had relevance to show that SGT Larkin was not well motivated towards the appellant.
7. As to Charge 2, SGT Larkin’s evidence was that on the morning of 15 April 2011, he was in the mess. He saw the appellant about 10 metres away near the TV hut. The appellant indicated that he should come over to speak to him, which he did. The appellant said to him: “I need to know my MPs are backing me up.” He said: “Sir.” The appellant said: “I know you say you don’t want to know but we all know what’s going on around here at the moment and I need to know - you’d have to be stupid not to and I need to know you’re going to back me up.”
8. SGT Larkin said that he interpreted this as a reference to the IGADF investigation or inquiry and that the appellant wanted him to give evidence in his support to that inquiry by playing down or refuting the allegations. SGT Larkin said: “Sir, if someone asks me a question, I’ll tell the truth.” The appellant replied: “All these people jumping on-board this complaint, they don’t understand the ramifications that will have for them. That’s why the RSM is here today, because I’m going about my own complaint but I’m doing it the right way.” SGT Larkin said that he understood the reference to “the RSM” to mean the RSM accompanying the Chief of Joint Operations who was in the country at that time. SGT Larkin said that the appellant was very agitated and “standing very, very close” to him at the time. Immediately afterwards he went to the MPs’ office, and made notes of the conversation. The notes were tendered as Ex G. According to SGT Larkin, he had already been interviewed on 12 April 2011 by the inquiry, which was two days before this conversation occurred.
9. SGT Larkin was closely cross-examined by counsel for the appellant at the trial. The object of the cross-examination was to put to SGT Larkin that the context of the conversation with the appellant was in relation to a quite different matter, namely that it concerned the Commanding Officer’s former liaison officer, LT N.J. Wells. It was suggested that LT Wells had been stood down by the Commanding Officer, she had subsequently taken up an office in the MPs’ office, that she and SGT Larkin were in an inappropriate relationship, and the purpose of the conversation was to deal with these issues. It was suggested that his evidence relating to some parts of the conversation were inaccurate, and that what was said in relation to the MP backing the appellant up, related to the chain of command, and not the IGADF inquiry.
10. SGT Larkin agreed in cross-examination that there was a conversation about LT Wells being in the MPs’ office, and that the appellant was concerned about that, but he thought that this was on a different occasion. He agreed that he had allowed her to use the MPs’ office. He also agreed that he had been in an intimate relationship with LT Wells, and that he was under a lot of stress at the time, and ultimately left the deployment on medical grounds. SGT Larkin also accepted that he did not record in his notes the whole of the conversation with the appellant. He agreed that in his service police statement that the conversation began with the appellant talking to him about tasking for the MP section. It was put to SGT Larkin that he had fabricated the conversation because he wanted the appellant removed from the chain of command, which SGT Larkin denied.
11. The appellant’s evidence was that on the morning of 14 April 2011, when he first spoke to SGT Larkin he asked him where the patrol plan was for the Commander. He said that the system was that a patrol plan for the next seven days was required to be prepared which he would then pass over to the commander to make decisions on what were the priorities, as at that time there were problems with over-tasking. SGT Larkin said that he would get it to him. The appellant said that he needed to know that he had the support of the MPs. His reason for saying that was because he had seen LT Wells in the MPs’ office, and he was aware that there were “dramas between her and the commander.” He said that SGT Larkin replied with words to the effect: “Sir. Unless it involves the MPs I am not interested in what is going on”. The appellant replied: “It does involve the MPs and you’d be a fool not to know what’s going on around here.” The appellant said that his reason for saying that he needed to know he had the MPs’ support was because if she was in the MPs’ office with no duties at that time he did not want LT Wells to think that he was checking up on her, and she should have been given a more appropriate office. He denied the rest of the conversation referred to in SGT Larkin’s evidence.
