**IN THE DEFENCE FORCE DISCIPLINE )**

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**APPEAL TRIBUNAL )** DFDAT No. 1 of 1991

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**BRISBANE REGISTRY )**

**ON APPEAL** from a trial by a Defence Force Magistrate held at Victoria Barracks Brisbane from the fifth day of December, 1989 to the eighth day of December, 1989

**IN THE MATTER** of a conviction under the Defence Force Discipline Act section 32 where Warrant Officer Second Major preferred the charges and 220687 Staff Sergeant C. Behan was the accused

**220687 STAFF SERGEANT C. BEHAN**

**APPELLANT**

**REASONS FOR JUDGMENT**

Members: The Honourable Mr. Justice Cox (Deputy President)

 The Honourable Mr. Justice Gallop (Member)

 The Honourable Mr. Justice Badgery-Parker (Member)

Date: 18 July 1991

Brisbane

This is an appeal against the conviction of the appellant before a Defence Force magistrate on one count of assaulting a member of the Defence Force, who was inferior to him in rank, by kicking her. The offence was alleged to have occurred at Bamaga in far North Queensland on or about 21 May 1989 and the trial was conducted in December of that year.

The evidence for the prosecution was to the effect that at about 2.00 am on 21 May the complainant, Sig. Millar, Cpl. Jones and Sig. Willard were seated near a bonfire at a beach party organised by the ORs of a small detachment of 7 Sig Regt which was stationed at Bamaga under the command of WO2 Woods. Despite instructions to the effect that familiarity between males and females of the unit was to be avoided, Sig Millar and Cpl. Jones had been kissing quite openly and in sight of the O.C., (WO2 Woods), the appellant and another senior NCO Sgt Nowicki. All had consumed some alcohol and Sig Millar and Cpl Jones were significantly affected by it. WO Woods had approached and told them to stop or leave the area. They desisted and he moved some distance away to rejoin the senior NCOs. Soon afterwards the appellant approached them, used obscene language and told them to go to bed. The complainant Millar asked why and was told by the appellant “I don’t have to tell you anything. Just fuck off out of here”. He then kicked her on her lower back behind the hips. She responded saying “Don’t kick me” and a heated argument developed, both Sig Miller and Cpl Jones swearing and the appellant telling her to “fuck off out of here or I’ll charge you”.

While discrepancies of detail undoubtedly existed between the evidence of the witnesses called for the prosecution, the substance of the complainant’s allegation was confirmed by Cpl Jones, Sig Willard and by Cpl Bull, the last of whom, it was common ground, was unaffected by intoxicating liquor, having consumed only one can of beer several hours before.

His account was to the effect that he joined the three senior NCOs prior to the incident several metres away from the group at the fire; that one of them asked what he (Bull) thought of what was happening at the fire, that he replied “I think you’re reading more into it than meets the eye” and was abused by both the appellant and WO Woods. The latter than told the appellant to remove Sig Millar and Cpl Jones from the area and the appellant approached them and stood behind Sig Millar. He then said “if I were you I’d fuck off out of this area”. Sig Millar asked “Why” and the appellant replied “Because I fucking well told you so” and kicked her. She then said “Don’t kick me” and asked again why she should move. He replied “Because you’re a low life sig and I am a s/sgt – you’ll do as you’re told”. He then said she was charged. Both Sig Millar and Cpl Jones swore at the appellant and Jones was also told he would be charged.

Thus there was direct evidence of four witnesses who claimed to have observed the incident and to see the kick administered or to have observed circumstances from which the delivery of a kick was a most compelling if not inevitable inference.

The defence on the other hand put forward a markedly different version of events. WO Woods gave evidence that he observed the couple kissing, approached them and, seeking not to draw undue attention to them, said quietly “Come on you pair, enough of that sort of thing, how about you stand up and go to bed”. Both then told the CO to “get fucked” or “fuck off”, he was not sure which expression was used. He told them they would both be charged and again ordered them to stand up and go to bed. They ignored him and again embraced, lying on the ground. He then returned to the group of senior NCOs and said to the appellant “see if you can move this pair, will you”. He said that the appellant had then approached the still embracing couple saying “Come on your pair, you’ve been told to move, now move” and was met with the same obscene response as the W.O. The appellant repeated his order, had not himself sworn as alleged by the prosecution witnesses and Cpl Jones had jumped up and given the appearance “that he was going to have a go at Staff Behan”. At no stage did WO2 Woods see any contact made between the appellant and either Sig W Millar or Cpl Jones.

