DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Rogers v Chief of Army [2004] ADFDAT 1

STATUTES – Acts of Parliament – Interpretation – Interpretation Acts and clauses – Particular Acts and Ordinances Commonwealth – Rights accrued – Liabilities accrued – Amendment to time limit within which a prosecution may be brought – Whether it has retrospective operation.

Acts Interpretation Act, 1901, (Cth), s8(c).

Defence Force Discipline Appeals Act 1995 (Cth), s21.

Defence Force Discipline Act 1982 (Cth) ss29(1) and 97.

Defence Legislation Amendment Act (No 1) 1999 (Cth), s3 and Sch4.

R v Pinder (1989) LSJS 65 - followed.

R v Chandra Dharma [1905] 2 KB 335 – followed.

Yew Bon Tew v Mara [1983] 1 AC 553 – followed.

Koutsoukos v Loader (1991) 109 FLR 114 – followed.

Hall v Bonnett [1956] SASR 10 – distinguished.

Maxwell v Murphy (1997) 96 CLR 261 - referred to.

Burt v Barry & Roberts Ltd ex parte Barry & Roberts (1956) St. R. Qd. 207 – followed.

R v Ford (1994) 84 C.C.C. (3d) 544.

DUANE ROGERS v CHIEF OF ARMY
DFDAT 1 OF 2004

UNDERWOOD J (Deputy President), MILDREN J (Member)
and DUGGAN J (Member)
11 AUGUST 2004
ADELAIDE

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL **DFDAT 1 OF 2004**

BETWEEN: **DUANE ROGERS**
APPLICANT

AND: **CHIEF OF ARMY**
RESPONDENT

JUDGES: **UNDERWOOD J (Deputy President), MILDREN and DUGGAN JJ (Members)**

DATE OF ORDER: **22 SEPTEMBER 2004**

WHERE MADE: **ADELAIDE**

THE TRIBUNAL ORDERS THAT:

1. Application for an extension of time for appeal be dismissed.

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL DFDAT 1 OF 2004

FEDERAL COURT OF AUSTRALIA REGISTRY

BETWEEN: **DUANE ROGERS**
APPLICANT

AND: **CHIEF OF ARMY**
RESPONDENT

JUDGES: **UNDERWOOD J (Deputy President), MILDREN AND DUGGAN JJ (Members)**

DATE: **22 SEPTEMBER 2004**

PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

THE TRIBUNAL

The issue

1 The issue on this application is whether:

(i) the applicant should be granted an extension of time within which to bring an appeal to the Tribunal against an order of a Defence Force Magistrate ("DFM") made on 27 March 2003, that he be dismissed from the Defence Force; and

(ii) if yes, whether the appeal should be allowed.

2 The *Defence Force Discipline Appeals Act* 1995 (Cth) ("the Act"), s21, relevantly provides that an appeal to the Tribunal must be made within 30 days commencing immediately after:

> "(a) the day on which the results of a review under section 152 of the *Defence Force Discipline Act 1982* of the proceedings are notified to the convicted person or the prescribed acquitted person; or
>
> (b) the last day of the period of 30 days after the conviction or prescribed acquittal;
>
> whichever is the earlier."

3 The material in the appeal book does not make clear the date upon which the applicant was given written notice of the results of the review conducted pursuant to the *Defence Force Discipline Act* 1982 (Cth) ("the Discipline Act"), s152. However, it appears that it was more than 30 days after the order of dismissal was made. The notice of appeal was filed on 22 August 2003 and consequently, is nearly five months out of time. The Act,

s21(1), confers an unfettered power on the Tribunal to extend the time within which an appeal might be brought. Counsel for the applicant and counsel for the respondent agreed that the Tribunal should determine the substantive point upon which the applicant wished to rely in order to set aside the order of dismissal. If it was made out, the time for appealing should be extended and the appeal allowed. If it was not made out, the application for an extension of time should be dismissed. The applicant's contention was that the DFM did not have jurisdiction to make the impugned order.

The facts

4 The material facts can be stated shortly. The applicant, a bombardier in the Australian Army, committed a breach of the Discipline Act, s29(1). He was charged with failing to comply with a lawful general order that was applicable to him by having sexual intercourse with a recruit under training. The offence was alleged to have occurred between 20 January 1998 and 19 February 1998.