12. No cross-examination was directed towards any part of the appellant’s evidence concerning the purpose of the conversation until the appellant was questioned by the DFM. He was then asked a series of questions by the DFM concerning why he had said he needed the MPs’ support and the relationship this had with LT Wells being in the MPs’ office. In response, the appellant said that the MPs’ office was small, there were only three people in it, he did not want her to think he was spying on her, he had to go to the office to brief the MPs, he did not want to get involved in her dispute with the commander, he did not want others thinking that he had taken sides and he “didn’t want to have her involved in the MPs’ operations in regards to what she was going through with the commander.”
13. Following this intervention the prosecutor, who had previously finished his cross-examination, was asked by the DFM if there was anything arising, and the appellant was asked in further cross-examination if he could have asked LT Wells to leave the room if he wanted to discuss something privately with the MPs. The appellant said that this would be inappropriate, because LT Wells is an officer, senior in rank to him. It was not put to the appellant that his purpose in speaking to SGT Larkin was to refer to the pending investigation.
14. As to Charge 4, CPL Butler testified was that she was interviewed by GPCAPT R.S. Press, one of the Assistant IGADF investigators on 12 April 2011. On 13 April 2011, she said that she had a conversation with the appellant at about 1330 hours, who asked her where CPL R.A. Allen was. She said that he was in his office. CPL Allen was one of the MPs in SGT Larkin’s section. The appellant replied, “What is he doing? Babysitting?” She took this to be a reference to LT Wells. Later that afternoon at about 1500 hours, she spoke to the appellant outside his office and he said to her that next week he would be in charge of the MPs. She did not understand what he meant until later that afternoon she found out that SGT Larkin was going to be medically evacuated from Timor. She said she was worried about this because she had already been a witness.
15. At 1645 hours on 15 April she was in the DVD hut watching television and e-mailing. The appellant came in and sat down with her. CPL Allen then came in and after a few minutes the appellant left. After a few minutes, CPL Allen also left, and the appellant returned and said that now that “we’re not being stalked”, he was going to be interviewed by the Assistant IGADF the next day, he intended to call her as a witness, and that if she didn’t confirm the story he would shoot her.
16. CPL Butler said that she understood “the story” to which he referred as a conversation between her and the appellant in February 2011 concerning a conversation the appellant had had with a New Zealand MP which related to the way the appellant had spoken to CPL Butler on some previous occasion, although the appellant did not mention this.
17. CPL Butler testified that the appellant also said to her that he had been asked if he wanted to take anyone or anything in to the interview with him and he said that he was going to take a smoke grenade and his pistol. She said that she did not reply. She was not initially worried about the conversation, but afterwards she made diary notes and a statement on 16 April 2011 of the conversations she had had. The diary notes were subsequently tendered without objection as Ext H. She was not cross-examined on the diary notes.
18. In cross-examination CPL Butler said that the conversation she had had with the appellant was at 0610 hours on 15April 2011. It is not clear if this is the same conversation as that which she said in chief occurred at 1645 hours. She was cross-examined about a second interview she had with GPCPT Press on 15 April 2011 which became Ex 2. The purpose of the cross-examination was to show that she had told the Assistant IGADF that SGT Larkin had told her what he, SGT Larkin, intended to tell, or had already told, the Investigators. It was put that she and SGT Larkin had concocted their evidence, that both made allegations to the same effect, and that no such conversation as she said occurred on the afternoon of 15April 2011 ever occurred. She agreed that she was aware of the attempt to have the appellant removed from the chain of command, but she said that she did not know if there was a better solution, and did not get involved in it.