The appellant’s own evidence was in substance to the same effect. His first words to the couple near the fire after they had sworn at the WO and he had withdrawn had been “It’s a bit hot around here. It’s time to move. You’ve got to move now”. They had each sworn and each had been told by the appellant that he or she were charged. He denied kicking Sig Millar who he claimed was quite hysterical and kept demanding to know why she was being charged.

The third witness for the defense was Sgt Nowicki. He saw WO Woods approach the embracing couple but did not hear any of the encounter. He heard WO Woods then tell the appellant to go over and “sort that out and get rid of them” or words to that effect. He heard the appellant tell them to leave and go to bed and heard Cpl Jones tell the appellant to “get fucked” or to “fuck off”. He did not hear any other swearing but heard Sig Millar saying “Well, charge me”. Thereafter she continued to protest vigorously about the fact that she had been charged and wanted to know the reason. Sgt Nowicki said he did not see the appellant kick the complainant, but conceded that he could have kicked her when he was not looking.

The Defence Force magistrate in making his findings commented on the marked disparity between the two versions of events presented and upon the lack of plausibility of that of the defence. Without prelude there had been a sudden breakdown in discipline with two junior members of the detachment openly defying their CO, swearing at him and persisting in an embrace he had ordered them to stop. He had retreated and left the next senior in rank, Staff Sgt Behan to resolve the problem. The appellant had also been subjected to abuse and defiance and had placed the offenders on charges and yet Sig Millar had vehemently and repeatedly demanded to know why she was being charged.

He reviewed the evidence, including that of the lack of sobriety at the time of many of the witnesses, including the complainant and the appellant, and said he was disposed to believe the evidence of Cpl Bull as generally accurate and to accept it and that of the other prosecution witnesses generally. Having done so he said in the course of his findings:-

“where four people have given evidence that they witnessed an assault and nothing seriously has been established against them beyond innuendo” (he was referring to suggestions of bias on the part of the prosecution witnesses, all of whom were corporals or private soldiers, against the three senior NCOs who gave evidence for the defence)” to talk of having a reasonable doubt is difficult. That the accused denied the assault and that another close friend and associate of the accused, who is the commander of the detachment at the time and upon whom some criticism must fall if the accused is found guilty, so close were they in the events of the evening, also denied the assault can make little difference. I was not impressed by the accused and as has already emerged some of his evidence strains credibility. The defending officer employed the phrase ‘hypothesis consistent with innocence’ in the course of her address. That phrase is employed in cases of circumstantial evidence but hardly seems relevant where four people witness an assault”.

The first attack upon the verdict claims that the Magistrate failed to direct himself correctly upon or to apply the lawful standard of proof which lay upon the prosecution in the proceedings. The excerpts cited above were relied upon to support this ground. It is unfortunate that the Defence Force magistrate did not spell out clearly the burden and standard of proof, elementary though such matters are. It is, we consider, desirable that in every case the record of proceedings should show that the presiding Magistrate adverted to them and correctly formulated them, no matter how experienced in his task he may be, for a failure to do so coupled with equivocal comments, may lead to the impression that he could have misdirected himself.

We emphasize that the standard of proof beyond reasonable doubt extends to all essential elements of the charge but only to those. It does not extend to every material fact forming part of the prosecution case.

Trite though such propositions are, it is necessary to repeat them for in this case there appeared to us to be a misconception on the part of the appellant that the existence of doubt about peripheral matters of fact could amount to a bar to a finding of guilty beyond reasonable doubt.

