DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Leith v Chief of Army [2013] ADFDAT 4

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| Citation: | Leith v Chief of Army [2013] ADFDAT 4 |
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| Appeal from: | Defence Force Magistrate |
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| Parties: | **OLIVER SEBASTIAN LEITH v CHIEF OF ARMY** |
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| File number: |  |
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| Judges: |  |
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| Date of judgment: | 20 August 2013 |
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| Catchwords: | **DEFENCE** – convictions relating to theft of ammunitions and disobedience of lawful command – whether Judge Advocate erred in admitting evidence – consideration of “special circumstances” under s 101JA(3) of the *Defence Force Discipline Act 1982* (“the DFDA”) – balancing the interests of justice – double jeopardy – whether the Judge Advocate erred in convicting the appellant of theft contrary to s 47C of the DFDA in light of conviction under s 34 of the *Explosives Act 1999* (Qld) – consideration of “substantially the same” under s 144 of the DFDA  |
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| Legislation: | *Army Act 1955* (UK) – s 134*Crimes Act 1914* (Cth) – s 23V*Crimes Act 1958* (Vic) *Criminal Code 1995*(Cth) – s 131.1*Defence Force Discipline Act 1982* (Cth) – ss 26, 27, 45, 47C, 47E, 47M, 101JA, 142, 144, 152, Sch 6*Defence Force Discipline Appeals Act 1955* (Cth) – ss 21, *Evidence Act 1995* (Cth) – s 90, 138*Explosions Act 1999* (Qld) – ss 34, 144*National Defence Act 1985* (Can) – s 66*Penalties and Sentences Act 1992* (Qld) – ss 12, 44*The Constitution* (Cth) – s 51(vi)*Theft Act* *1968* (UK) – s 3*Defence Force Discipline Bill 1982* – Explanatory Memorandum*Report of the 1973 Working Party in respect of a Defence Force Disciplinary Code*  |
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| Cases cited: | *Burdett v Abbot* (1812) 4 Taunt. 401 [128 E.R. 384] - considered*Connelly v Director of Public Prosecutions* [1964] A.C. 1254 - applied*Coutts v The Commonwealth* (1985) 157 CLR 91 - cited*Director of Public Prosecutions v Gomez* [1993] AC 442 - considered*Groves v The Commonwealth* (1982) 150 CLR 113 - discussed*House v The King* (1936) 55 CLR 499 - considered*M v The Queen* (1994) 181 CLR 487 - applied*Marks v The Commonwealth* (1964) 111 CLR 549 - discussed*McWaters v Day* (1989) 168 CLR 289 – referred to, discussed*Pearce v The Queen* (1998) CLR 610 - applied*R v Armstrong* (2010) 202 A Crim R 478 - cited*R v Barklimore* (2007) 167 A Crim R 377 - discussed*R v JF* (2009) 237 FLR 142 - discussed*R v Orellana (No 2)* [2009] NSWDC 152 - applied*R v Waters* (2002) 129 A Crim R 115 - applied*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 – cited, discussed*The Commonwealth v Welsh* (1974) 74 CLR 245 - cited*Yewsang v Chief of Army* [2013] ADFDAT 1 - discussedOrmerod D, *Smith and Hogan Criminal Law* (12th ed, Oxford University Press, 2008) 741Oxford English Dictionary 2013 (Oxford University Press) www.oed.com viewed 12 June 2013 |
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| Date of hearing: | 5 June 2013 |
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| Place: | Melbourne (heard in Townsville) |
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| Category: | Catchwords |
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| Number of paragraphs: | 111 |
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| Counsel for the Appellant: | SQNLDR G Lynham |
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| Solicitor for the Appellant: | Giudes & Elliott Solicitors and Notary |
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| Counsel for the Respondent: | LTCOL H Dempsey and LCDR J Nottle |
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| Solicitor for the Respondent: | Director of Military Prosecutions |

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| DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL |  |
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|  | DFDAT 7 of 2012 |

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| BETWEEN: | OLIVER SEBASTIAN LEITHAppellant |
| AND: | CHIEF OF ARMYRespondent |

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| JUDGES: | TRACEY, COWDROY & LOGAN JJ |
| DATE OF ORDER: | 20 august 2013 |
| WHERE MADE: | MELBOURNE (HEARD IN TOWNSVILLe) |

THE TRIBUNAL ORDERS THAT:

1. The appeal be dismissed.

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| defence force discipline appeal tribunal |  |
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| BETWEEN: | OLIVER SEBASTIAN LEITHAppellant |
| AND: | CHIEF OF ARMYRespondent |

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| : |  |
| DATE: | 20 august 2013 |
| PLACE: | MELBOURNE (HEARD IN TOWNSVILLE) |

**REASONS FOR JUDGMENT**

1. The appellant appeared before a Defence Force Magistrate (“DFM”) at Lavarack Barracks, Townsville on 28 February 2012. He faced two charges. The first was a charge of the theft of three electric detonators. This charge was laid under s 47C of the *Defence Force Discipline Act 1982* (Cth) (“the DFDA”). The second charge, which was preferred under s 27(1) of the DFDA, was disobedience of a lawful command. That command was said to have been given to the appellant by Sergeant J. E. Feo. The command, as particularised, was “to conduct a 100% range clearance of the Pioneer Section before leaving Townsville Field Training Area.”
2. Corporal Leith pleaded not guilty to both charges. The DFM convicted him on each charge. On the first charge he was sentenced to be reduced in rank to Private and on the second a severe reprimand was imposed.
3. Although the convictions were recorded on 2 March 2012 a notice of appeal was not filed until 14 December 2012. By s 21(2) of the *Defence Force Discipline Appeals Act 1955* (Cth) (“the DFDAA”) the appellant was required to lodge his appeal within 30 days of the conviction or 30 days after he had been advised of the results of a review of the trial under s 152 of the DFDA, whichever first occurred. The appellant applied for an extension of time within which to lodge this appeal.
4. He deposed that he first became aware that his convictions had been upheld by the Reviewing Authority on 1 November 2012. On that day he was provided with a copy of a minute to that effect signed by the Reviewing Authority. The minute had apparently been received by his unit on 8 May 2012 but, for some unknown reason, had not been forwarded to him.
5. In these circumstances an extension of time was granted because strict adherence to the temporal limits, imposed by s 21(2) of the DFDAA, would have worked an injustice on the appellant.