19. The appellant gave evidence that on 15 April 2011 at 0600 hours he was in his office, conducting a telephone conversation with a WO1 in Australia, that the conversation lasted about 15 or 20 minutes, he then took the command Sergeant Major to the airport at about 0625 to 0630 hours, and did not return until 0830 to 0900 hours. He denied having any conversation with CPL Butler at 0610 hours. He denied each of the conversations alleged against him by CPL Butler. He agreed that in the afternoon he was present in the DVD hut when CPL Butler was there. He watched the news, but apart from general chit-chat there was no such conversation as alleged. He said that on the morning of 16 April 2011, whilst having breakfast in the mess, CAPT A.W. (now Major) Clarke asked him how he was, and he said that he was to be interviewed that day and he replied “if it all gets too much, I’ve got my pistol and my smoke grenade, so I can do a hot extraction.” He explained to the Court that this is a slang term used by infantry reconnaissance soldiers to indicate when they have had enough. CAPT Clarke was called by the defence and gave evidence to the similar effect.
20. There was virtually no cross-examination of the appellant on his evidence concerning Charge 4. The only questions asked related to whether CPL Allen was present in the DVD room whilst he and CPL Butler were there, and whether the appellant left the room and then returned after CPL Allen had left. The appellant said that his recollection was that CPL Allen was already in the room when he went in; that he decided to get some water, and asked them both if they would like some, he walked out to get the water, and when he returned, he is unsure of whether or not CPL Allen was still there or not.
21. Counsel for the appellant submitted that the rule of practice known as the rule in *Browne v Dunn* (1893) 6 R 67 was not complied with by the prosecutor. The rule was described in *MWJ v The Queen* (2006) 222 ALR 436 at 448 [38]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.” There is no question that the rule applies equally to criminal as well as to civil proceedings, and there is nothing in the authorities to suggest that a prosecutor is not obliged to comply with the rule when the accused gives evidence. The contest in the present case was essentially a question of credit between the prosecution witnesses and the accused and his witnesses.
22. In our view, fairness required the prosecutor to put to the accused that his intention was to try to intimidate or threaten a subordinate, viz CPL Butler, as the learned DFM in fact found, a matter which was not put to him at all.
23. Failure to comply with the rule does not necessarily mean that the learned DFM was obliged to accept the appellant’s evidence. It would have been open to the learned DFM to reject the appellant’s evidence if it was inherently incredible: *Precision* *Plastics Pty Ltd v Demir* (1975)132 CLR 362 at 371 per Gibbs J, but otherwise it might be wrong, unreasonable or even perverse for the tribunal of fact to disbelieve the appellant’s evidence: *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 26 per Hunt J*.*
24. Counsel for the respondent referred us to *Kennedy v Wallace* (2004) 142 FCR 185. The issue in that case was whether certain documents seized by police were subject to legal professional privilege. The question was whether the documents in question were brought into existence for the dominant purpose of obtaining legal advice. The documents were hand written notes made by Kennedybefore he met with his Swiss lawyer. Kennedy asserted that the notes were points he wished to raise with the lawyer, and were all matters on which he was seeking legal advice. The trial judge found that the dominant purpose of the notes had not been proven to be for the obtaining of legal advice, and that Kennedy consulted the lawyer for other purposes. Criticism was directed, on appeal, to this finding on the basis that Kennedy was not cross-examined about whether his purpose in consulting the lawyer included obtaining advice or information that was not legal advice. The majority (Black CJ and Emmett J) held (at 198) that the case against Kennedy had been put with sufficient clarity, and that the appellant was put on notice as to what the case was in order that he might adduce evidence to contradict it.
25. *Kennedy* was very different from the matter with which we are dealing. There was a great deal of evidence which supported the conclusion that Mr. Kennedy was not consulting the lawyer merely for the purpose of obtaining legal advice. It is nevertheless a good illustration of the point made in *MJW v The Queen* at 441 [18]that the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings. In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* at 26-27,Hunt J said that the failure to cross-examine does not necessarily lead to the result that the evidence of the witness must be disbelieved. The ultimate question is whether it would be unfair to accept that witness’ evidence. In this respect, Hunt J said (at 22-23):