5 On 6 December 2002, the appellant was charged with this offence and a number of other offences, the last of which was alleged to have been committed on 15 May 1998. In the events that happened, the applicant pleaded guilty to the offence set out in par4 and the other offences were withdrawn. However, at the request of the applicant, the DFM took two of the withdrawn offences into account when fixing penalty.

6 At the time of the commission of the offences charged, and at the time of the commission of the offences that were taken into account, the Discipline Act, s97 provided that a person shall not be charged with an offence against the Act (apart from an irrelevant exception) "after the expiration of a period of 3 years after the time at which the offence is alleged to have been committed". Thus, the time within which the prosecution might be brought expired, at the latest, on 15 May 2001.

7 However, the *Defence Legislation Amendment Act (No 1)* 1999 (Cth), s3 and Sch4, amended the Act, s97, by substituting five years for three years. The amending Act came into force on 22 September 1999, viz, in the case of the applicant, before the period of three years had expired. He was charged more than three years after the commission of the offence to which he pleaded guilty, but within five years from the commission of that offence and the last of the offences that were taken into account.

The contentions

8 Senior counsel for the applicant, Mr Manetta, contended that the amending Act did not have retrospective effect, that at the expiration of the three year period the right to charge the applicant ceased and consequently, the DFM was without jurisdiction to make the order of dismissal, even though the applicant pleaded guilty.

9 Senior counsel for the respondent, Mr Hilton SC, contended that the amendment was procedural, that it had retrospective effect, and that the order made by the DFM was within jurisdiction.

10 There is authority that appears to clearly support the respondent's contention. In *R v Chandra Dharma* [1905] 2 KB 335, the prisoner was convicted of an offence contrary to statute. At the time of the commission of the offence, the statute provided that proceedings

for a breach must be brought within three months thereafter. Before that period had expired, the Act was amended to extend the time to six months. The prosecution against the prisoner was instituted five months after the commission of the offence. The court held that the statute was procedural and applied to past events.

11 The facts in *R v Pinder*, (1989) LSJS 65, are indistinguishable from the facts in this case. The argument put to the Full Court in *Pinder* was that the prisoner had an *accrued right* at the time the statute was amended to have the proceedings brought within the prescribed time, and the amendment to the Act did not affect this accrued right. King CJ said, at 66, that there is a distinction between amendments that affect substantive rights and amendments that are purely procedural. He said that in the case of the former there is a presumption that the amendment does not have retrospective operation, but went on to explain that it is not quite correct to say that procedural amendments have retrospective operation. He said that although the statutory provision limiting the time within which a proceeding may be brought is procedural, it would not be construed "as depriving a person of an already accrued right of immunity against prosecution". He went on, at 66, to say:

> "It would not authorise the launching of a prosecution which was already statute barred when the amendment was passed, *Maxwell v Murphy* (1997) 96 CLR 261; *Yew Bon Tew v Mara* [1983] 1 AC 553."

12 In *Pinder* the appellant could not show that at the time of the amendment the prosecution was already statute barred and therefore could not show that he had any accrued right at that time. The present applicant is in the same position. Cox J agreed with King CJ and with the reasons published by the other member of the court, Bollen J. The last mentioned member of the court referred in some detail to *Chandra Dharma* and to *Yew Bon Tew v Mara* (supra). The latter was a civil case. The advice of the Judicial Committee of the Privy Council was that until the defendant had an entitlement to plead a time bar, he did not have an accrued right that the relevant Interpretation Act operated to protect. The Committee took the same approach as did King CJ in *Pinder* namely, that it is inappropriate to say that a procedural amendment has retrospective operation, for such an amendment would not be construed to "impair existing rights and obligations". The reasoning in *Yew Bon Tew* to that effect is consistent with the reasoning of Channell J in *Chandra Dharma*. To the extent that Lord Alverston CJ's judgment in the latter case did not exempt acquired rights from his declaration that procedural amendments have retrospective effect, I do not think it should be followed today as it is inconsistent with principle, with statute, and with the advice of the Privy Council in *Yew Bon Tew*. Dixon CJ referred to this in *Maxwell v Murphy* (1957) 96 CLR 261 when he said at 270, that *Chandra Dharma* was not authority contrary to the proposition that where a right has accrued or a liability acquired, a procedural statutory amendment will not operate to affect the right or revive the liability. His Honour referred to the judgment of Channell J and noted that in that case, the period within which proceedings might be brought had not expired at the time the amending statute took effect, and inferentially, that decision was in accordance with established principle. *Chandra Dharma* was followed in *Burt v Barry & Roberts Ltd ex parte Barry & Roberts* (1956) St. R. Qd. 207 at 220-223; 223-4. *Chandra Dharma* was cited with approval in the Canadian case of *R v Ford* (1994) 84 C.C.C. (3d) 544 at 553 – 554. In so doing the Court of Appeal drew special attention to the passage in the judgment of Channell J to the effect that had the time limit within which proceedings might be brought had expired at the time the amendment came into force the amending statute would not have revived the right to prosecute. The Canadian case also referred to *Maxwell v Murphy* (supra) at 555 - 556.