We are satisfied that in the passages complained of the Defence Force magistrate was saying no more than that having, as he had announced, found the prosecution witnesses as a whole accurate as to essential details and their general credibility unimpaired by suggestions of bias based largely on innuendo, there was no real room for a reasonable doubt. The fact of denial by the accused and another witness who himself had some interest in the outcome, would not be sufficient on its own to raise a reasonable doubt as to guilt if the prosecution witnesses were, as he found, accurate and reliable. The phrase “a hypothesis consistent with innocence” is one normally spoken of in the context of a circumstantial case and in such a case requires detailed exposition to a jury, but the Defence Force magistrate rightly, in our view, dismissed the need for detailed consideration of the proper approach to the drawing of inferences from the circumstances alone where, as here, there was direct eye-witness evidence and he was not dealing with a circumstantial case. We cannot discern error in the Defence Force magistrate’s remarks, nor do they fairly lead to any suspicion that he may have misdirected himself.

The next ground of appeal is that the Defence Force magistrate “with respect to the evidence of a witness for the defence, namely Woods, did not properly direct himself upon, and/or did not properly apply the rule or process of assessing evidence commonly described as the rule in **Browne v Dunn**”.

A significant feature of the defence was that Cpl. Bull, clearly a very important witness if only for the fact that he was undoubtedly completely sober at the time of the incident, was biased not only against the appellant but also against the senior NCOs at large and was acting as a kind of champion for the couple and bonding the junior ranks together to give a united account for the prosecution. It was put to him in cross-examination that some time after the incident he had said to WO2 Woods in a conversation about taking a discharge from the Army, words to the effect “When I go down, I’m going to take others with me”. Cpl. Bull denied saying any such words. WO2 Woods when led in chief gave evidence of this incident, presumably as evidence in rebuttal of a denial of bias, but was not cross-examined on this aspect of his evidence by the prosecuting officer, who did challenge the truth of the witness’ evidence of the incident involving Sig W Millar. It was submitted to us that the Defence Force magistrate should have attached significance to the prosecution’s omission.

The rule in **Browne v Dunn** (1894) 6 R. 67 (4.2) requires the cross-examiner to put to his opponent’s witness any material or suggestion impugning the witness’ evidence which he intends to later adduce or invite the tribunal of fact to infer so that the witness, in fairness, should have the opportunity to deny it or explain it. The evidentiary issues between the parties should be identified so that each side’s position on them can be put. This issue having been raised by the defence in cross-examination, it was specifically denied by Cpl Bull. That left the way open for the defence to adduce evidence in contradiction of WO2 Woods but it did not impose any obligation on the prosecution to cross-examine the latter in detail on it. Failure to cross-examine may sometimes be interpreted as acceptance of the evidence led but where the cross-examiner’s challenge to the evidence has already been made by a specific denial from his witness, it could not be said that failure to cross-examine on that point implies an acceptance of the opponent’s evidence. It is a matter for the cross-examiner’s discretion as to whether he cross-examines in detail or at all on that point. The issue was joined, WO2 Woods was cross-examined in a manner indicating his testimony was not accepted by the prosecution as truthful or reliable, and no special significance could be attached to the prosecution’s failure to cross-examine on the point in question. There is no substance in his ground of appeal.

Complaint is also made that the Defence Force magistrate failed to properly direct himself on the law or rules of practice relating to evidence of prosecution witnesses which is probably or possibly affected by collusion. An attempt was made to suggest that the witnesses for the prosecution were biased and had colluded in the presentation of their evidence. Neither of the two signalwomen was cross-examined in a manner suggesting bias on their part or that they had been involved in any collusion. Both Cpls. Bull and Jones were cross-examined as to resentment they may have had towards their senior NCO and threats uttered by them but it was not suggested to either of them that they had colluded with each other or with the other witnesses to put forward a false story.

We were referred to **Hoch v The Queen** (1988) 165 CLR 292 but that was a totally different case concerned with similar facts and the danger of attributing probative value to similar facts where there was a reasonable possibility that the witnesses to those facts may have colluded in their fabrication.