“There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness *is*to be challenged but also *how*it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given, and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based.” (Original emphasis.)

1. Looking at the evidence as a whole, we do not think that the appellant was denied the opportunity to deal with the allegations and inferences which were made against him, except to deny him the opportunity to “show his mettle”: see also *R v Morrow* (2009) 26 VR 526 at 539-540; [47]-[50]. In those circumstances there was no denial of procedural fairness to the accused. We would therefore dismiss this ground of appeal. Nevertheless, the lack of any effective cross-examination is a matter to which the learned DFM should have given weight in deciding whether or not to reject the appellant’s evidence, particularly in the light of the character evidence which was called on his behalf: *R v Morrow* at 528 [3]; 541 [55]. It called for a thorough analysis of the evidence in the learned DFM’s reasons. The appellant submitted that the reasons were inadequate. This constituted Ground 3, to which we now turn.

# GROUND 3

1. It is well established that a trier of fact must give adequate reasons for his or her decision. This means that the judicial officer must explain, however briefly, why he or she came to his or her decision, and the reasoning process must be apparent: *Pettit v Dunkley* [1971] 1 NSWLR 376; *Mobasa Pty. Ltd. v Nikic* (1987) 47 NTR 48; *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 at [41] - [43]; *Intertransport International Private Ltd v Donaldson* [2005] VSCA 303 at [18].In cases where the issue to be decided depends on the credibility of one witness against another, it is not sufficient for the judicial officer merely to set out the evidence adduced by one side, and then the evidence of the other side, and then assert that having heard and seen the witnesses he or she prefers the evidence of one and not the other: *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186 at 191 [28]. The need for care to be taken in making findings based on demeanour has been discussed in a number of authorities which are usefully discussed by Ipp JA (Mason P and Tobias JA concurring) in the *Goodrich Aerospace* decision, especially at 188-191 [11] - [27].
2. In the present case, the reasons of the learned DFM occupy six pages following a four day hearing, of which three days was taken up with the evidence of the witnesses. That is not in itself sufficient to show that the reasons given are inadequate.
3. In relation to Charge 2, the learned DFM briefly set out the substance of the evidence of SGT Larkin, and even more briefly the evidence of the appellant, and concluded:

“When the accused was later asked to explain why he needed to ask for the MPs’ support, he elaborated on the situation concerning LT Wells, who, as I said, had been the commander’s liaison officer. I did not find the explanation credible.

My assessment of the conversation is that the subject of count 2 is that SGT Larkin was both honest and reliable in his version. I accept that the accused was referring to the complaint that was then under investigation by the IGADF. I have no doubt that the words that are the subject of this charge, spoken in the given context, would be likely to prejudice discipline. I am satisfied beyond reasonable doubt that the defendant is guilty of Charge 2.”

1. In our opinion the reasons for this conclusion are inadequate. The following sub‑issues are not even mentioned: the evidence concerning the attempt by SGT Larkin to have the appellant removed from the chain of command which provided a motive for him to lie or give unreliable evidence against the appellant; SGT Larkin’s inappropriate relationship with LT Wells; why, even on SGT Larkin’s account, the appellant said “I know you say you don’t want to know … We all know what’s going on around here” and if this was not a reference to LT Wells being in the MPs' office;why the explanation given by the appellant was not credible; why the words spoken, if they were spoken by the appellant in the context of the account given by SGT Larkin, might reasonably be taken to have referred to the complaint the subject of the investigation and not something else, and hence why those words were likely to prejudice discipline: see *Goodrich Aerospace* at 192 [29]. In our opinion the account given by the appellant was not so glaringly improbable that the learned DFM was entitled to reject the appellant’s account without more.
2. In relation to Charge 4, the learned DFM’s reasons set out the evidence of CPL Butler, and briefly set out the evidence of the accused, including the evidence about the remark about the smoke grenade and the pistol. The DFM accepted the evidence of the appellant and MAJ Clarke that this was said by the appellant to MAJ Clarke at breakfast on 16 April 2011, but then said that:

“… it does not follow that he could not have also made such a remark to CPL Butler. I accept the evidence of CPL Butler, who I found to be an honest and reliable witness. I am satisfied beyond reasonable doubt that the defendant told CPL Butler that he was going to be interviewed by IGADF, that he would call her as a witness and that, if she didn’t confirm his story, he would shoot her.

I do not accept for one moment that the defendant was serious about the threat to shoot CPL Butler but it would be highly prejudicial to discipline for an RSM to threaten or intimidate a subordinate in this way, or even to make such a remark, let alone leave any doubt whatever that the threat was not seriously made. Of course it would be prejudicial to discipline for him to apply any pressure to her to confirm his story to the IGADF inquiry. I find the defendant guilty on Charge 4.”

