
COMMONWEALTH OF AUSTRALIA

THE COURTS-MARTIAL APPEALS ACT 1955

No. 1 of 1970

In the matter of an appeal against conviction by Court-Martial by

PETER DENZIL ALLEN

TRANSCRIPT OF PROCEEDINGS

BEFORE THE COURTS-MARTIAL APPEAL TRIBUNAL

MR. P. A. COLDHAM, Q.C. - Deputy President

MR. W. O. HARRIS, Q.C.)
MR. B. J. F. WRIGHT, Q.C.) - Members

AT HOBART ON THURSDAY, 7TH MAY 1970, AT 12.45 P.M.

(Continued from 6/5/70)

THE DEPUTY PRESIDENT: On the 23rd November, 1969, at Nui Dat in the Republic of Vietnam the Appellant, Peter Denzil Allen, killed Lieutenant Robert Tom Convery. Convery was asleep in his tent in the Australian Army Compound and Allen went to the outside of the tent with a live grenade. He put his arm under the side of the tent, placed the grenade beside the sleeping officer, withdrew his arm and crouched down beside the sand bags which protected the outside of the tent. The grenade exploded and Convery was killed.

On the 29th December, 1969, Allen was charged as follows:

> "61905 Private Peter Denzil Allen, 9th Battalion, The Royal Australian Regiment attached to First Field Regiment Royal Australian Artillery is charged with having while being a soldier of the Military Forces of the Commonwealth of Australia on war service committed the following offence:-
>
> WHEN ON ACTIVE SERVICE WHEN IN A PLACE NOT WITHIN HER MAJESTY'S DOMINIONS COMMITTED A CIVIL OFFENCE, THAT IS TO SAY MURDER
>
> in that he
>
> at the 9th Battalion, The Royal Australian Regiment Base Camp, Nui Dat, Republic of Vietnam, on 23rd November, 1969, murdered 38627 Lieutenant Robert Tom Convery of B Company, 9th Battalion, The Royal Australian Regiment."

He was tried by a general Court-Martial at Vung Tau from the 8th-15th January, 1970, inclusive, and found guilty of the charge. The evidence of the facts set out above was unchallenged and indeed was indisputable. The sentence was that the appellant be imprisoned with hard labour for life and that he be discharged from the Defence Force of the Commonwealth.

By petition dated 12th February, 1970, the appellant petitioned the Military Board to quash the conviction, sentence, and discharge. The appellant was notified on the 21st March, 1970, that the petition had been refused. Thereafter he lodged an Application for Leave to Appeal to this tribunal. The application for leave to appeal was heard by us in Hobart on the 4th, 5th and 6th May, 1970. Counsel for the appellant and the Military Board presented a full and complete argument on the matter and it was agreed that the Application for Leave to Appeal should be treated as the appeal if leave were granted.

At the trial the Judge Advocate ruled that the Homicide Act 1957 (Imperial) applied and that a plea of diminished responsibility could be raised by the appellant.

Having some doubts as to the applicability of the provisionsof the Homicide Act 1957, we drew the attention of counsel for the appellant and the respondent to the matter which had been raised at the trial by the prosecuting officer. However, neither counsel desired to argue the question. Counsel for the appellant did not pursue any argument that the appellant had suffered any miscarriage of justice on the assumption that the Homicide Act had been applied wrongly.

We are satisfied that, on the assumption that the Act did not apply, no injustice was suffered by the appellant. The evidence of the guilt of the appellant was overwhelming quite apart from any evidence of a confessional nature which was adduced by the appellant in support of his plea of diminished responsibility. This latter evidence amounted to no more than a repetition in part of what the appellant had already written by way of confession in his own hand and of his own free will. The fact that the defence was raised did not prejudice the appellant and he did not miss thereby a chance of acquittal.

We will now consider the grounds of appeal. By Section 54 of the Defence Act of the Commonwealth of Australia 1903-1966, it is provided that:

"Members of the Military Forces whether on war service or not while

(a) serving beyond the territorial limits of Australia;

(b) on their way from Australia for the purpose of so serving; or

(c) on their way to Australia after so serving or after war service shall be deemed to be on war service and are subject to the Army Act with such modifications and adaptations as are prescribed."