# THE FACTUAL BACKGROUND

1. On 23 June 2011 the appellant’s platoon was engaged in an exercise at the Townsville Field Training Area. One element of the exercise was a live firing phase. The appellant was issued with electronic detonators which were to be deployed during this phase of the exercise. Upon the conclusion of the live fire phase the appellant’s Platoon Sergeant, SGT Feo, ordered him to conduct a range clearance for members of the training detachment. The appellant conducted that clearance but forgot to clear his own equipment. Some detonators were in his pack.
2. On the morning after his return to Lavarack Barracks the appellant discovered the detonators. He placed them in the pocket of his jeans. He then travelled into Townsville by taxi. He planned to have lunch with friends. Lunch extended into a protracted drinking session. Early the following morning (25 June 2011) the appellant was arrested by civilian police following an incident outside a nightclub. He was taken to the Townsville Watch‑house. He was searched. The police found the detonators which the appellant was carrying in a transit case. The civilian police notified the military police. CPL R. L. Pittman (a military policeman) attended at the watch-house. He collected the appellant and took him back to the military police headquarters at Lavarack Barracks. They arrived at the headquarters shortly after 0600 hours. CPL Pittman cautioned the appellant although there was some dispute as to precisely what was said. CPL Pittman asked the appellant some questions relating to the detonators. He recorded his answers in a notebook but did not, despite recording equipment being available, tape record the conversation. CPL Pittman gave evidence at trial (over the objection of the appellant) that the appellant had told him, in answer to one of the questions, that he had planned to dispose of the detonators by exploding them on the beach in Townsville.
3. CPL Pittman arranged for the appellant to be picked up by an NCO from his unit. The appellant was taken back to his unit lines. He was later interviewed under caution by his Platoon Sergeant, SGT J. P. Cox. He made further admissions to SGT Cox which were relied on by the prosecution at trial.
4. The appellant was charged by the Queensland Police with possessing explosives without lawful authority. This charge was subsequently dealt with in the Magistrates’ Court at Townsville.

# GROUNDS OF APPEAL

1. The appellant advanced three grounds of appeal. The first two related to the construction and application of s 101JA(1) of the DFDA by the DFM. The substance of the appellant’s complaint was that the DFM should not have admitted into evidence at trial evidence given by CPL Pittman as to what passed between him and the appellant at the military police headquarters on the morning of 25 June 2011.
2. The third ground was that the finding of guilt in respect of the second charge was unreasonable or could not be supported having regard to the evidence.
3. As a result of an issue which arose in the course of argument the appellant sought and was granted leave to add a fourth ground. That ground was:

“That having regard to the appellant being dealt with in respect of an offence of possession of explosives under the *Explosives Act 1999 (Qld)* then under s 144 of the DFDA the appellant was not then liable to tried by a service tribunal for an offence of theft under s 47C of the DFDA being an offence which is substantially the same offence as the State offence.”

1. The Chief of Army neither opposed nor consented to the granting of leave.

# GROUNDS 1 AND 2 – CPL PITTMAN’S EVIDENCE

1. The appellant submitted that the evidence of CPL Pittman should not have been admitted at trial.
2. As already mentioned the Queensland Police conveyed the appellant to the Townsville Watch-house, and upon him being searched, the appellant was found to be in possession of a transit case containing the detonators. CPL Pittman was contacted by the Queensland Police and was told of the appellant’s possession of detonators.
3. At approximately 0530 hours on 25 June 2011 the appellant was transported to MP Headquarters at Lavarack Barracks where he arrived at approximately 0605 hours. CPL Pittman then asked the appellant several questions.
4. CPL Pittman gave evidence that he had had a short conversation with the appellant and then cautioned him. CPL Pittman stated that the appellant appeared tired and that he assumed that the appellant had been drinking but did not appear to be intoxicated. He said that he believed that the appellant understood his questions and gave coherent answers. CPL Pittman stated that he asked the appellant three questions, namely how he came to have the detonators, what he should have done with them and what the appellant’s immediate movements were to be. He was provided with answers to those questions by the appellant. The questions and answers were not electronically recorded even though there was such equipment available in a nearby interview room to which CPL Pittman had ready access.
5. Under cross-examination, CPL Pittman stated that he had spoken to SGT Ritchie at the Australian Defence Force Investigation Service (“ADFIS”) before he had questioned the appellant and was trying to have ADFIS speak to the appellant. CPL Pittman said that he was told to take notes and to leave them at the station and that ADFIS would look after them later. He made no other inquiries concerning recording or how he might go about recording the interview.
6. CPL Pittman was asked whether he had made a recording of the conversation with the appellant but stated that he had no cassette recorder but that he had recorded the conversation in his police service notebook which had been archived in Canberra.
7. Significantly, under cross-examination, CPL Pittman said that he had access to the record of interview room, that he was familiar with it and the use of the recording equipment and acknowledged that he could have used it. When asked why he failed to do so, he said that ADFIS would be dealing with the matter later. CPL Pittman left his handwritten notes for SGT Ritchie of ADFIS but did not believe that the notes included a reference to what had actually been said by the appellant.
8. As to his notes CPL Pittman said that he did not believe that they had been read over to the appellant; nor had the appellant been asked to sign his notebook. When asked about the caution he had given to the appellant, he stated that it was a “standard caution”; that he thought he included reference to the appellant having the opportunity to speak to a friend or lawyer but he could not be certain as to that aspect. Subsequently, he said he could not recall if in fact he provided that part of the caution.
9. CPL Pittman recalled that SGT M.D. Kays, the duty officer of the appellant’s unit, had arrived at the office at approximately 0700 hours. He had a conversation with SGT Kays, being, as he described, “general chit chat”. The appellant took no part in that conversation nor were questions directed to the appellant concerning the effects of alcohol on him.

## The Legislation

1. Section 101JA(1) of the DFDA relevantly provides:

“(1) If a person who is being interviewed as a suspect (whether under arrest or not) makes a [confession](http://www.austlii.edu.au/au/legis/cth/consol_act/dfda1982188/s101.html#confession) or admission to a police member, the confession or admission is inadmissible as evidence against the person in proceedings for a service offence unless:

(a) if the confession or admission was made in circumstances where it was reasonably practicable to tape record the confession or admission–the questioning of the person and anything said by the person during that questioning was tape recorded; or

(b) …

1. Section 101JA(3) provides for an exception to the otherwise rigid requirements of s 101JA(1), as follows:

“In proceedings for a service offence, evidence to which this section applies may be admitted even if the requirements of this section have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the service tribunal or, in the case of a court martial, the judge advocate of the court martial, is satisfied that, in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.”

1. In argument before the DFM the appellant also relied on s 90 of the *Evidence Act 1995* (Cth) (“the Evidence Act”) which provides:

“In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.”