1. Nowhere in his reasons does the learned DFM explain why he rejected the appellant’s denials that any such conversation as was alleged by CPL Butler in fact occurred. One is left to infer that the learned DFM rejected the appellant’s evidence on the “subtle influence of demeanour”: see *CSR Ltd v Della Maddalena* (2006) 224 ALR 1 at 44 [180] per Callinan and Heydon JJ; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291. In a situation where one witness gives evidence that a particular conversation occurred, and another denies that any such conversation ever took place, it is necessary to examine the evidence with great care, and to explain why it is that the evidence of the accused is rejected. What happened in this case is the classic error referred to by Ipp JA in *Goodrich Aerospace* at 191 [28]. It was not enough to merely accept the evidence of SGT Butler, and brush aside the appellant’s evidence and that of MAJ Clarke with the observation that the conversation concerning the smoke and gun could also have occurred with CPL Butler. Of course that is possible, but not likely, and in the circumstances of a case such as this, where it is unlikely that the appellant will be in a position at trial to call any supporting evidence to contradict the evidence of CPL Butler and to support his own evidence, that evidence deserved more weight than it was apparently given. As we have pointed out above, the lack of any relevant cross-examination of the accused in relation to these issues is also a factor which required to be given weight. It is not mentioned by the learned DFM. There were also sub-issues raised about whether CPL Butler had departed from evidence she had given elsewhere relating to whether or not SGT Larkin had purchased alcohol in circumstances which amounted to an offence, and whether she had tailored her evidence to support SGT Larkin and his evidence in the trial. There is no discussion about these issues by the learned DFM. In our opinion the reasons for concluding that the appellant was guilty of Charge 4 were inadequate. The appellant had done all that he could have done to answer the charge. He gave evidence on oath and subjected himself to cross-examination. He relied on evidence of good character and the evidence of MAJ Clarke. No reason is given for rejecting his evidence.
2. It follows that, because proof of Charges 1 and 5 depended on proof of the matters in Charges 2 and 4, the conviction in relation to Charges 1, 2, 4 and 5 cannot stand. We would uphold Ground 3 of the appeal. However, we are not in a position to decide for ourselves what the ultimate outcome should have been. This could only be determined on a re-trial.

# GROUND 6

1. This ground complains about the admission into evidence of part of the record of interview by the inquiry with the appellant. This evidence was objected to by counsel for the appellant at the trial. The learned DFM admitted the evidence notwithstanding the objection, and gave reasons for so doing.
2. The question of the admissibility of the evidence in question was raised by counsel at the beginning of the trial. The following facts were agreed:

“1. That on 14 April 2011 BRIG Dunn was informed that veiled threats had been made to SGT Larkin if he did not back the RSM during the inquiry.

2. On 16 April 2011 two officers conducted an interview with the accused.

3. The interview began at 0920 hours and terminated at 1630 hours on that day.

4. The accused was not provided with a warning pursuant to section 101C of the DFDA at any stage during the interview.”

1. BRIG Dunn was called to give evidence on the voir dire. His testimony was summarised by the learned DFM as follows:

“1. BRIG Dunn was an Assistant Inspector-General of the ADF, appointed under part VII of the Defence (Inquiry) Regulations;

2. He was directed by the Inspector General Australian Defence Force to conduct an inquiry in East Timor;

3. After commencing the interview with the appellant the interview was suspended. During the suspension, BRIG Dunn was shown a statement made by CPL Butler. Shortly afterwards he was shown a statement made by SGT Larkin. BRIG Dunn formed the view that a DFDA offence may have been committed by the appellant;

4. BRIG Dunn contacted the Inspector General Australian Defence Force and discussed the matter. It was decided that BRIG Dunn should not investigate whether a service offence had been committed but he should proceed with his inquiry and that it should include whether the defendant had spoken to other witnesses about the inquiry.”

We add that BRIG Dunn said in evidence that the reason he asked this question was because “we ask all witnesses whether they have been talking to other people”, and the reason for asking that question is to see if the evidence of a witness has been impacted upon, and is credible and reliable.