13 In *Pinder*, Bollen J concluded that on the day the amendment took effect *Pinder* was still liable to prosecution, he had not acquired a right of immunity from prosecution, and accordingly the enlargement of time within which the prosecution might be brought applied to him.

14 *Koutsoukos v Loader* (1991) 109 FLR 114 concerned a Social Security prosecution. Before the time within which a prosecution might be brought had expired, amending legislation abolished the time limit altogether. Franklyn J of the Supreme Court of Western Australia said, at 119:

> "Even were that not clear from the words of such amending statutes it is clear from the authorities that an amendment of this nature, being procedural and not affecting vested or accrued rights and working no injustice on persons affected thereby, has retrospective effect in the absence of something in the Act to reveal a contrary intention: see *Rodway v R* (supra) (at 518-519) and generally, the quotation therein (at 306) from the judgment of Gibbs J in *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228 the effect of which was approved by the Court (at 308); *Maxwell v Murphy* (supra) (at 276) (quoted in *Rodway*); *R v Pinder*; (unreported, Court of Criminal Appeal, SA, No 301 of 1989, 6 December 1989 which the last-mentioned case is precisely on point but unfortunately was not drawn to the attention of his Worship. Whether or not an amendment has retrospective effect is not determined by the significance of the limitation period in criminal proceedings nor by the absence of specific reference in the amending legislation to it having retrospective effect, as appears to have been the view of his Worship. Such view is contrary to the authorities."

15 For the applicant, Mr Manetta submitted that a distinction should be drawn between penal statutes and civil statutes when construing the effect of amendments to limitation periods. He did not refer to authority in point, but relied on analogy from cases that deal with amendments to penalty and which are set out in Pearce and Geddes, *Statutory Interpretation in Australia* (4th ed) par9.16. The authorities do not speak with one voice on this issue, but at all events we see no analogy between the effect of amendments that increase a penalty for wrongdoing after the commission of the wrongdoing, and amendments that enlarge the time within which proceedings may be brought to prosecute wrongdoing before an offender has acquired the right of immunity from prosecution.

16 Alternatively, although Mr Manetta accepted that the weight of authority was against the applicant arguing that the amendment affected an acquired right, he pointed out that the *Acts Interpretation Act* 1901 (Cth), s8(c), provides:

> "Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
>
> (c) affect any right privilege obligation or *liability* acquired accrued or incurred under any Act so repealed;" [emphasis added]

He submitted that although the amendment did not affect an *acquired right* not to be prosecuted after the expiration of three years, it did affect a *liability* that the applicant had acquired. The argument ran:

- upon commission of the offences, the applicant acquired a *liability* not just to be prosecuted, but to be prosecuted within three years;

- the amendment affected this liability and therefore had no application to him;
- the authorities were concerned only with acquired rights, did not touch acquired or accrued liabilities, and were therefore distinguishable.

17 With respect to the proposition that the applicant's liability was a liability to be prosecuted within the time prescribed when the offence was committed, Mr Manetta relied upon *Hall v Bonnett* [1956] SASR 10. We do not see that case as assisting his argument. In *Hall v Bonnett*, the Full Court of the Supreme Court of South Australia was concerned with the meaning of the word "liable" as enacted twice in the expression "any tort-feaser *liable* in respect of that damage may recover contribution from any other tort-feaser who is, or would if sued have been, *liable* in respect of the same damage …", enacted in the *Wrongs Act* 1936 – 1951 (SA), s25. Napier CJ and Abbott J observed, at 15, that the meaning of the expression "tort-feaser *liable* in respect of that damage" had been settled by *Wimpey v British Overseas Airways Corporation* [1955] AC 169, and said that there was no clear authority with respect to the meaning of "liable" used secondly in the statutory phrase. Their Honours went on to conclude that it is unusual to find that one word had two meanings when enacted in the same statutory breath, but that was the position in the case of the *Wrongs Act*, s25(c). Whilst "liable" was given its ordinary meaning viz, responsible, when speaking of a "tort-feasor liable in respect of that damage" when enacted secondly it meant "one who could be compelled to pay by using the due process of law". Their Honours went on to say, at16, "or, to speak more accurately, 'who can be compelled to pay by taking such steps as may be *or remain* necessary to obtain and enforce the judgment of a court of justice.'" The following passage then appears in the judgment:

> "In this sense it seems to us that 'liable' comprehends the state of a wrongdoer from the time of the fault committed to the point at which his liability is established and quantified by the judgment and, beyond that, to the point at which it is discharged whether by release or payment or otherwise, as by lapse of time."

18 Mr Manetta relied upon this passage and submitted that it supported his contention that "liability" as enacted in the *Acts Interpretation Act*, s8(c), in the context of the facts of this case, is a reference to the applicant's liability to be prosecuted within the time prescribed by the legislation at the time the offence was committed. It seems to us that the ascertainment of the intention of the Parliament upon the enactment of the *Wrongs Act*, s25(c), has no bearing on the ascertainment of the Parliament upon the enactment of the *Acts Interpretation Act*, s8(c). It is a well established cannon of statutory construction that a statutory expression must be read in the context of the whole Act. In *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, Mason J (as he then was) said, at 514:

> "However, to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, at pp 304, 319-320; *Attorney-General v Prince Ernest Augustus of Hanover* (1957) AC 436, at pp 461, 473). Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to

> interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."

19 The context and specialised subject matter of the *Wrongs Act*, s25(c), called for a contextual interpretation of the word "liable" as enacted twice in the same paragraph that is of no assistance with the construction of that word when enacted in a statute of general application to all other legislative enactments. Mr Manetta further submitted that the authorities to which we have referred turned upon the common law concept of accrued rights and did not turn their attention to liabilities. In *R v Pinder* (supra), King CJ set out the *Acts Interpretation Act* 1915 (SA), s16(1)(c), which speaks of (*inter alia*) "rights." The paragraph makes no reference to liabilities but the following paragraph does, and did at the time *Pinder* was decided. It provides that an amendment does not:

> "(d) affect any duty, obligation, liability or burden of proof imposed, created or incurred, or any penalty, forfeiture or punishment incurred or imposed or liable to be incurred or imposed, prior to the repeal, amendment or expiry;"

20 The judgments of the court do not expressly refer to this paragraph but we think this is probably because liability was not seen as a relevant concept, separate from the concept of accrued right. In our view, the relevant rights of the applicant correspond with his liabilities. At the time the amending Act took effect the authorities are clear that the applicant had not accrued a right not to be prosecuted. It follows that he was then still liable to be prosecuted and consequently, had not then accrued a liability to be prosecuted limited to a proceeding that is commenced within three years of the commission of the offence. The liability of the applicant to be prosecuted and convicted persisted until the expiration of the time limited by statute for the commencement of prosecution proceedings. That liability was extant at the time the amending Act came into operation. Just as the applicant had no accrued right to immunity from prosecution at that time, his accrued liability was not limited by that same immunity. The extent of his liability cannot be limited by a right that has not accrued to him. To put the matter conversely, if the liability that the applicant accrued or acquired was a liability to be prosecuted within three years of the date that the offence was committed, it would follow that he accrued or acquired a right not to be prosecuted after that period had expired.

21 We are of the opinion that the order made by the DFM was within jurisdiction, and that if the time for appealing was extended, the appeal would fail. Accordingly, the order of the Tribunal is that the application for an extension of time within which to bring an appeal is dismissed.

We certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Underwood (Deputy President), Justice Mildren and Justice Duggan (Members)

Associate:

Dated: 22 September 2004

Counsel for the Appellant:	M.B. Manetta
Solicitor for the Appellant:	Mr Tim Mellor, Mellor Olsson Solicitors
Counsel for the Respondent:	Jeffrey S. Hilton SC, with James Gaynor
Solicitor for the Respondent:	Office of the Director of Military Prosecutions, Department of Defence
Date of Hearing:	11 August 2004
Date of Judgment::	22 September 2004