## Challenge to Admissibility

1. At the trial the appellant objected to the admissibility of the evidence of CPL Pittman. He contended that there were no “special circumstances” which would warrant the admission of that evidence under of s 101JA(3) of the DFDA. There had been no recording of the evidence despite the recording equipment being readily available to CPL Pittman. CPL Pittman knew how to operate the equipment. The appellant submitted that many authorities had supported the proposition that strict compliance with the requirements of recording interviews was necessary and that, in the interests of justice, there were no circumstances which justified the admission of CPL Pittman’s evidence.
2. The DFM laboured under a disability in dealing with the appellant’s evidentiary objections. No prior notice of the objections had been given to the DFM and limited facilities for research were available to him at the trial venue. Furthermore, no authorities relating to the construction of s 101JA(3) of the DFDA were drawn to his attention.
3. The DFM accepted, by reference to *R v Armstrong* (2010) 202 A Crim R 478 and the authorities therein referred to, that procedural protections of the kind which are dealt with in s 101JA(1) must strictly be complied with. He also accepted that the policy considerations which inform this approach were relevant to a determination of where the interests of justice lay when an application of s 101JA(3) was being considered. He noted that both the prosecution and defence had contended that a balancing exercise, of the kind contemplated by s 138 of the Evidence Act, was appropriate in determining where the interests of justice lay. This involved weighing the considerations which favoured the admissibility of evidence against those which tended to the opposite conclusion.
4. The DFM did not find authorities, to which he was referred and which dealt with whether or not a reasonable excuse existed for non-compliance with similar requirements, to be of assistance.
5. He accepted submissions that the words “special circumstances” in s 101JA(3) should be accorded their ordinary meaning and were not to be equated with extreme or exceptional circumstances.
6. The DFM then turned to the application of s 101JA(3). He started by identifying the reasons given by CPL Pittman for not tape recording his interview with the appellant. Those reasons were that CPL Pittman did not have a cassette recorder available to him and that he expected that ADFIS would conduct an interview later. He had done as SGT Ritchie had requested and taken notes and left them for ADFIS. The DFM continued:

“Whilst the circumstances demonstrate a certain slackness on the part of CPL Pittman, and potentially of ADFIS, although it must be said SGT Ritchie was not called, and it would be unfair to criticise him in such circumstances, I have concluded that the non-compliance by CPL Ritchie [sic] was not a deliberate attempt by him to circumvent the DFDA requirements or to compromise the rights of the accused. CPL Pittman had made contact with a superior officer at ADFIS and done what he was told.

He did keep a written record of what was said to him in his service notebook. Those notes were not available yesterday, but they do exist, and could be made available and could be the subject – could be subject to test by cross-examination. Importantly, CPL Pittman did administer a caution to the accused, and despite some slight protestations by the accused in his evidence suggesting he did not know what he was doing, the evidence overall supports a conclusion that what was said was voluntary, and no submissions were made questioning its reliability.

The slackness to which I referred earlier is to be deplored, not encouraged. On the other hand, there is a strong public interest in having all reliable evidence before a tribunal of fact and in having offenders brought to justice.”

1. At that point he put further consideration of s 101JA of the DFDA temporarily to one side and turned his attention to the appellant’s alternative submission that the evidence of CPL Pittman should not be admitted because it would be unfair to him to do so within the meaning of s 90 of the Evidence Act. In the absence of any suggestion that the admissions by the appellant were given involuntarily or were unreliable, he held that it would not be unfair to admit the evidence. The appellant’s objection, insofar as it was based on s 90, therefore failed.
2. The DFM then returned to the provision of s 101JA(3) of the DFDA and said:

“To return to section 101JA(3) of the DFDA, I am satisfied that in the special circumstances of the case admission of the evidence of CPL Pittman would not be contrary to the interests of justice. It follows that I rule his evidence to be admissible.”

Although, at this point in his reasons, the DFM did not identify the particular “special circumstances” which he considered justified the admission of CPL Pittman’s evidence, we consider that a fair reading of his ex tempore reasons suggests that those circumstances are to be discerned from the three paragraphs which we have quoted above at [31].

## Submissions of the Appellant

1. The appellant submitted that the DFM erred in admitting CPL Pittman’s evidence. He further submitted that the onus of satisfying a court that the evidence should be admitted rested on the prosecution; that, under s 101JA(3) of the DFDA, a service tribunal may admit the evidence of a confession or admission which has not been tape recorded in compliance with s 101JA(1), but before doing so must have regard to the reasons for the non-compliance and to any other relevant matters; to consider the circumstances of the case; and to be satisfied that the admission of the evidence would not be contrary to the interests of justice.
2. The appellant contended that there was a clear contravention of s 101JA(1) of the DFDA; that there was evidence from CPL Pittman obtained during the *voir dire* that he had received a briefing from the Queensland Police concerning the finding of detonators; that he suspected the appellant had potentially committed a service offence; that he administered a caution to the appellant because he believed that he had committed a service offence; that he had first contacted ADFIS before questioning the appellant and was advised to “record notes and to leave them in the station for him [SGT Ritchie] to have a look at later”; that CPL Pittman had access to the interview room with recording equipment, was familiar with it and had previously used it and could have done so on this occasion but did not do so.
3. The appellant pointed to the reasons provided by CPL Pittman for not recording his questions of the appellant, and his answers, namely:

 (i) “… this was basically just a number of questions so I had clear in my mind what was happening that night and for ADFIS to follow up the following day”; and

(ii) It was CPL Pittman’s understanding that there was no requirement to record his conversation with the appellant other than in a form that could be left for them later that day because he was “under the impression that ADFIS would be dealing with the job later.”

1. The appellant also referred to the following findings of the DFM:
* CPL Pittman did not read back to the appellant the notes nor was the appellant asked to sign them and further, the notes were not available at the hearing;
* CPL Pittman could not recall whether he had administered all of the warnings that he was required to administer;
* The observations of CPL Pittman that when the appellant was interviewed he was still “pretty drunk” and was “not functioning properly because of a combination of his intoxication and lack of sleep”.
1. The appellant submitted that the failure by an experienced military police officer who suspected the appellant had committed an offence to record the conversation in circumstances where recording equipment was readily available led to the conclusion that no special circumstances existed which would have justified the admission of the evidence.

## Submissions of the Respondent

1. The respondent contended that the DFM had provided comprehensive reasons for the admission of the evidence of CPL Pittman; that consideration was given, not only to the operation of s 101JA(3) of the DFDA, but also to s 90 of the Evidence Act; that whilst the appellant appeared to be tired, he did not give the impression to CPL Pittman that he was intoxicated and he could understand what was being said to him by CPL Pittman. The respondent stressed that the failure to comply with the requirements of s 101JA(1) resulted from CPL Pittman believing that the matter would be investigated by ADFIS later on that day. It was for this reason that he did not record the interview.
2. The respondent acknowledged that CPL Pittman could not recall the extent of the caution provided. He submitted, however, that “special circumstances” are not necessarily extreme or exceptional circumstances; that the circumstances in which the appellant came into CPL Pittman’s custody needed to be considered in the light of the latter’s belief that he would not be investigating the conduct of the appellant and that he passed on no details to ADFIS.
3. In these circumstances, the respondent submitted that the interests of justice test required fairness to both parties and that the DFM had carefully considered all relevant factors before reaching his decision. No appellable error had been established.

