DF2 / 90

IN THE DEFENCE FORCE)
) No. DFDAT 5 of 1989
DISCIPLINE APPEAL TRIBUNAL)

IN THE MATTER of the Defence Force Discipline Appeals Act 1955

AND IN THE MATTER of an Appeal against conviction by a Defence Force Magistrate of Petty Officer Fire Control Linsey Peter Anning R113024

REASONS FOR JUDGMENT

Members: The Hon. Mr Justice Woodward (President)
The Hon. Mr Justice Cox (Deputy President)
The Hon. Mr Justice Gallop (Member)

Date: 11 May 1990

Melbourne

This is an appeal pursuant to s.20(1) of the Defence Force Discipline Appeal Act 1955 against convictions by Defence Force Magistrate on 19 July 1989 at HMAS CERBERUS in Victoria.

The appellant was convicted of two offences against s.33, and two offences against s.60, of the Defence Force Discipline Act 1982. In respect of each offence, the appellant was fined the sum of $250 and made subject to forfeiture of all seniority as a Petty Officer to the date of his conviction. Section 33 reads:

> "A person, being a defence member or a defence civilian, who, on service land, in a service ship, service aircraft or service vehicle or in a public place:
>
> (a) assaults another person;
>
> (b) creates a disturbance or takes part in creating or continuing a disturbance;
>
> (c) behaves in an obscene manner within the view or another person; or
>
> (d) uses insulting or provocative words to another person;
>
> is guilty of an offence for which the maximum punishment is imprisonment for 6 months."

Section 60 reads:

> "A defence member who, by act or omission, behaves in a manner likely to prejudice the discipline of, or bring discredit upon, the Defence Force is guilty of an offence for which the maximum punishment is imprisonment for 3 months."

The relevant parts of the Charge Sheet read as follows:

"First Charge

Defence Force Discipline Act section 33(d)

Using Provocative Words

On the twenty-seventh day of January, 1989 at the Petty Officers' Mess, HMAS CERBERUS did use provocative words to WRSR Rachel Lee GLEW W143737 by saying 'I've got this uncontrollable urge to make love to you' or words to that effect.

Second Charge

Defence Force Discipline Act section 33(d)

Using Provocative Words

On a date between the first day of November, 1988 and the twenty-fourth day of March, 1989 at HMAS CERBERUS did use provocative words to WRSR Rachel Lee GLEW W143737 and WRCO Lisa Kay Waterman VOULLAIRE W143463 by saying 'I've got this uncontrollable urge to make love to you, why don't you come and visit me?' or words to that effect.

Charge Three

Defence Force Discipline Act section 60.

Prejudicial Behaviour

On a date between the ninth day of January, 1989 and the twenty-seventh day of January, 1989 at the Recruit School Parade Ground, HMAS CERBERUS, did behave in a manner likely to prejudice the discipline of the Royal Australian Navy by encouraging members of the Recruit School to rate the posteriors of female recruits whilst fallen in on the said parade ground.

Charge Four	Prejudicial Behaviour
Defence Force Discipline Act section 60	On the seventh day of April, 1989 at Cabin 34, 4 Accommodation Block HMAS CERBERUS did behave in a manner likely to prejudice the discipline of the Royal Australian Navy by making an improper remark to Recruit Training Class Victor by saying 'The next module will be a sex module and we will demonstrate on the girls' or words to that effect."

At all material times, the appellant was a Petty Officer Instructor at the Recruit School at HMAS CERBERUS. In respect of the first charge, evidence was given that on 27 January 1989 the appellant had used the words complained of to WRAN Glew in the Petty Officers' Mess where she was on duty as a mess orderly and that those present included WRAN Voullaire, who was performing similar duties to WRAN Glew, CPO Leonard and PO Fredericks. At the time the remark was made, the three Petty Officers were drinking and conversing together in the Mess at the conclusion of the day's work. The two WRANS were occupied in clearing away glasses and ashtrays. There were some 20 persons in the Mess, but the remark appears to have been made in the hearing of the abovenamed personnel only. WRAN Voullaire had joined the Navy in August 1988 and WRAN Glew had joined one month earlier.

Evidence of the reactions of each witness who heard

the remark is set out hereafter: CPO Leonard said he was "quite shocked and quite unimpressed that the comment had been made", but agreed in cross-examination that he did not remonstrate at the time nor report the incident, although he thereafter "monitored" the appellant "closer within his duties". WRAN Glew said she "just laughed ... because I didn't think there was anything else I could do. It didn't really worry me so I thought 'Well, you can only laugh'". In cross-examination she agreed that she was not fazed about the comment and that it "sort of went in one ear and out the other". She said she had not run off and complained to anyone. WRAN Voullaire, when asked her reaction said "I was just - I didn't really take it - I was disgusted and I just let it go over my head and I just went back to the Chiefs' Mess". PO Fredericks denied that the remark was said at all, but his evidence was rejected by the Defence Force Magistrate.