Counsel for the appellant sought to rely on Hoch’s case “by way of analogy” but while it was incumbent on the Defence Force magistrate to closely consider all the evidence including anything relevant to bias or collusion there is no rule of law or practice that in a case such as the present the existence of a reasonable possibility or even probability of collusion between some of the witnesses or of bias of necessity raises a reasonable doubt as to one or more of the essential elements of the charge and calls for an acquittal. In any event the Defence Force magistrate adverted to the suggestion of collusion and bias and dismissed it as being of no substance.

The main complaint of the appellant is that the verdict of the Defence Force magistrate is unsafe and unsatisfactory in all the circumstances of the case.

In relation to appeals on the ground that the verdict was unsafe or unsatisfactory, Mason, CJ. said in **Chidiac v The Queen** (1991) 65 ALJR 207 at p.210-211:-

“It is now well settled that a verdict may be set aside as unsafe or unsatisfactory notwithstanding that there was, as a matter of law, evidence upon which the accused could have been convicted: **Whitehorn v. The Queen** (1983) 152 CLR 657 at 660, 686; **Chamberlain (No. 2)**, at 532, 601, 604, 618-619; **Morris** at 461, 473. In deciding whether a verdict should be set aside as unsafe or unsatisfactory, the question for the appellate court to determine is whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused: **Whitehorn**, at 686; **Chamberlain (No. 2)**, at 534, 606-608, **Morris**, at 461. Or, to put it another way, it is for the court to decide whether, on the relevant evidence, it was open to the jury to be satisfied beyond reasonable doubt of the accused’s guilt: **Morris**, at 472-473. The appellate court does not discharge its responsibility by finding that there was evidence sufficient to entitle the jury to convict because a verdict may be unsafe or unsatisfactory when there is a sufficiency of evidence for that purpose: **Chamberlain (No. 2)**, at 531; **Morris**, at 473.

In deciding whether the jury, acting reasonably, should have entertained a reasonable doubt, it is the duty of the appellate court to make an independent assessment of the evidence: **Ratten**, at 515-516; **Chamberlain (No. 2)**, at 534; **Morris**, at 463, 473. In making that assessment, the court must necessarily take into account the nature and quality of the evidence, as this Court did in **Morris**, when it set aside the conviction as being unsafe or unsatisfactory because it proceeded upon the jury’s evidence acceptance of an admission of guilt which, in the opinion of the Court, was unreliable.”

Later (at p.211) his Honour said:-

“Rather, it is for the court to determine whether there is a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof.”

In resolving that question the court must necessarily recognise that issues of credibility and reliability of oral testimony are matters for the jury. For that reason, if for no other, an appellate court will infrequently set aside a conviction as being unsafe because the evidence of a vital Crown witness lacked reliability or credibility. Nonetheless, occasions do arise when a jury proceeds to a conviction when the Crown case rests upon oral testimony which is so unreliable or wanting in credibility that no jury, acting reasonably, could be satisfied of the accused’s guilt to the required degree. Then the appellate court must discharge its responsibility to set aside the conviction as one which is unsafe.”

We have indicated in broad outline the competing versions of events on the night of the offence. While some of the prosecution witnesses were significantly affected by alcohol the evidence fell short of suggesting that they were incapable of accurate recollection of the principal events which occurred, especially the sequence of events involving the two confrontations of Sig. Millar and Cpl. Jones by WO Woods and the appellant and the delivery of a kick by the appellant; such as details as the clothing of the appellant to which there was some confusion, and their precise positions on the ground were not matters likely to impress themselves on the consciousness and memory of the witnesses. In any event the evidence of Cpl. Bull, which the Defence Force magistrate was in the best position to evaluate, was unaffected by any suggestion that he was intoxicated.

In stating his findings the Defence Force magistrate adverted to the many challenges to the reliability of Cpl. Bull’s evidence including the suggestion of bias. If Bull’s account was true it is not surprising that he should disapprove of the reprehensible conduct he says was engaged in by the senior NCO’s that night nor that he should even be concerned to indicate Sig. Millar as the innocent victim of that conduct. His resentment to the subsequent disparaging report made of him by WO2 Woods is also understandable. All these issues were before the Defence Force magistrate and there is no reason to suppose he did not weigh them carefully. There is nothing intrinsically surprising in his acceptance of Cpl. Bull as an honest and accurate witness who bore no more than “understandable resentment against” the appellant. It was not incumbent upon the Defence Force magistrate to justify his rejection of each criticism of the prosecution case.