## Consideration

1. This inquiry focuses attention on two competing interests, namely the appellant’s interest in being afforded the protection of a recorded interview and the public interest in courts or tribunals being able to consider all relevant evidence. The legislature has accorded primary importance to the protective provisions contained in s 101JA(1). If they have not been complied with any resulting evidence will be inadmissible unless, having regard to a range of considerations, a service tribunal is satisfied that “in the special circumstances of the case, admission of the evidence would not be contrary to the interests of justice.”
2. Although the meaning of the words “special circumstances” have not previously been considered in the context of s 101JA(3) they have received judicial attention in a similar context. In *R v Orellana (No 2)* [2009] NSWDC 152, Cogswell SC DCJ dealt with s 23V(5) of the *Crimes Act 1914* (Cth) (“the Crimes Act”). That subsection was in substantially the same terms as s 101JA(3) of the DFDA. His Honour said (at [13]) that:

“To my mind, the provision directs my attention to the particular circumstances of the case at hand. The word *“special”* is used in the sense of the definition contained in the fourth edition 2005 of the *Macquarie Dictionary* as *“peculiar to a particular instance”*. I do not regard the adjective *“special”* as requiring the circumstance to be, for example, exceptional, extraordinary or different from what is ordinary or usual.”

1. In *R v Waters* (2002) 129 A Crim R 115 at [25], Gray J was more open to the view that “special” and “exceptional” circumstances were semantically similar. His Honour said:

“The discretion to admit under “exceptional circumstances” in the *Crimes Act 1958* (Vic) is similar to the “special circumstances” provision in s 23V(5) of the *Crimes Act 1914* (Cth).”

1. We agree with the DFM that the term “special circumstances” in s 101JA(3) should not be equated with extreme and exceptional circumstances. Rather, the definition is intended to provide scope for the decision-maker to pay regard to all of the circumstances of the particular case in order to determine whether, on balance, the decision-maker considers that the circumstances are such as to warrant the admissibility of evidence despite non compliance with the requirements of s 101JA(1).
2. The “contrary to the interests of justice” test has also been considered in the context of s 23V(5) of the *Crimes Act*.
3. In *R v Barklimore* (2007) 167 A Crim R 377, Higgins CJ (at [94]) framed the test as follows:

“The test is whether I am satisfied that the admission of the evidence would *not* be contrary to the interests of justice. Thus whilst I am not satisfied it would be “contrary to the interests of justice” to admit the evidence; I cannot positively say that it would not be.”

1. This test was applied by Refshauge J in *R v JF* (2009) 237 FLR 142.
2. These authorities also support the view that a court is required to balance competing considerations when determining whether it can conclude that it would not be contrary to the interests of justice to admit the impugned evidence. In *Barklimore* Higgins CJ said (at [94]) that:

“The interests of justice, for this purpose, include marking disapproval of police misconduct both as to conducting unrecorded interviews and as to then denying that such an interview had taken place. Against that would have to be balanced the desirability of admitting relevant evidence which could properly support the prosecution case.”

1. The peculiar circumstances of the present case which the DFM identified and took into account were:
* CPL Pittman should have and could have made an electronic recording of his interviewing with the appellant.
* He did not do so because he did not consider that he was undertaking an investigation.
* He did not fail to record the interview in order, deliberately, to avoid complying with the legislative requirements.
* He had administered a caution before he asked any questions of the appellant.
* Any admissions were made voluntarily and there was nothing to suggest that they were unreliable.
* Notes were taken of the questions and answers.

The DFM balanced these factors when concluding the departures from the requirements of s 101JA(1) were to be deplored rather than encouraged but that there was “a strong public interest in having all reliable evidence before a tribunal of fact and in having offenders brought to justice.”

1. We consider it to be surprising that the questions were asked by CPL Pittman of the appellant at all. Certainly, CPL Pittman did not believe that he was investigating the matter. That function was to be performed by ADFIS. He said that he could not be certain that the appropriate caution was administered in full before he asked the questions which he recorded in his notebook.
2. There was also evidence before the DFM that:
* Due to his intoxication, the appellant had no recollection of the interview, and was therefore not in a position to challenge the evidence of CPL Pittman;
* The appellant may not have been provided the appropriate caution and was clearly suffering from the effects of intoxication; and
* The appellant was not taken into the interview room.
1. It is, therefore, possible that the conversation between the appellant and CPL Pittman took place in circumstances where the appellant had no idea that he was being asked to provide information which could be used as admissions against him in criminal proceedings.
2. It is apparent that the competing considerations were finally balanced. The question for determination is not whether we would have made the same or a different decision from that made by the DFM had we been conducting the trial. The appellant can only succeed on this ground if he is able to establish that the DFM committed one or more of the errors identified in *House v The King* (1936) 55 CLR 499 at 505:

“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.”

1. Having carefully examined the DFM’s reasons we are unable to discern any relevant error which affected the exercise of his discretion. In particular the DFM directed himself correctly as to the construction and application of s 101JA of the DFDA and he took account of all material considerations which bore on his decision.

## Additional Evidence

1. In any event there was other evidence before the DFM which supported his decision to convict the appellant. That evidence was contained in a record of interview between the appellant and SGT Cox. The interview took place on 28 June 2011 after the appellant had been cautioned.
2. In the course of the interview the appellant was asked about what he did on the range:

“SGT Cox: [W]ere you issued an order by your superior officer at the time to conduct a complete range clearence [sic] of Field equipment?

CPL Leith: AH, YEAH I WAS TOLD BY SGT FEO TO CLEAR THE PIONEER GUYS OFF THE RANGE.

SGT Cox: Was SGT Feo your superior at this time?

CPL Leith: YES

SGT Cox: Was a 100% Clearance of field equipment conducted, including your own equipment?

CPL Leith: 100% CLEARENCE [sic] WAS CONDUCTED OF THE PIONEER GUYS BUT I DIDNT [sic] CLEAR MY OWN PACK JUST MY WEBBING.”

1. Later in the interview the appellant was asked about what he intended to do with the detonators:

“SGT Cox: [U]pon finding the Electric Detonators in your possession what did you do?

CPL Leith: UM, NOTHING PRETTY MUCH, UM, I DONT [sic] KNOW HOW TO ANSWER IT. UM, I DIDNT [sic] REPORT IT I WAS GOING TO BLOW THEM ON THE BEACH ON THE QUIET TO AVOID DISRUPTION TO THE BOYS, HOWEVER ABOUT AN HOUR LATER I DECIDED THIS WAS A BAD OPTION BUT I WAS ALREADY IN TOWN AND I WAS GOING TO HAND THEM IN THE NEXT MORNING.

SGT Cox: [W]hat were your intentions with the Electric Detonators?

CPL Leith: AS PER THE LAST STATEMENT MY INTENTIONS WERE INITIALLY TO GET RID OF THEM BUT AFTER I THOUGHT ABOUT IT WAS TO HAND THEM IN THE NEXT MORNING [sic].”