1. The relevant portion of the evidence before the inquiry and the terms of reference of the inquiry were tendered on the voir dire and subsequently admitted into evidence by the DFM.
2. Shortly before the interview concluded, the appellant was asked if he had “raised the inquiry with anybody” and “whether he had spoken to anybody about the inquiry.” As noted previously, the appellant denied that he had spoken to anybody about the inquiry, except WO Barnham. Apart from some questions at the beginning of the interview confirming the e-mail sent to the appellant by BRIG Dunn about not speaking to anybody about the inquiry, which occurred before the interview was suspended, only those parts of the interview which dealt with the subject matter of whether or not he had spoken to anybody were tendered. The appellant was not cross-examined during the inquiry about the allegations of CPL Butler or SGT Larkin of what the appellant had said to either of them.
3. It was put that the circumstances were such that the Assistant IGADF, BRIG Dunn, was aware that a service offence was likely to have been committed, and the appellant was required by compulsion of law to answer questions. It was submitted that at a point early in the process, BRIG Dunn was informed that the accused was alleged to have disobeyed a command in that he had spoken to two individuals about the inquiry. It was put that from the point of time that the inquiry was suspended in accordance with the terms of reference, it was impermissible to ask questions about whether he had committed a service offence. It was submitted that BRIG Dunn became an investigating officer for the purposes of that offence, and that the appellant should have been cautioned vide s 101C of the DFDA. It was further submitted that the DFM erred in admitting this evidence because he failed to consider the factors set out in s 101ZB of the DFDA and s 138 of the *Evidence Act* *1995* (Cth) (“the Evidence Act”). In further elaboration of this submission, it was put that the powers conferred on the IGADF to compel a witness to answer questions, related only to the subject matter and terms of reference of the inquiry itself, and did not extend to asking questions designed to enquire about whether or not the appellant had disobeyed a lawful command.
4. Counsel for the respondent referred us to the relevant provisions of the Regulations. The appellant was required to answer questions put to him by an Assistant IGADF: see Reg 96 (1). With some exceptions not relevant to this case, the obligation to answer questions subsists notwithstanding that the answer may tend to be incriminating: see Reg 96 (3). However, any answers so given cannot be admitted as evidence in proceedings before a service tribunal, “otherwise than in proceedings by way of a prosecution for giving false testimony at the hearing before the court of inquiry, the board of inquiry, the Chief of the Defence Force commission of inquiry, an inquiry officer or the inquiry assistant.”: see the Act*,* ss 124 (2C).A person who gives false evidence before a Court of Inquiry commits an offence: Reg 56*.* Although the definition of “Court of Inquiry” in Reg 3 (1) does not include an inquiry under Part 7 of the Regulations, Reg 107 (1) (c) applies Reg 56 to “an Assistant IGADF acting under a direction mentioned in paragraph 87 (1) (a) in the course of an inquiry as if that person constituted a Court of Inquiry.” The terms of reference proved that the inquiry was being conducted in accordance with paragraph 87 (1) (a) of the Regulations.
5. Prima facie the evidence tendered was admissible to prove Charge 5. The questions asked were not so far outside of the bounds of the inquiry to convert the inquiry into an investigation by an investigating officer for a service offence. Counsel for the appellant referred to s 101B of the DFDA which deals with the power of an investigating officer to ask questions of a person believed to have committed a service offence which are relevant to the investigation of the service offence. Section 101B (2) provides that “[a] person who is asked a question by an investigating officer under subsection (1) is not required to answer the question.” The expression “investigating officer” is defined by s 101 (1) of the DFDA to mean:

“(a) A police member; or

(b) An officer, warrant officer, or non-commissioned officer (not being a police member) engaged in the investigation of a service offence.”

1. There was no evidence that the AIGADFs were engaged in the investigation of a service offence. This was also the conclusion of the learned DFM. We consider that he was correct, and that this was consistent with the evidence of BRIG Dunn. The fact that nothing was put to the appellant about what was apparently said in the statements obtained from SGT Larkin and CPL Butler supports this conclusion. It has not been demonstrated that the learned DFM erred.
2. As to the argument that the statutory power to compel answers went beyond the purpose for which the power was conferred, whilst we acknowledge that the exercise of a power for an ulterior purpose may well be invalid, there was no evidence to support the contention that there was an ulterior purpose in asking the questions concerned, and in fact, no such suggestion was even put to BRIG Dunn when he gave evidence on the voir dire.
3. We would therefore reject this ground of appeal.