An unusual feature of the case was the failure of Sig. Millar to voice any further complaint about the kick that night or to lodge any formal complaint against the appellant until several weeks had passed. It appears that in instructing her defending officer when she herself faced charges of insubordination arising out of the incident she had told that officer what she claimed had happened. Nevertheless the indignity of her being unjustly charged may have been more significant to her that night than the physical blow which is nowhere suggested to be of any severity and in the weeks following she was herself facing charges levelled by those in authority over her. There is no reason to suppose the Defence Force magistrate failed to take such considerations into account.

The Defence Force magistrate had a classic case of competing testimony. There was nothing about the nature and quality of the prosecution evidence which rendered a conviction unsafe or unsatisfactory. The Defence Force magistrate had the further benefit of seeing and assessing the evidence adduced by the defence. He found it unimpressive and the version advanced lacking in plausibility, a view which he was clearly entitled to take. After careful consideration of the whole of the transcript of the trial and of the submissions made to us by counsel for the appellant, we are of the view that this is not a case where it can be said that the verdict is unsafe or unsatisfactory.

Another ground of appeal asserts that the Defence Force magistrate took into account irrelevant matters to the prejudice of the appellant, namely alleged defects in discipline or leadership at Bamaga, “these being extrinsic to the act with which the applicant was charged”. Suffice it to say we are of the view that the state of discipline and leadership of the detachment at the time of the incident and leading up to it was highly relevant to the credibility of the applicant’s account as compared with that of the prosecution. There is no substance in this ground of appeal.

Ground 8 asserts that:-

“The magistrate erred in giving no consideration or insufficient consideration to a reasonable hypothesis of accident”.

The appellant’s submission is that it is reasonably possible that the contact with her backside which Millar felt was not a kick delivered by the appellant but an accidental contact with Jones as he jumped to his feet. The difficulty with this submission is that there is absolutely no evidence to support it. It rests on no more than speculation. No suggestion that such a thing may have occurred was put to Jones, Millar, Willard or Bull. The submission seems to have had its genesis in certain evidence given by WO Woods. At 303 he referred to Jones as having jumped up, and at 305, this appears:-

“Defending Officer – Q. Can you tell me whether Cpl. Jones made any contact with Sig. Millar at that stage as he jumped up? A. As he jumped up?

Q. Yes. A. No, I can’t recall.”

The position is, as the Defence Force magistrate himself pointed out in the course of the Defending Officer’s closing address, that the suggestion of accident was fanciful and unsupported by evidence. There was no obligation upon him to consider the possibility of accident at all.

We reject this ground of appeal.

Ground 9 is expressed as follows:-

“There is fresh and material evidence for the Appellant which ought to be admitted in these proceedings and which, if admitted, will indicate that the conviction entered against the Appeallant is unsafe or unsatisfactory, and that a reasonable doubt as to his guilt should be entertained.”

The “fresh and material evidence” on which the appellant seeks to rely is set out in four affidavits which have been filed.

Major Michael Norman Wheatley of 1 Aviation Regiment deposes that he was at Bamaga on the night in question, and after spending two hours or more in the company of the “seniors” of 7 Sig. Rgt. (including the appellant) in their recreation room, he then accompanied them to the scene of the party near the volleyball court. He did not stay long, because the music was too loud for his liking. While he was there, “everything was quite orderly”. The appellant was “not drunk although he may have been over the legal driving limit … his speech and demeanour did not indicate any intoxication”.

Cpl. Pamela Joyce Coe of 7 Sig. Rgt. was not at Bamaga at the relevant time but was at Cabarlah after the detachment returned there. She deposes to having overheard a conversation at Cabarlah between two persons, one an unidentified “junior” and the other “either Sig. Willard or Sig. Millar” – she could not say which. That other person said to the “junior”:-

“I don’t remember what happened that night. I was too pissed. Don’t tell anyone.”

