DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Douglas v Chief of Army [2017] ADFDAT 5

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| Appeal from: | Defence Force Magistrate |
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| File number: |  |
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| Members: | **TRACEY (PRESIDENT), LOGAN (DEPUTY PRESIDENT) AND HILEY (MEMBER) JJ** |
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| Date of decision: | 28 April 2017 |
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| Date of publication of reasons: | 1 June 2017 |
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| Catchwords: | **DEFENCE** – appeal from a decision of a Defence Force Magistrate – convictions for an act of indecency and for prejudicing the discipline of the Army – where the respondent conceded the convictions were unsafe – whether convictions ought to be quashed – whether a new trial ought to be ordered |
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| Legislation: | *Defence Force Discipline Appeals Act 1955* (Cth) s 24  *Defence Force Discipline Act 1982* (Cth) ss 60(1), 61(3)  *Crimes Act 1900* (ACT) s 60(1) |
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| Cases cited: | *Gilham v The Queen* (2012) 224 A Crim R 22; [2012] NSWCCA 131  *Liberato v The Queen* (1985) 159 CLR 507  *M v The Queen* (1994) 181 CLR 487  *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53  *R v Anderson* (2001) 127 A Crim R 116  *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13 |
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| Date of hearing: | 28 April 2017 |
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| Place: | Brisbane |
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| Category: | Catchwords |
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| Number of paragraphs: | 38 |
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| Solicitor for the Appellant: | Gabbedy Milson Lee |
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| Solicitor for the Respondent: | Director of Military Prosecutions |

ORDERS

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|  | | DFDAT 3 of 2016 |
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| BETWEEN: | SCOTT MICHAEL DOUGLAS  Appellant | |
| AND: | CHIEF OF ARMY  Respondent | |

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| MEMBERS: | TRACEY (PRESIDENT), LOGAN (DEPUTY PRESIDENT) AND HILEY (MEMBER) JJ |
| DATE OF ORDER: | 28 April 2017 |
| WHERE MADE: | BRISBANE |

THE TRIBUNAL ORDERS THAT:

1. The appeal be allowed.
2. The convictions of the appellant on Charge 3 and the alternative Charge 4 be quashed.
3. A new trial be had on Charge 3 and alternative Charge 4.

REASONS FOR DECISION

# THE TRIBUNAL:

1. The appellant appeared before a Defence Force Magistrate (“DFM”) in Canberra on 12 September 2016. He faced four charges and three alternative charges. He pleaded not guilty to each charge.
2. Following a four day trial he was convicted on two charges — Charge 3 and alternative Charge 4. He was found not guilty of the remaining charges.
3. The charges arose from events which were alleged to have occurred during a course being conducted at the Warrant and Non Commissioned Officer (“WONCO”) Academy at Canungra in late June and July 2015. The appellant and the complainant were students on the course.
4. The third charge alleged that the appellant had committed an act of indecency on the complainant contrary to s 61(3) of the *Defence Force Discipline Act 1982* (Cth) and s 60(1) of the *Crimes Act 1900* (ACT). The appellant was alleged to have committed the act on a date between 7 and 15 July 2015 “by pushing his drill cane between her legs and moving it up the inside of her legs until it was touching her genital area on the outside of her clothing while simultaneously making wet slurping noises with his mouth, without her consent and being reckless as to her consent”.
5. The alternative charge to Charge 4 alleged that, on or about 15 July 2015, the appellant said to other persons, “All you have to do is get [the complainant] drunk and you could have her”, or words to that effect, thereby prejudicing the discipline of the Army. This conduct was said to be contrary to s 60(1) of the *Defence Force Discipline Act 1982* (Cth).
6. In his amended notice of appeal, the appellant advanced multiple grounds for asserting that each conviction was unreasonable, could not be supported on the evidence and was unsafe or unsatisfactory. These grounds arose from the reasons (or, in some cases, the lack of them) given by the DFM to support his findings of guilt on the two charges.
7. The Director of Military Prosecutions (“the DMP”), acting on behalf of the Chief of Army, has conceded that the DFM made a series of errors which render the convictions unsafe and unsatisfactory and, in respect of one of the charges, that a substantial miscarriage of justice has occurred.
8. We considered that the concessions were properly made and, at the end of the hearing on 28 April 2017, we ordered that the appeal be allowed, the convictions quashed and that a new trial be had. We advised the parties that we would provide our reasons for so ordering at a later date. These are those reasons.