# GROUND 7

1. The appellant submits that the DFM erred by not directing himself in accordance with s 165 of the Evidence Act in relation to the evidence of SGT Larkin. The appellant contends that such a direction was warranted because of SGT Larkin’s personal motive to give evidence to convict the appellant and evidence of SGT Larkin’s mind being fragile at the time of the relevant events.
2. Section 134(1) of the DFDA provides:

“(1) In proceedings before a court martial, the judge advocate shall give any ruling, and exercise any discretion, that, in accordance with the law in force in the Jervis Bay Territory, would be given or exercised by a judge in a trial by jury.”

1. Section 129(1) of the DFDA provides that a DFM has the same powers as a judge advocate.
2. Section 4A of the *Jervis Bay Territory Acceptance Act* *1915* (Cth) provides that the laws of the Australian Capital Territory form part of the laws of the Jervis Bay Territory (although contrary to popular belief, the Jervis Bay Territory is not part of the Australian Capital Territory, but is instead a separate territory of the Commonwealth). Those laws include s 68C(3) of the *Supreme Court Act 1933* (ACT), which states:

“In criminal proceedings tried by a judge alone, if a territory law requires a warning or direction to be given, or a comment to be made, to a jury in the proceedings, the judge must take the warning, direction or comment into account in considering his or her verdict.”

1. Therefore, if a warning was required to be given pursuant to s 165 of the Evidence Act, then the learned DFM was required to record it and heed it: see *Fleming v The Queen* (1998) 197 CLR 250 at 264 [33].
2. If the DFM came to a conclusion that a warning pursuant to s 165 of the Evidence Act was not required, then he should have provided reasons for arriving at this conclusion: see *R v Beattie* (1996) 40 NSWLR 155 at 160. In *R v Taranto* [1999] NSWCCA 396 Spigelman CJ stated at [12] – [16]:

“[12] In *R v Beattie* [1996] 40 NSWLR 155 at 160, James J with whom Grove J and Hamilton AJ agreed said, with respect to s165:

"In declining to give the directions asked for, the trial judge did not state any reasons for declining to give the direction. It may be that it is not essential that in all cases in which a judge is of the opinion that there are good reasons for not complying with s165(2) the judge should expressly state what he considers those reasons to be. There is no express requirement in the section itself that the reasons be stated. It may, for example, be quite obvious, in the particular circumstances of an individual case, but evidence which happens to fall within one or other of the paragraphs of subs(1) and is therefore evidence to which s165 applies, is not unreliable. However, in most cases at least, a trial judge should, in my opinion, state what he considers to be the good reasons for not complying with subs(2)".

[13] I would add to the reference by his Honour to the need for reasons with respect to the exercise of the discretion under s165(3), that a similar approach is required with respect to a finding of fact that any paragraph of s165(1) relied on by an accused is not established.

[14] In many circumstances it will be obvious as to the reasons for the rejection of a submission with respect to such a matter. It was not obvious here.

[15] Elaborate reasons are not required. However, sufficient must be said, particularly with respect to evidence that was as central to the Crown case as the evidence of Mr Johnson in these proceedings, so that an independent fair-minded observer would accept that the accused had a fair trial according to law. A dismissive conclusory assertion, merely repeating the words of the statute, does not satisfy such a test.

[16] For this reason, I agree with the orders proposed by Hidden J that the appeal should be allowed and that there should be a new trial.”

1. During closing submissions the DFM indicated to counsel that he was not inclined to entertain the defence’s proposition regarding the need for a warning. In his reasons for decision, the DFM did not mention the need for a warning at all. In our view it was incumbent upon the DFM to do so and the failure to do so caused a miscarriage of justice of the type identified in *Taranto*. We would allow the appeal on this ground.