She gives no account of the context in which these words were uttered. Then she deposes to conversations with Cpl. Bull who, “on several occasions” approached her and spoke to her about WO Woods. On one such occasion in July 1989 he enquired about her working relationship with Woods and urged her to make a complaint about Woods. She deposes in effect that she had no reason to complain of Woods, and “felt upset and pressured” by Bull’s approach. Soon after that, Bull advised her to write a statement “about what you told me of the other night” – but to what that may refer is not expressed. Then she deposes to an opinion held by her, that Cpl. Bull is a person of considerable influence amongst the juniors in 7 Sig. Rgt. In paragraph 8 of the affidavit she says:-

“Prior to January 1990 I advised S/Sgt Behan that Cpl. Bull had approached and had urged me to complain about Behan.”

To what this refers is unclear. Perhaps the name “Behan” secondly appearing is an error for Woods”.

S/Sgt. Steven Robert Coe of 7 Sig. Rgt., the husband of Pamela Coe, corroborates his wife’s evidence that she felt “worried and pressured” allegedly as a result of Bull’s having made some approach to her to make a statement.

Peter Colin Stanley Hewitt, now not in the Defence Force, was formerly a signalman in 7 Sig. Rgt. and on 20 May 1989 was duty barman in the mess at Bamaga. He ceased duty and went to bed at 11.00 pm and so had no personal knowledge of or involvement in the incident. However, two or three days later Cpl. Bull asked him if he would make a statement “about what I had seen of the incident”. Hewitt replied, “No I was not even there at the time”, to which Bull responded, “Well, other people are making statements, why don’t you?” A few weeks later, at Cabarlah, Bull again asked Hewitt to make a statement. Hewitt refused, “because I was not there when the subject incident allegedly occurred”. Bull said, “You don’t have to have been there. I want you to make a statement”. He further deposes that when he went off duty at 11.00 pm, Sig. Willard was very drunk.

Section 23(2) of the Defence Force Discipline Appeals Act 1955 provides for an appeal on the ground of fresh evidence in the following terms:-

“Subject to subsection (5), where in an appeal it appears to the Tribunal that there is evidence that:-

1. was not reasonably available during the proceedings before the court martial or the Defence Force magistrate;
2. is likely to be credible; and
3. would have been admissible in the proceedings before the court martial or the Defence Force magistrate;

it shall receive and consider that evidence and, if it appears to the Tribunal that the conviction or the prescribed acquittal cannot be supported having regard to that evidence, it shall allow the appeal and quash the conviction or the prescribed acquittal.”

Initially, the appellant made no attempt at all to establish, as to any of the material, that it was not reasonably available during the proceedings before the Defence Force magistrate; and indeed as to the material emanating from Cpl. Coe and Mr. Hewitt, it seemed very likely that it was available or could readily have been obtained, for it appears from the transcript (at pp 117, 118) that the Defending Officer cross-examined Cpl. Bull about his approaches to those persons.

Without in any way reflecting on the integrity of counsel for the appellant, we must emphasize that an appellant who seeks to rely on s.23(2) must by evidence establish the criteria set out in the subsection, and assertions from the bar table are not a sufficient substitute for sworn evidence.

However, at the start of the second day of the hearing of the appeal, counsel for the appellant sought and was granted leave to file an affidavit sworn by the appellant, in support of a submission that the material now sought to be relied upon “was not reasonably available during the proceedings before … the Defence Force magistrate”. We have reservations as to whether this affidavit is sufficient to establish that; but having regard to the view we have formed as to the effect of the new material, we find it unnecessary to resolve that issue. We proceed upon an assumption, in favour of the appellant, that all of the three criteria stated in s.23(2) are satisfied.