By Section 55 of that Act it is provided with regard to the Military Forces that they "shall at all times, whilst on war service, whether within or without the limits of the Commonwealth, be subject to the Army Act save so far as it is inconsistent with the Defence Act and subject to such modifications and adaptations as are prescribed."

Members of the Military Forces are persons who have offered to enlist in any part of the Military Forces and have taken and subscribed the required oath. (See Defence Act, Section 37, subsections (1) and (2)).

Military Forces include the Regular Army Supplement as part of the Permanent Military Forces. (See Defence Act, Section 31 and Section 32, subsection (1)).

The definition of the Army Act is to be found in Section 4 of the Defence Act where it is defined as meaning "the Imperial Act called the Army Act as in force on the day on which the Defence Act 1956 came into operation." This day was the 29th October, 1956. The Imperial Act in force at that date was the Army Act, 1881. Section 41 of that Act makes persons subject to military law liable to punishment by Court-Martial for a number of offences called civil offences. The civil offences are deemed to be offences against military law. One such offence is murder. By reason of Regulation 196A(1) of the Regulations under the Defence Act, which are known as The Australian Military Regulations, it is provided that:

> "~~By subsection~~ (1) the Military Forces and the members thereof shall for the purpose of the application to and in relation to them of the provisions of the Army Act be deemed to be persons subject to military law within the meaning of that expression as used in those provisions."

In our opinion the result of this legislation is that members of the Military Forces are persons subject to military law and that a Court-Martial can try a person subject to military law for any offence wherever committed which would be an offence against the law of England, subject only to this, that the section provides for the trial of the prisoner before a civil court instead of a Court-Martial in the circumstances set out in the section and regulations". (Per Goddard, CJ., in re Regina v. Page, 1954, 1 Queen's Bench 170 at 177.) In this passage the learned Chief Justice was referring to Section 41 of the Army Act. Where the offence alleged under Section 41 is that of murder, what has to be proved is that it is "an unlawful killing with malice aforethought" (Regina v. Page supra at p.177). The offence of murder under Section 41 does not require proof either that the victim or the offender was a British subject, nor are those requirements an element of the offence.

The learned Judge Advocate ruled at the Court-Martial of the appellant that it was necessary for the prosecution to prove as an element of the offence of murder that the appellant was a subject of Her Majesty. He based this conclusion upon a further passage in Regina v. Page where the court said at p.177:

> "Nevertheless, the legislation to which we have referred enables a subject of Her Majesty to be tried and punished in the courts of this country or if subject to military law by a Court-Martial abroad for murder, whoever the victim and wherever committed."

The legislation referred to in this passage is Section 9 of the Offences Against the Person Act, 1861, and Section 41 of the Army Act. Section 9 is the culmination of previous legislation extending over centuries which operated to extend the jurisidiction of British civil courts to try cases of murder committed abroad by subjects of the Crown. It is only in respect of those subjects that the British courts can properly be empowered to exercise extra territorial jurisdiction. There is no occasion to limit Section 41 of the Army Act in this way because all the persons who could be affected by it are subject to military law. The only limitation that is required with respect to Section 41 is a limitation to prevent a conflict of jurisdiction between the civil courts and Courts-Martial. This conflict is resolved by the proviso to Section 41 which requires that persons subject to military law who are charged with offences under that section, including murder committed in the United Kingdom or in Her Majesty's Dominions, should not, subject to exceptions, be tried by Courts-Martial but by the civil courts.

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THE DEPUTY PRESIDENT (Continuing): The passage in Page's Case which was relied upon by the learned Judge Advocate only explains the effect of the resolution of the conflict between Civil Courts and Courts Martial in relation to extra territorial murder. If a subject of Her Majesty commits a crime on an alien shore, he may be tried for that crime by the Civil Courts of the United Kingdom, or, if he happens to be "a person subject to Military Law" he may be tried for the crime by a Court-Martial abroad. This, in our opinion, is what the Court meant in the passage relied upon by the learned Judge Advocate in Page's Case. This passage does not exhaust the jurisdiction of Courts-Martial abroad which have jurisdiction to try all persons subject to Military Law whether British subjects or not. This is made explicit by the Court in Page's Case in the passage first quoted by us (at p.177) and which we consider to be the true ratio decidendi of that case.