# GROUND 8

1. This ground raises the question of whether the verdict of not guilty in relation to Charge 3 was so inconsistent with the verdict in relation to Charge 2 that it cannot be supported. It is necessary to consider this ground of appeal, notwithstanding our earlier findings, because if it is correct, this will result in a verdict of acquittal in relation to Charge 2.
2. The evidence of SGT Larkin in relation to Charge 3 was that on the morning of Friday 15 April 2011, he was in the courtyard area at the back of Camp Phoenix when he received a telephone call from the appellant on his mobile phone. He looked up and saw the appellant on the other side of the courtyard, and the appellant signalled to him to come over to him. He said the appellant was very angry, and hurled a barrage of abuse at him. He was unable to remember a lot of the conversation. It began with the appellant asking him who was in and who authorised the use of SGT Larkin’s office. He responded that the office was being used by IGADF and that he authorised it himself. From thence, he said the conversation deteriorated and he was so shocked that he could not recall the exact conversation, but towards the end of the conversation the appellant said: “I’ve called you as a witness and you’re going to have to back me up.” He also said that part of the conversation related to the e-mail relating to removing the RSM from the chain of command. Unlike the conversation in relation to Charge 2, he made no notes of it. The appellant’s version of this conversation is referred to in paragraph [30] above.
3. The finding of the learned DFM was that although he accepted SGT Larkin as an honest witness, there was an innocent reason for the appellant to approach SGT Larkin, many people were in the vicinity, SGT Larkin’s overall memory of the incident was poor, that he was somewhat pre-occupied because he was expecting to be assaulted, and there was an innocent explanation for some of the words contained in the charge, that is “You’re going to have to back me up” given the e-mail sent earlier that day, and he was left with a reasonable doubt in respect of the charge.
4. The tests to be applied were discussed in *Jones v Chief of Navy* (2012) 262 FLR 418 at 443-445 [134]-[144]*.* It was put by counsel for the appellant that there must have been a reasonable doubt as to whether the evidence of SGT Larkin could be accepted on the second charge. In our opinion there is nothing illogical or affronting to common sense about accepting the evidence of SGT Larkin in relation to Charge 2 but having a reasonable doubt about Charge 3. The conversations in relation to both charges occurred on different days and in different circumstances, particularly having regard to the timing of the e-mail. Furthermore SGT Larkin conceded that his memory of the exact conversation was poor. These factors were not present in relation to Charge 2. In relation to the latter charge, SGT Larkin made notes of that conversation shortly afterwards, and the learned DFM was impressed with the honesty and accuracy of his evidence. This is quite different from the kind of case such as *Jones* v *The Queen* (1997) 191 CLR 439 where the quality of the evidence in relation to the charge on which the appellant was convicted was no different than the quality of the evidence on which the appellant was acquitted. The overall circumstances do not compel the conclusion that the credibility of SGT Larkin was diminished by the finding that the learned DFM held a reasonable doubt. There was no finding that this witness was not an honest witness. In our opinion the verdicts are not inconsistent and the conviction in relation to Charge 2 was not unsafe or unsatisfactory. We would dismiss this ground of appeal.

# NEW EVIDENCE ON APPEAL

1. At the commencement of the hearing the appellant applied to have the Tribunal receive and act on what was described as “new evidence”. That evidence consisted mainly of anonymous postings on websites which had been published after the trial. It was submitted that they would support a submission that some of the prosecution witnesses were ill‑disposed towards the appellant. We do not think it is necessary to canvass this alleged new evidence. Its quality is not such as to demand a verdict of acquittal. At best it may have provided a basis for attacking the credit of some of the witnesses called at the trial. As there may be a retrial, there is no point in canvassing it further. This observation should not be understood as indication on our part that a retrial should occur. Any decision on this matter rests with the Director of Military Prosecutions. In exercising the Director’s discretion the effects on the appellant of the orders which we have determined should be quashed will no doubt be taken into account. We would reject the reception of the evidence at the hearing of this appeal.

# CONCLUSIONS

1. We would allow the appeal and set aside the convictions and penalties recorded and imposed on Charges 1, 2, 4 and 5.

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| I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Mildren and Cowdroy. |

Associate:

Dated: 12 October 2012