# CHARGE 3

1. The prosecution called evidence from two witnesses in relation to Charge 3. They were the complainant and Sergeant Roy Diaz.
2. The complainant’s evidence was that the act of indecency occurred on the veranda of the Sergeant’s Mess where students had congregated before being ushered into the mess. She said that she had been talking to another student when she felt a cane being inserted between her legs from behind. She said that she first felt the cane at knee level and then it was raised past her inner thigh until it was touching her crotch. As this was happening she said that she heard the appellant making what she described as a wet, inappropriate noise. The complainant said that she reacted by moving forward away from the cane, turning and telling the appellant: “Don’t fucking touch me. You touch me again I’m going to the SI”, or words to that effect. She said that she had spoken in a raised voice and made a scene.
3. Sergeant Diaz gave evidence that he observed the appellant walk up behind the complainant and brush his cane along the back of her thighs just below her buttocks. The complainant had responded by turning around and yelling, “Don’t fucking touch me”.
4. The appellant gave evidence in which he denied placing the cane between the complainant’s legs. He said that had poked the tip of his cane in to the complainant’s hair bun as a joke. He described the noise he made when doing so as “an immature sound” rather than a wet, sexual-sounding noise.
5. The appellant’s evidence was corroborated by Corporal Joseph Burns. When Corporal Burns was cross-examined, it was not put to him that he was wrong in recalling that the appellant’s cane was put into the complainant’s hair bun. It was not put to him that the cane had been placed between the complainant’s legs and raised up to her crotch. It was not suggested to Corporal Burns that his evidence had been influenced in any way by discussions he had had with the appellant.
6. The DFM made credit findings in respect of each of these witnesses. He found that the complainant generally was “an honest and reliable witness” although he had reservations about her delay in making a complaint and her unwillingness to make certain appropriate concessions.
7. The DFM found Sergeant Diaz to be “an honest and reliable witness who was doing his best to assist the court”. He regarded Sergeant Diaz as being an objective witness and an experienced and mature soldier.
8. The DFM found the appellant to be “generally … an honest and reliable witness”. He did however express “some doubts about [the appellant’s] assessment of the events and some doubts about his recollections” of those events.
9. The DFM said that he found Corporal Burns “to be generally honest and reliable”. The DFM went on:

there is a certain risk that, not intentionally, the discussions between the appellant and CPL Burns after their removal from [the] course may have influenced each other’s recollections. As such, their ability to corroborate each other has to be somewhat discounted; the risk of reconstruction versus recollection.

With respect to CPL Burns, principally, I am only interested in the Sergeants’ Mess balcony incident. He corroborates the [appellant]. Indeed, he closely corroborates the [appellant] in its details, both leading up to and being on the balcony and the events. I am concerned that on some critical issues it is possible that CPL Burns’ testimony, whilst honestly believed, could be influenced by an element of reconstruction rather than recollection.

1. In dealing with the evidence of the appellant generally, including in relation to the third and fourth charges, the DFM said:

The summary of that is whilst I find the [appellant] to have generally have been an honest and reliable witness, I have some doubts about his assessment of the events and some doubt about his recollections and would again look for independent corroboration before, if needing to, accepting his version with respect to an event.

Later, when dealing explicitly with the third charge, he said that:

I accept the complainant’s version of the events as corroborated by SGT Diaz. Importantly, it is not that I do not accept the [appellant’s] version as supported by CPL Burns – I do not – but having done that, I have separately considered the matter and I accept the complainant’s version with corroboration and I accept it beyond reasonable doubt.

1. The DMP acknowledged that these passages bespoke error and, in particular, were inconsistent with the principles explained by Brennan J in *Liberato v The Queen* (1985) 159 CLR 507 at 515. His Honour there said:

The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue.