1. The appellant gave evidence that, when he discovered the detonators in his possession, he did not have an opportunity to hand them in before he left the base because he had a pressing luncheon engagement in Townsville.
2. In cross-examination he stated, that, when he left the barracks to attend the lunch, he had not decided “which option to take”. He also stated that one of his concerns about his failure to remove his own detonators was the possibility that all members of the unit would be asked to participate in a clearance of their equipment and that the reputation of SGT Feo and himself could suffer. He steadfastly maintained that, at the time he left the barracks, he had not decided what to do with the detonators. He was asked in cross‑examination: “Isn’t it true that the reason that you left to go to lunch and took these detonators with you is because you had no intention of returning them at that stage to your superiors?” He responded: “I didn’t have any intention at that point, sir, or any – of – I hadn’t made a decision of my options. I hadn’t assessed what was going on. I hadn’t made any logical thought process at that point.”
3. Ultimately, it appears that the appellant came to the view that the detonators should be returned. This is apparent from the following question in cross-examination and reply:

“Yes. So of the bad options that were available to you, you didn’t consider handing back the ammunition as being one of those bad options?---In the end I considered it to be the best option of the lot, sir, to hand them back.”

1. As to the possibility which had been earlier referred to of blowing the detonators up on a beach, the appellant stated that he had no actual means of detonating such explosives.
2. The admissions made by the appellant in his interview with SGT Cox, when read with uncontested oral evidence, supported findings that:
3. he did not intend to keep the detonators after completion of the exercise; rather, it was by inadvertence that he failed to clear his own equipment and the detonators remained in his pack;
4. he took the detonators into Townsville;
5. when in Townsville, he decided to destroy them in order to avoid any disciplinary or other action that might occur because of their removal from the base;
6. about an hour later he changed his mind; and
7. decided to hand the detonators in the next morning.
8. In our view the evidence established that, when the appellant left Lavarack Barracks, the appellant did not have the intent necessary to establish an offence under s 47C of the DFDA. Once in Townsville, however, he changed his mind and, albeit for a relative short time, maintained a determination to destroy the detonators on the beach. Whether or not it was practicable to do so was of no moment. He decided to deprive the Commonwealth of the detonators. Nor does it matter that he again changed his mind and determined to take the detonators back to the barracks and place them in the proper repository. This is because an offence was committed under s 47C at the point at which the appellant formed his malign intent.
9. Section 47E(1) of the DFDA provides that “in a case where a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner” will render the accused liable to conviction. Section 47E(1) is based on s 3(1) of the *Theft Act 1968* (UK). In *Director of Public Prosecutions v Gomez* [1993] AC 442 the House of Lords held that, under this provision, an appropriation can occur when the accused person assumes any right of the owner. One such right is the right to dispose of or destroy the property. The effect of the English authorities on the equivalent legislation is that theft occurs when “[a]nyone doing anything whatever to property belonging to another, with or without his consent, appropriates it; and, if he does so dishonestly and with intent by that, or any subsequent act, permanently to deprive, he commits theft”: see Ormerod D, *Smith and Hogan Criminal Law* (12th ed, Oxford University Press, 2008) p 741.
10. An appropriation, therefore, occurred when the appellant, who had the detonators in his possession, determined to retain them for the purpose of destroying them, notwithstanding his subsequent change of mind.

## Conclusion

1. For these reasons we consider that this ground has not been made out.

# GROUND 3 – THE LAWFUL ORDER

1. The second charge alleged that the appellant had disobeyed a lawful command. That lawful command, as alleged in the Charge Sheet, was given by SGT Feo. The order was that the appellant “was to conduct a 100% range clearance of the Pioneer Section before leaving Townsville Field Training Area.” A “range clearance” is a process prescribed by the Manual of Land Warfare. It requires the physical checking of all the equipment of all relevant members in order to ensure that no ammunition or other explosives used on the range had been retained by the members.
2. SGT Feo gave evidence at trial that he had instructed the appellant to “[c]lear the boys while I go hand back the ammo.” By this he meant that the appellant was to undertake a physical check of the equipment in the manner prescribed by the Manual.
3. The appellant confirmed that he had acted on this direction by undertaking a physical check of the equipment of all the members of his platoon. He acknowledged that he should have, but did not, check his own equipment. Had he done so he would have discovered the detonators.
4. The appellant submitted that he could not be found guilty of the second charge because he had, literally, complied with the order given to him by SGT Feo. He also emphasised the difference between the language actually employed bySGT Feo and the more formal paraphrasing of it in the particulars of the charge.
5. Having summarised the evidence, the DFM explained his reasons for finding the appellant guilty of this offence as follows:

“In the circumstances, I can see no merit in the argument raised by the defending officer about the description of the command in the charge, vis-à-vis the evidence of the actual words used. I find that SGT Feo gave to the accused the command alleged by using the words “Clear the boys.” I find that he intended his command to require a physical check of the equipment of all members of the section and the accused’s own equipment. I find that the accused knew that he had been given the command and that he understood it to require a physical check of the equipment of all members and his own equipment.”

1. We do not consider that these reasons disclose appellable error.
2. An order may be lawful even though the person giving it does not use formal language. What is critical is that the words used are reasonably capable of conveying and being understood as conveying a direction to do or not do some act. In making this determination it will be relevant to have regard to the relationship between the person giving the order and the person to whom it is given, the terms in which they converse in relation to work related matters and the common understandings of terms and expressions used in their workplace environment.
3. SGT Feo was the appellant’s immediate superior in the Pioneer Platoon. They worked together closely and had done so for some time. They had worked together over a number of days during the range exercise which had just concluded when SGT Feo gave his order.
4. The appellant understood what SGT Feo had directed him to do. Notwithstanding the shorthand expression “[c]lear the boys”, the appellant understood that he was required to conduct a clearance in accordance with the Manual. The persons to be cleared were all members of the Platoon including himself. The appellant did not seek any clarification from SGT Feo about what he (the appellant) was required to do. On the contrary he immediately set about complying with it by physically checking the equipment of all members of the Platoon in order to ensure that none of them was in possession of any ammunition or detonators with which they had been provided for the purposes of the exercise. He understood that he should have checked his own equipment but did not do so due to inadvertence.
5. In dealing with this ground the Tribunal is required to apply the test propounded by the High Court in *M v The Queen* (1994) 181 CLR 487. As we said in *Yewsang v Chief of Army* [2013] ADFDAT 1 at [59]:

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

1. In our view, having regard to the whole of the evidence, it was open to the DFM to conclude, beyond reasonable doubt, that the appellant was guilty of this charge.