The result is that what the prosecution had to prove was that the Court-Martial had jurisdiction to try the appellant on a charge of murder under Section 41 of the Army Act so that the Army Act was applicable to him and that he was a person subject to Military Law. The Army Act was applicable to him because he was serving beyond the territorial limits of Australia (see the Defence Act Section 54). He was a person subject to Military Law if he was "a member of the Forces" (regulation 196 (A)).

At the outset of his trial, in compliance with Rule of Procedure 23 (A), the Court-Martial took steps to be satisfied in respect of the charge against the appellant that it appeared to be laid against a person amenable to Military Law, and to the jurisdiction of the Court. The appellant was asked, "Are you 61905, Private Peter Denzil Allen of 9th Battallion Royal Australian Regiment attached to 1st Field Regiment, Royal Australian Artillery?" And he answered this question in the affirmative. In addition the appellant stated in his confession his regimental number, rank, unit and location (Exhibit 64). Apart from this direct evidence there was evidence from which the Court-Martial was entitled to infer that the appellant was "a member of the forces"; we refer to evidence of the presence of the appellant at the Australian Army Compound at Nui Dat, his participation in military operations, and his receipt of military pay. In our opinion, all this evidence conclusively established that the appellant was at all times a member of the Forces and therefore a person subject to Military Law.

The first three grounds of appeal which appear in the appellant's Application for Leave to Appeal are:

1. That in order to justify a conviction it was necessary for the prosecution to prove beyond

reasonable doubt that the appellant was a subject of Her Majesty the Queen and that there was no evidence properly adduced before the general Court-Martial upon which such a finding could be made.

2. That the learned Judge Advocate erred in law by admitting into evidence as capable of establishing beyond reasonable doubt the place of birth of the appellant, the attestation papers and application for enlistment allegedly signed by the appellant.

3. That the learned Judge Advocate erred in law by directing the general Court-Martial that the alleged answers to his questions in the application form and attestation papers with an admission by the appellant that he was an Australian citizen were capable in law of satisfying the general Court-Martial beyond reasonable doubt that the appellant was a subject of Her Majesty.

As we have concluded that it was not necessary for the prosecution to prove that the appellant was a subject of Her Majesty, these three grounds must fail.

There were further grounds of appeal involving criticism of the charge of the learned Judge Advocate. These grounds were that he failed to direct the Court-Martial adequately on the burden of proof which lay upon the prosecution having regard to the evidence relating to drunkenness and in particular to the effect of that evidence upon proof of intent. A further ground was that the learned Judge Advocate failed to distinguish the principles of law to be applied with respect to drunkenness and to a defence of diminished responsibility. On a close examination of the charge of the learned Judge Advocate we have come to the conclusion that he directed the Court-Martial adequately on all aspects relative to these grounds of appeal. It follows that these grounds are not made out.

It was a further ground of appeal that the learned Judge Advocate failed to direct the Court-Martial that it was entitled to disregard or alternatively to give little weight to the signed confessional statement of the appellant having regard to the evidence of psychiatrist called by the appellant to the defence of diminished responsibility. This psychiatrist stated in evidence that the appellant had told him, in the course of one of the psychiatrist's interviews, that the appellant had received an inducement to make his confession. The statement made by the appellant to the psychiatrist was that he was told that he would be "better off" if he made a statement, but this statement was of a self serving nature - it was made outside the Court and not given in evidence before the Court-Martial. It follows from this, in our opinion, that this evidence

of the psychiatrist in no way affected the confession which was solemnly made in writing in the appellant's own hand on the day following the commission of the crime. We should also add that on a voir dire this statement was put to the person who was alleged to have made it to the appellant and wasnegatived by that witness. The matter was not pursued when that witness was giving evidence before the Court-Martial, nor did the appellant himself give evidence on the voir dire. For these reasons we must reject this last ground of appeal.

While we consider that the case is a proper one in which to grant Leave to Appeal having regard to the seriousness of the crime and the points raised, we are clearly of the opinion that the appeal must fail. The order of the Tribunal is, consequently, that Leave to Appeal be granted but that the appeal be dismissed.

We will adjourn sine die.

AT 12.07 P.M., THE TRIBUNAL ADJOURNED SINE DIE.