1. The DFM’s reasons did not explain why it was, that following his separate consideration, he accepted the complainant’s version “with corroboration” beyond reasonable doubt. He had made generally favourable assessments of the credit of both the appellant and Corporal Burns. Corporal Burns had given unchallenged evidence that the appellant’s cane had made contact with the complainant’s hair bun, and not her legs and genital area. Sergeant Diaz’s “corroboration”, on which the DFM relied, did not support the complainant’s version that the cane had been inserted between her legs but was otherwise consistent with the complainant’s evidence about this incident.
2. The DFM’s apparent acceptance of most of the evidence of both the appellant and the complainant suggests that he may have approached the matter by carrying out some kind of balancing exercise rather than asking himself whether the evidence of and in support of the accused caused him to have a reasonable doubt about his guilt, and even if that were not so whether he was still satisfied beyond reasonable doubt of the appellant’s guilt based upon the whole of the evidence. By approaching the matter in this way he does not appear to have correctly applied the requirements of *Liberato*.
3. The DMP’s concession that the conviction on this charge should be quashed because there had been a substantial miscarriage of justice was properly made. So too was her concession that the conviction was unsafe and unsatisfactory. In accepting this latter concession we have been mindful of the principles propounded in *M v The Queen* (1994) 181 CLR 487 at 493, *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 and *SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13. They required us, independently, to consider whether, on the whole of the evidence, it was open to the DFM to be satisfied beyond reasonable doubt that the appellant was guilty as charged. This required us to examine both the sufficiency and the quality of the evidence called at trial. We have done so. Given that there may be a retrial it is not desirable that we elaborate on our reasons for concluding that we were not so satisfied.
4. In coming to this conclusion, we were not unmindful of the appellant’s contention that a restatement of the *Liberato* directions by Kirby P (has his Honour then was) (Sheller JA and Dowd J agreeing) provided even stronger support for the quashing of the convictions. In *R v Anderson* (2001) 127 A Crim R 116 at 121; [2001] NSWCCA 488 at [26] his Honour, having referred to standard directions in Canadian criminal trials analogous to those in *Liberato*, continued:

Directions along these lines are customarily given, although I prefer the following formulation:

“First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you find difficulty in accepting evidence of the accused, but think that it might be true, then you must acquit.

Third, if you do not believe the accused, then you should put his testimony to one side. The question will remain; has the Crown, upon the basis of the evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?”

Particular emphasis was placed on the second direction, having regard to what the DFM had said about the appellant’s credibility and the resultant possibility that his denials might be true.

# ALTERNATIVE CHARGE 4

1. Some days after the incident which was the subject of Charge 3, it was alleged that a further incident occurred, this time in the accommodation block which housed the students on the course. The female students were accommodated at level 3 and the male students on the two lower levels.
2. The complainant gave evidence that she was on level 3. A group of other students was standing in the smoking area on the ground floor. She had heard the appellant say to the group: “All you have to do is get her drunk and you could have her.” Her name had been mentioned by the appellant as the person to whom he was referring.
3. Sergeant Diaz was one of the group. He gave evidence that he was with at least four other members of the course at the time. The appellant had approached the group and spoken the words heard by the complainant to him (Sergeant Diaz).
4. The appellant denied uttering these words.
5. None of the other students who were present at the time was called to give evidence.
6. The DFM accepted the evidence of the complainant and Sergeant Diaz. He gave no reasons for rejecting the appellant’s denials. The DMP conceded that it was difficult to see how the DFM could have been satisfied beyond reasonable doubt, consistently with the *Liberato* principles, that the appellant uttered the words alleged, having found him to be, generally, “an honest and reliable witness”.

# A NEW TRIAL?

1. The DMP submitted that a new trial on Charges 3 and alternative Charge 4 should be ordered pursuant to s 24 of the *Defence Force Discipline Appeals Act 1955* (Cth). The appellant opposed the making of such an order.
2. The power to award a new trial is discretionary. Some of the considerations which guide the exercise of this discretion were summarised by McClellan CJ at Common Law in *Gilham v The Queen* (2012) 224 A Crim R 22; [2012] NSWCCA 131 at [649]:

The relevant principles were discussed in *Reid v The Queen* [1980] 1 AC 343 and [*Director of Public Prosecutions (Nauru) v*] *Fowler* [(1984) 154 CLR 627]: *R v Anderson* (1991) 53 A Crim R 421 at 453 (Gleeson CJ). The overriding consideration is whether the interests of justice require a new trial: *Fowler* at 630. Unless the interests of justice require the entry of a verdict of acquittal, an appellate court should ordinarily order a new trial of a charge where a conviction in respect of that charge has been set aside but there is evidence to support the charge: *Spies v The Queen* [2000] HCA 43; (2001) 201 CLR 603 at [104]. The court determines where the interests of justice lie by considering various factors, including:

* the public interest in the due prosecution and conviction of offenders (*R v Taufahema* [2007] HCA 11; (2007) 228 CLR 232 at [49]; *Anderson* at 453; *Reid* at 349);
* the seriousness of the alleged crimes (*Anderson* at 453; *Reid* at 350; *Haoui v R* [2008] NSWCCA 209; (2008) 188 A Crim R 331 at [164] (Johnson J));
* the strength of the Crown case (*Anderson* at 453);
* the desirability, if possible, of having the guilt or innocence of the accused finally determined by a jury, which, according to the constitutional arrangements applicable in New South Wales, is the appropriate body to make such a decision (*Taufahema* at [51]; *Anderson* at 453; *Reid* at 350);
* the length of time between the alleged offence and the new trial, and in particular whether the delay will occasion prejudice to the accused (*Taufahema* at [55]; *Parker v The Queen* [1997] HCA 15; (1997) 186 CLR 494 at 520 (Dawson, Toohey and McHugh JJ); *Anderson* at 453);
* whether the grant of a new trial would impermissibly give the prosecution an opportunity to supplement or "patch up" a defective case or to present a case significantly different to that presented to the jury in the previous trial (*R v Wilkes* [1948] HCA 22; (1948) 77 CLR 511 at 518; *King v The Queen* [1986] HCA 59; (1986) 161 CLR 423 at 433 (Dawson J); *Parker* at 520 (Dawson, Toohey and McHugh J); *Reid* at 350; *Fowler* at 630; *Anderson* at 453; *Taufahema* at [59]);
* the interests of the individual accused, and in particular whether it would be unduly oppressive to put the accused to the expense and worry of a further trial (*Spies* at [103]; *Reid* at 350);
* whether a significant part of the sentence imposed upon conviction has already been served (*Jiminez v The Queen* [1992] HCA 14; (1992) 173 CLR 572 at 590 (McHugh J));
* the expense and length of a further trial (*Reid* at 350);
* whether a successful appellant to the Court of Criminal Appeal has been released from custody (*Taufahema* at [55]; *Everett v The Queen* [1994] HCA 49; (1994) 181 CLR 295 at 302 (Brennan, Deane, Dawson and Gaudron JJ); *R v Wilton* (1981) 28 SASR 362; (1981) A Crim R 5 at 367–68 (King CJ)); and
* whether an acquittal would usurp the functions of the properly constituted prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions (*R v Thomas (No 3)* [2006] VSCA 300; (2006) 14 VR 512 at [27]).

1. The DMP submitted that the allegations made against the appellant were, in a service context, serious. There had been direct and cogent evidence which supported the prosecution case and which could have supported the convictions absent the conceded errors on the part of the DFM. The prosecution case on any retrial would not differ substantially from that presented before the DFM. Given the reduction in the number of charges to be considered, any second trial could reasonably be expected to be shorter than the original trial. It could take place within three months.
2. The DMP advised the Tribunal that, even if it were minded to order a retrial, the question of whether or not the appellant should be re-presented would rest with her and that her discretion would be exercised having regard to the circumstances pertaining at the time she was called upon to make a decision. This would ensure that the appellant had the opportunity of placing before her any submissions which he might wish to make relating to the exercise of her discretion.
3. The appellant resisted the application for an order that there be a new trial. He submitted that, at a retrial, the prosecution would be able to “patch up” its case by challenging the corroborative evidence, given by Corporal Burns, in relation to Charge 3. He also relied on the adverse consequences which he had suffered prior to and following the trial. Once the complainant had reported the conduct, the appellant had been separated from the course but kept within the precincts of the barracks. Whilst there he was required to perform menial tasks such as shredding paper and disassembling a marquee. He was ordered to wash vehicles. Upon removal from the course and on returning to his unit, he was removed from training roles involving female recruits. Following the trial, he had been reduced in rank to Private and posted to an infantry battalion in Queensland. He had fallen well behind his cohort in pursuing promotion opportunities. This had put pressure on his marriage and had had detrimental financial implications for his family. Any retrial would, as a result, be oppressive.
4. The relevant events had occurred almost two years ago.
5. We accept that any retrial would be burdensome for the appellant. We are not, however, persuaded that, on balance, the relevant considerations weigh against the granting of a retrial. Indeed, we consider that the interests of justice require it.
6. There exists cogent evidence which, if accepted, would support convictions on the two charges. The charges are serious. The evidence to be presented at a retrial would be substantially the same as that heard by the DFM. No “patching up” of a deficient case on the evidence would be involved. The complainant’s interests and those of the Army are also properly to be brought to account. As with any retrial, the witnesses will be called on to give evidence again and called upon to recollect events which occurred at a greater temporal distance than was the case at the first trial. The evidence is not, however, complicated and the witnesses’ memories of events are unlikely to have faded and can be refreshed by reference to previous statements made by them.
7. We are conscious of the lengthy period during which the consequences of the charges have borne heavily on the appellant. These are, however, matters which will, no doubt, be considered by the DMP when she decides whether or not to re-refer the charges. They will also be relevant to any sentence that might be imposed if the appellant is ultimately convicted.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justices Tracey (President), Logan (Deputy President) and Hiley (Member). |

Associate:

Dated: 1 June 2017