Where an intermediate court of appeal receives fresh evidence, the test which it must apply in deciding whether to set aside a conviction on the ground of that fresh evidence is that laid down by the High Court in **Mickelberg** (1989) 167 CLR at 259. Mason, CJ. said (at 273):-

“It is established that the proper question is whether the court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant had the fresh evidence been before it at the trial. This test was endorsed by four of the five Justices in **Gallagher v. The Queen** (1986) 160 CLR 392. Deane, J. and I (at p. 402) considered that the test was best expressed in those terms. Gibbs, CJ. (at p. 399) expressed his substantial agreement with the statement, although his Honour emphasized that ‘no form of words should be regarded as an incantation that will resolve the difficulties of every case’. Dawson, J. said (at p. 421) that the court would need to conclude that ‘a jury might entertain a reasonable doubt about the guilt of the appellant’. His Honour went on to say (at p. 421) that in his view the use of the expression ‘significant possibility’ did not involve a different standard. I am in agreement with those statements. We were not asked to reconsider the correctness of the decision in **Gallagher**.”

Brennan, J. (167 CLR 275) expressed a preference for a test expressed as “whether the jury if the fresh evidence had been laid before it at the trial, would have been likely to have entertained a reasonable doubt about the guilt of the accused”. Toohey and Gaudron, JJ. were of the view that there is no practical difference between the two formulations (167 CLR at 301-302).

None of the material tendered as fresh evidence appears to us to be such as gives rise to any significant possibility that the outcome of the trial would have been any different had that material been laid before the Defence Force magistrate.

The evidence of S/Sgt. Coe is simply irrelevant.

The evidence of Major Wheatley, as to the appellant’s state of sobriety at the time Wheatley left the scene is in no way inconsistent with the evidence accepted by the Defence Force magistrate as to the appellant’s state of sobriety at the later relevant time.

The evidence of Cpl. Pamela Coe goes to two matters. First, she gives evidence of an oral statement by one of two witnesses, possibly inconsistent with that witness’s testimony at the trial. It could have been given in evidence, as a prior inconsistent statement, if the witness did not distinctly admit that she had made it. The difficulty is that Coe does not identify which of the witnesses made the remark, so that, assuming both denied it, the ground for its admissibility would not have been laid. Alternatively, of course, when the matter was put to her in cross-examination, one or other of the witnesses Millar and Willard may have admitted making the remark, but then have put it in a qualifying context. The remark as quoted by Coe out of context is equivocal – it might well mean no more than that the witness saw the kick but could recall nothing of the circumstances, which is very close to what the evidence already reveals as to the knowledge and recollection of both Willard and Millar.

Taken with all of the other evidence in the case, it does not appear to use at all likely that this additional evidence would have influenced the outcome.

The second aspect of Coe’s evidence is its potential to reinforce the allegation made on behalf of the appellant, of bias on the part of the witness Cpl. Bull. The evidence of Hewitt (apart from his observation of Willard’s intoxication, which clearly adds nothing to the case) goes to the same matter, and they can conveniently be considered together.

Taken at its highest, this evidence shows Bull’s zeal in assembling evidence against the appellant, and his dislike of WO Woods. The latter is of doubtful relevance, but we will assume in favour of the appellant that it is relevant on the question of bias. However, the evidence of Coe is confused and confusing, with elliptical references that are left unexplained. The evidence of Hewitt is difficult to understand fully, because the context of the words quoted is not fully stated. The acknowledgement by Bull that Hewitt did not need to have been there indicates that he was seeking a statement, not about the incident itself, but about surrounding circumstances. The evidence cannot fairly be understood as showing that Bull was soliciting false evidence.

There is already evidence of Bull’s zeal in the matter. Because of that manifest zeal, his evidence required careful scrutiny before the magistrate accepted and relied on it. We are, as already indicated, satisfied that the Defence Force magistrate was alert to that need, and did indeed consider carefully whether he might safely act on Bull’s testimony. We are satisfied that it was fairly open to the Defence Force magistrate to act on Bull’s evidence as he did.

In our opinion, the further evidence now tendered as to Bull’s zeal and possible bias is not of such cogency and weight as to have significantly affected the outcome of the trial.

Accordingly, we reject this ground of appeal.

The appeal is dismissed.