# GROUND 4 – DOUBLE JEOPARDY

1. A Queensland Police record included in the appeal book disclosed that, on 11 July 2011, the appellant was dealt with by the Queensland Magistrates’ Court at Townsville in respect of an offence against s 34 of the *Explosives Act 1999* (Qld) (“the Explosives Act”). Subject to prescribed exceptions, none of which are presently material, that section creates a civilian offence of possessing an explosive without lawful authority. The offence is punishable by fine or by imprisonment not exceeding six months. The record discloses that, without proceeding to conviction, the court fined the appellant. It became common ground before us that the power to deal with the appellant in this way was conferred on the Magistrates’ Court by the combined effect of ss 12 and 44 of the *Penalties and Sentences Act 1992* (Qld) (“the Penalties and Sentences Act”).
2. Recalling that, an unlawful appropriation of property, however transitory, was an element of the service offence of theft contrary to s 47C of the DFDA of which the appellant had been convicted, we raised with counsel at the outset of the hearing of the appeal whether this was a case in which s 144(3) of that DFDA had application such that the appellant ought never to have been tried by the DFM in respect of that offence, on the basis that the service offence of theft was “substantially the same” as the offence against the Explosives Act. Counsel for the appellant requested and we granted a short adjournment so as to consider this question. He properly drew our attention to that part of the transcript which disclosed that the question of the operation of s 144(3) of the DFDA was one which had been raised before the DFM, albeit in the context of whether the effect of s 144(3) was such that the appellant could not lawfully have been convicted of the alternative offence of unlawful possession of service property contrary to s 45 of that DFDA. In the result, it did not prove necessary for the question to be explored in depth before the DFM as the appellant was convicted of the offence of theft.
3. Following the adjournment, counsel for the appellant sought leave to add as further ground of appeal a ground in terms that the effect of the appellant’s having been dealt with by the Queensland Magistrates’ Court in respect of the offence against s 34 of the Explosives Act was such that it was not lawfully possible for him to have been tried in respect of the service offence of theft on the basis that the latter was substantially the same offence as the former. Counsel for the respondent acknowledged that the point was purely one of law. He further submitted that, as far as he was aware, there was no prior authority in either an Australian Court or this Tribunal in respect of the meaning and effect of s 144(3) of the DFDA. Counsel for the appellant confirmed that this was also his understanding of the present position. In the result, counsel for the respondent neither consented to nor opposed the granting of a leave to amend.
4. Particularly because of the novelty of the question in relation to service discipline law and as a matter of fairness to the appellant, we considered that it was in the interests of justice to grant leave to the appellant to amend the grounds of appeal as requested. In so doing, we extended to the parties an opportunity, if desired, to make supplementary written submissions in respect of this further ground, given that it had only emerged on the hearing of the appeal. Counsel informed us that they were content to address the issue in oral submissions and did so.
5. Before considering the merits of this additional ground of appeal it is desirable to set out the material parts of s 144 of the DFDA:

“144 Previous acquittal or conviction

…

(3) Where:

(a) a person has been acquitted or convicted by a civil court of a civil court offence; or

…;

the person is not liable to be tried by a service tribunal for a service offence that is substantially the same offence.

...

(4) For the purposes of this section:

…; and

(d) the dismissal of a charge of a civil court offence against a person, or the discharge of a person in proceedings on a charge of a civil court offence, by a civil court, under section 19B of the *Crimes Act 1914* or any corresponding provision of a law of a State or Territory, shall be deemed to be an acquittal of the offence.”

1. It was common ground between the parties that, for the purposes of s 144(4)(d) of the DFDA, s 12 and s 44 of the Penalties and Sentences Act, considered in conjunction, should be regarded as a “corresponding provision” of a law of a State. We concur with that position. For the purposes of s 144(3) of the DFDA, the appellant is therefore to be regarded as a person who has been acquitted of an offence against s 34 of the Explosives Act.
2. Counsel for the appellant was astute to acknowledge at the outset of his submissions that an intention of permanent deprivation, either as that concept is defined for the purposes of s 47C by s 47M of the DFDA, or otherwise, was not one of the elements of the offence created by s 34 of the Explosives Act. He submitted that exact correspondence was unnecessary, s 144(3) requiring nothing more than “substantially the same”. Recalling the statement in *McWaters v Day* (1989) 168 CLR 289 at 298 that the effect of *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518is that military law is limited in scope and intended to be “seen as an additional, rather than a replacement, set of rights and duties”: see *Groves v The Commonwealth* (1982) 150 CLR 113 at 125, he submitted that the civil power here, which might have chosen to charge theft as a “civil court offence” in respect of the conduct which occurred after the appellant left the barracks boundary, had instead made a deliberate decision only to charge the Explosives Act offence in respect of which the appellant was deemed to have been acquitted. There was therefore no place for the appellant to be tried in respect of service offence of theft. He further submitted that theft contrary to s 47C entailed as an element possession, however transitory, of the detonators concerned and that this was enough to make it “substantially the same”. Were the s 47C service offence not regarded as a “substantially the same” offence, the appellant would suffer the embarrassment of being prosecuted and convicted under a supposedly supplemental system in respect of a service offence at the heart of which lay an alleged unlawful possession of which he was deemed to have been acquitted.
3. Counsel for the respondent accepted that military law supplemented rather than replaced liabilities to which members of the Australian Defence Force were subject under the general criminal law. He submitted that one manifestation of this was that the offence against s 47C of the DFDA operated so as to supplement the offence against the Explosives Act. The latter offence was not “substantially the same” as the former. Further, the deemed acquittal in respect of the latter did not mean that the appellant’s possession was lawful for all purposes only that it could not be alleged that he had possession without Explosives Act authority. It did not mean that he was authorised by the Commonwealth to remove the detonators from the barracks and retain them in his possession.
4. One thing, we consider, is clear. The disposition of this ground is not to be determined by *a priori* assumptions based on an understanding of the doctrines of *autrefois acquit* and *autrefois convict* or of whatever may be said in an explanatory memorandum as to the purpose of s 144 of the DFDA. It is necessary to begin with the text of that provision, read in context and having regard to the subject matter, scope and purpose of the DFDA.
5. It may readily be accepted that “substantially the same” is not to be equated with the same. There is an inherent imprecision about the adverb, “substantially” but on no view does it mean “exactly”. While the dictionary meaning offered for the word, “In essence; essentially, intrinsically”: see Oxford English Dictionary 2013 (Oxford University Press) [www.oed.com](http://www.oed.com) viewed 12 June 2013 confirms this, beyond this that meaning offers other, equally inexact synonyms. Inexact though these and the adverb “substantially” are, they do convey that there must be a high degree of correspondence. Context also supports that view of the meaning of the word. The purpose and intent of s 144 is to prevent a defence member or defence civilian being tried for a service offence where that member or civilian has already been dealt with by a civilian court here or abroad or a service tribunal for what is, “substantially or “in essence” the same offence as the service offence with which that member has later been charged.
6. To afford the word “substantially” that meaning in the context in which it appears in s 144(3) of the DFDA conforms to what was said in *McWaters v Day* not only as to the limited scope of military law but also its supplemental nature. Preventing a defence member again being tried where there is a close correspondence between the service offence now proffered and an offence earlier dealt with limits the scope of military law. It also recognises that its supplemental nature means that the possession of one element in common between the service offence now charged and an offence earlier charged and dealt with is not to be equated with substantial sameness if it can be seen that there are other elements in the service offence now charged which thereby create an offence which is supplementary in character.
7. The present offers a case in point. Were the appellant previously to have been dealt with by a civil court in respect of the offence of theft of Commonwealth property contrary to s 131.1(1) of the *Criminal Code* *1995* (Cth), it is difficult to see any supplementary quality in s 47C of the DFDA. The correspondence is not quite as stark in relation to the alternative service offence created by s 45 of the DFDA - possession of service property without lawful authority. Were the appellant to have had authority under the Explosives Act for the possession of the detonators that would have been a complete defence to the charge he faced under s 34 of that Act. He would not have had military authority for possessing them when found with them outside barracks but the two offences are arguably “substantially the same” on the facts - possession of an explosive without lawful authority. It is not necessary to reach a concluded view on that subject because we were not pressed on behalf of the respondent to substitute, under s 26 of the DFDA, a conviction for an alternative offence in the event that we quashed the appellant’s conviction in respect of an offence against s 47C of the DFDA.
8. So far as an offence against s 47C of the DFDA is concerned, the absence of the fault element entailed in that service offence from an offence against s 34 of the Explosives Act is a distinctive and telling feature. Proof of bare possession without lawful authority would not be sufficient to prove an offence against s 47C of the DFDA. The additional fault element which must be proved to convict in respect of that service offence discloses a supplementary operation for military law over and above the “civil court offence” against s 34 of the Explosives Act. There is a purpose of preserving and enhancing good order and discipline in the Australian profession of arms served by s 47C of the DFDA. There are obvious risks, even in peacetime in Australia presented by a military whose members intentionally, permanently and without authority, remove Commonwealth arms and munitions, to say nothing of the impact on military efficiency in wartime of such conduct. Pilfering within barracks of issued items other than arms and munitions is also apt to diminish military efficiency and to fuel inter-personal tensions between defence members. All of these considerations lie behind the adage, well-known in the military, “[s]oldiers don’t steal”.
9. It follows from this textual and contextual analysis that we do not consider that the service offence created by s 47C of the DFDA and the civil court offence created by s 34 of the Explosives Act are substantially the same. While that would be enough to dismiss the additional ground of appeal, it is desirable, particularly because the meaning and effect of s 144(3) has not earlier fallen for consideration, also to consider whether there is anything in secondary materials or other principles attending the construction of legislation affecting the armed forces which would either confirm or call into question the correctness of the conclusion thus reached.
10. Though s 144 of the DFDA has been amended on a number of occasions since first enacted, those amendments, which take account of the later innovation of a “discipline officer” and which were responsive to the creation and short-lived existence of the Australian Military Court, do not detract from the ongoing utility of what was said of clause 144 of the Bill, which became the original s 144 of the DFDA. The scheme of the section has remained the same since its original enactment, avoidance of trial before a service tribunal in respect of an offence which is substantially the same as one earlier dealt with in the civil courts here or abroad or under the military discipline system.
11. The explanatory memorandum had this to say about the then clause 144:

“1050. This clause provides, in relation to service tribunals, a prohibition against double jeopardy, ie, in simple terms, an accused cannot be tried a second time for an offence of which he has previously been charged and acquitted or convicted (whether by a service tribunal or a civil court).

1051. Sub-clause (1) provides that acquittal or conviction of a person by a service tribunal is a bar to any further trial by a service tribunal of that person for the same, or substantially the same, offence.

1052. Sub-clause (2) provides similarly where a court martial or a Defence Force magistrate takes an offence into consideration under clause 77, and sub-clause (3) makes similar provision in relation to offences previously dealt with by a civil court in Australia or overseas.

1053. Sub-clause (4) provides that the dismissal of a charge by a service tribunal (under clauses 130, 132, 135 or existing law or by a civil court (including a conditional release without proceeding to conviction)) is deemed to be an acquittal, but that a direction by a convening authority or a summary authority that a charge be not proceeded with (clauses 103, 110, 111) is not.

1054. As to protection of persons tried by service tribunal against double jeopardy in a civil court, see clause 191, and as to re-trial, see clauses 160 and 166 of the Bill and new clause 24 and sub-clause 52(5) of the Courts-Martial Appeals Act (the Defence Force Discipline Appeals Act) as amended by the Defence Force (Miscellaneous Provisions) Bill 1982.

Present position

Existing law: AA and AFA 47(5), 157, AMR 250, AFA 46(7), NDA 129(2).

1055. Existing law is generally similar, but there is r necessarily no reference to offences taken into consideration, and Navy law makes no reference to the position dealt with in subclause (1) because the common law is presumed to apply.

1973 Report

1056. Clause 131 makes similar provision but:

1. the definition of “substantially the same offence” has been omitted from the Bill as unnecessary; and
2. clause 144 of the Bill is restricted to liability to trial again by service tribunal, liability to trial again by civil court being dealt with in clause 191 of the Bill.” (Emphasis added).
3. Clause 191 of the Bill, referred to in para 1056 of the explanatory memorandum, became s 190 of the DFDA, s 190(3) and s 190(5) of which were declared invalid in *Re Tracey* because the defence head of legislative power in s 51(vi) of *The Constitution* did not extend to the making of a law which interfered with the exercise by State courts of their general criminal jurisdiction. Given the question introduced by the amended ground of appeal, there is a certain irony in the statement, in the part of para 1056 which we have emphasised, that the definition of “substantially the same offence” was omitted because it was “unnecessary”. That is because, when one goes to the text of the draft bill annexed to the *Report of the 1973 Working Party in respect of a Defence Force Disciplinary Code* (“the 1973 Report”), one finds that, for the purposes of s 131 of the draft bill, of which s 144 and, as to clause 130(3), the original s 190(3) and 190(5) of the DFDA are analogues, it is there provided, by draft clause 131(4):

“For the purposes of this section, the expression ‘substantially the same offence’ includes -

1. an alternative offence of which the person might have been convicted; and
2. where the offence of which the person was acquitted or convicted was an offence of causing the death of a person, any other offence of causing the death of that person.”
3. That an alternative offence was regarded by the well experienced committee which authored the influential 1973 Report as warranting being regarded as “substantially the same” highlights a reason why the amended ground cannot be dismissed as unarguable. It by no means follows from this that a conclusion drawn from the text, context and purpose of s 144 of the DFDA should be reversed.
4. Section 142 of the DFDA, which must be read in conjunction with Schedule 6 of the DFDA, makes extensive provision in respect of what are to be regarded as alternative offences for the purposes of trials and pleas in respect of service offences. Here, as we understand it, the argument would go that, because an offence against s 47C of the DFDA is to be regarded as an alternative to an offence against s 45 of that Act they must be regarded as “substantially the same” offences and because an offence against s 45 is “substantially the same” as an offence against s 34 of the Explosives Act, that State offence must be regarded as also “substantially the same” as an offence against s 43C of the DFDA. The next step in that argument would then be that a deemed acquittal in respect of the State offence precluded being tried in respect of an offence against s 43C.
5. Though s 142, like s 144, falls within a subdivision of the DFDA which contains a number of provisions about trials, there is nothing about the prescription of alternative offences in and pursuant to s 142 which indicates that “substantially the same” offence must be equated with an alternative offence. Had this been intended by Parliament, it would have been easy expressly to say so, as clause 131(4) of the draft bill annexed to the 1973 Report demonstrates. Further, the reference in that definition to alternative offences was by way of inclusion. Absent such express inclusion, it by no means follows that an alternative, perhaps lesser, offence is “substantially the same” offence as the offence of which it is a specified alternative.
6. An analogue of s 144(3) of the DFDA is to be found in s 134(1) of the *Army Act* *1955* (UK) (“Army Act”). In s 134(1) of the Army Act, the expression used is “the same, or substantially the same offence”. Canada’s *National Defence Act 1985* (Can) also contains, in s 66, an analogue but, as that provision uses the less exacting expression, “substantially similar” we do not consider that assistance is to be gained from any Canadian authority.
7. As to both s 144(3) of the DFDA and s 134(1) of the Army Act, there is reason to think that the draftsman’s use of the expression, “substantially the same offence” was an endeavour to capture a prevailing common law criminal law position at least and materially as to *autrefois acquit*. That is because the identical expression, “substantially the same” is to be found in a summary of the common law on the subject of *autrefois acquit* offered by Lord  Morris of Borth-y-Gest (Lord Morris), accepted as correct by Lord Reid, in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1305-1306.
8. There is longstanding authority that legislation concerning the armed forces should be considered against the background of the common law: *Marks v The Commonwealth* (1964) 111 CLR 549 at 573; *The Commonwealth v Welsh* (1947) 74 CLR 245; *Coutts v The Commonwealth* (1985) 157 CLR 91 at 108. Further, in *Re Tracey*, the applicability in Australia of Lord Mansfield CJ’s statement in *Burdett v. Abbot* (1812) 4 Taunt. 401 at 449-450 [128 E.R. 384 at 403] as to rights of a soldier at common law was placed beyond doubt. Lord Mansfield CJ stated:

“[A] soldier is gifted with all the rights of other citizens ... the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman.”

1. Thus, unless the language of s 144(3) of the DFDA dictated otherwise, a construction of that provision and, in particular, the expression, “substantially the same” which preserved the rights and duties of an Australian would have to be preferred to one which did not.
2. The summary offered by Lord Morris in *Connelly* of the position at common law was this:

“(1) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;

(2) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;

(3) that the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;

(4) that one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;

(5) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus if there is an assault and a prosecution and conviction in respect of it there is no bar to a charge of murder if the assaulted person later dies;

(6) that on a plea of autrefois acquit or autrefois convict a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;

(7) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;

(8) that, apart from circumstances under which there may be a plea of autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of res judicata applies;

(9) that, apart from cases where indictments are preferred and where pleas in bar may therefore be entered, the fundamental principle applies that a man is not to be prosecuted twice for the same crime.”

1. The expression “substantially the same” is used by Lord Morris in the third, sixth and seventh propositions in his summary. In that same case, at 1340, Lord Devlin, commenting upon the summary offered by Lord Morris, stated:

“My noble and learned friend [Lord Devlin] in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with my noble and learned friend that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based: see *Rex v. Kendrick and Smith*. I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. **I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not.**” (Emphasis added - footnote omitted).

1. By its use of the expression “substantially the same” in s 144(3) of the DFDA, Parliament must be taken not to have shared the difficulty voiced by Lord Devlin in *Connelly*. Legal characteristics or “elements” are always relevant but the task of determining whether two offences are “substantially the same” must necessarily be approached on the footing that exact correspondence is not required.
2. Applying the fourth of Lord Morris’ propositions as a measure of what would at common law be regarded as “substantially the same offence” does not compel a conclusion different to the one we reached on the basis of the language of s 144(3) and its context alone. That is because the evidence which is necessary to support the charge against s 47C of the DFDA, or the facts which constitute that offence, would not have been sufficient to procure a legal conviction in respect of an offence against s 34 of the Explosives Act in that the absence of authorisation under that Act is not a necessary proof in respect of an offence against s 47C. Neither is proof of intentional permanent deprivation in any way relevant to the proof of an offence against s 34 of the Explosives Act.
3. *Connelly* states the position at common law in the United Kingdom but the position is no different in Australia. Here, too, in *Pearce v The Queen* (1998) 194 CLR 610 at [18] , the High Court has acknowledged that the common law plea in bar based on prior conviction or acquittal extends to a prior conviction or acquittal in respect of an offence which is “substantially the same”. In their joint judgment in *Pearce*, McHugh, Hayne and Callinan JJ, at [18] – [21], also explain how the question as to whether offences are “substantially the same” is to be resolved:

“18 It is clear that the plea in bar goes to offences the elements of which are the same as, or are included in, the elements of the offence for which an accused has been tried to conviction or acquittal. There are, however, decisions that a person may not be prosecuted for one offence when that person has previously been prosecuted for “substantially the same” offence, or for an offence the “gist” or “gravamen” of which is the same as the subject of the earlier prosecution or, as was said in *Wemyss v Hopkins*, for the “same matter”. It may be suggested that these cases indicate that a plea in bar is also available if a person is charged with different offences arising out of substantially the same set of facts.

19 Much of the difficulty in determining whether a plea in bar is available when a person is charged with different offences arising out of substantially the same facts can be seen to stem from two sources: first, the uncertainties inherent in the proposition that it is enough that the offences are ‘substantially’ the same; and secondly, the attempt to identify the “sameness” of two offences by reference to the evidence that would be adduced at trial. But these difficulties may be more apparent than real.

20 In each of Chia Gee v Martin and Li Wan Quai v Christie, Griffith CJ identified the test for whether a plea in bar would lie as being “whether the evidence necessary to support the second [charge or prosecution] would have been sufficient to procure a legal conviction upon the first.” At first sight this might suggest that it is appropriate to consider what witnesses would be called and what each of those witnesses could say about the events which gave rise to the charges. Closer examination reveals that the inquiry suggested is different; it is an inquiry about what evidence would be sufficient to procure a legal conviction. That invites attention to what must be proved to establish commission of each of the offences. That is, it invites attention to identifying the elements of the offences, not to identifying which witnesses might be called or what they could say. It is only if attention is directed to what evidence might be given, as opposed to what evidence was necessary, that the inquiry begins to slide away from its proper focus upon identity of offence to focus upon whether the charges arise out of the same transaction or course of

events.

21 Further, when it is said that it is enough if the offences are “substantially” the same, this should not be understood as inviting departure from an analysis of, and comparison between, the elements of the two offences under consideration.” (Emphasis in original - footnote omitted).

1. Having regard to the explanation given in *Pearce* and for reasons already given, the proofs are different as between the offence against the Explosives Act and the offence against s 47C of the DFDA. They are not, “substantially the same”.
2. In the result, this case is one where the appellant has not been placed in double jeopardy contrary to s 144(3) of the DFDA. Instead, it is a case where, in respect of the charge of theft contrary to s 47C of the DFDA, military law is fulfilling the constitutionally sanctioned role of supplementing civilian criminal law in respect of a subject touching upon the good order and discipline of the Australian Defence Force.
3. Accordingly, the fourth ground also fails.

# DISPOSITION

1. It follows from our reasons that the appeal must be dismissed.

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| I certify that the preceding one hundred and eleven (111) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Cowdroy and Logan. |

Associate:

Dated: 20 August 2013