There was ample evidence to justify the finding that the words alleged in the first charge were said. The appellant's challenge to the conviction is that such words, in the circumstances, were incapable in law of constituting provocative words within the meaning of s.33 of the Defence Force Dicipline Act, 1982. Section 33 is to be found in Division 3 of the Act which bears the heading "Offences relating to insubordination and violence". Other offences included in the Division are:

> Assault on a superior officer (Sec.25); insubordinate behaviour with respect to superior officer (Sec.26); disobedience of command (Sec.27); failure to comply with direction of the person in command of a service ship, aircraft or vehicle (Sec.28); failure to comply with a general order (Sec.29); assault on a guard (Sec.30); obstruction of a service policeman (Sec.31); and assault on an inferior (Sec.34).

Section 32 makes it an offence for a defence member on guard duty or watch to sleep at his post, to be drunk at or to leave his post. While it is true that in Reg. v Grant [1957] 1 WLR 906 at p. 908, when dealing with a charge of mutiny which he defined as "an offence of collective insubordination, collective defiance or disregard of authority or refusal to obey authority", Lord Goddard C.J. said "everybody knows that insubordination means refusal to subordinate oneself to authority, and it does not follow that a mere failure to obey an order amounts to insubordination", the term "insubordination" has also a broader meaning. The Oxford English Dictionary defines it as "the fact or condition of being insubordinate; absence of subordination or submission; resistance to or defiance of authority; a refusal to obey orders; refractoriness, disobedience". It is in the broad sense of disobedience that the term is used in the heading to the division, although in s.26 the adjective "insubordinate" may well have the narrower meaning of being openly defiant of authority.

All the sections we have so far noted create offences which relate either to insubordination or violence.

Even s.32, which at first glance may seem to fall outside either category, does relate to insubordination in the broad sense, since being asleep or drunk at or absent from one's post without reasonable excuse is incompatible with obedience to an order placing the defence member on guard duty or on watch.

It was submitted by the defending officer to the Defence Force Magistrate and by counsel for the appellant to us that provocative words for the purposes of s.33 must be likely in the view of a reasonable person to lead to a disturbance.

The Defence Force Magistrate ruled that the word "provocative" should be taken in its ordinary sense, adding that the context in which the word is used in the legislation is to be considered. He rejected the view that it should only be given a meaning such as "exciting anger or violence" or "causing disturbance" and directed himself that the word should be construed "in the ordinary general way along the lines of the Concise Oxford Dictionary definitions cited to [him] namely 'tending to cause provocation (of curiosity, anger, lust, etc., intentionally annoying)'". He continued:

> "Provocation is defined as 'incitement, especially to anger etc., instigation, irritation, cause of annoyance'. I think that the words and their context have to be considered, of course. The tendency to provoke is not to be measured in terms solely of the effect which words have on a recipient

> or an addressee although any such effects are a relevant consideration".

In our view, this contained a misdirection. The section is derived from s.13 of the Naval Defence Act 1910, the previous service law applicable to the Navy. There was no corresponding Army or Air Force offence. That section provided:

> "Every person subject to this Act who -
>
> (a) fights or quarrels with any other person whether subject to this Act or not: or
>
> (b) uses threatening, abusive, insulting or provocative words or behaviour likely to cause a disturbance,
>
> shall be liable to imprisonment for a term not exceeding two years or any less punishment authorised by this Act."

The effect of the enactment of s.33 in the Defence Force Discipline Act 1982 is to extend the liability to conviction for such an offence to the whole of the Defence Force, to define with more precision the conduct formerly embraced by the wide terms 'fighting' and 'quarrelling' and to confine the ambit of the offences to service land, etc. and public places. The omission of the reference to threatening or abusive words, and to "behaviour likely to cause a disturbance", does not in our view alter the essential character of the conduct the section is designed to prohibit. That character is indicated by the context in which the section appears and by a consideration of the kind

of behaviour specifically mentioned, namely assaults, actual disturbances, behaviour within the view or hearing of another person which is offensive to ordinary standards of propriety to a degree more marked than is conveyed by the expression "indecent" (see Reg. v Stanley [1965] 2 QB 327 at 333) and using insulting words to another. The behaviour described in paras.(a) and (b) of the section connotes actual force or disturbance while that contemplated by paras.(c) and (d) is of a kind likely to cause others to take offence in such a way that the use of force, violence or the creation of disturbance might reasonably be expected to ensue.

The words complained of in the circumstances found by the Defence Force Magistrate could not reasonably be said, in our view, to have had that character. Tasteless, embarrassing and offensive though the remark was, it could not reasonably have been interpreted in the circumstances as a threat by the appellant of any immediate action. Nor could it be said that it was likely to excite any overt response amounting to a disturbance from anyone present who heard it. Though the words were such that they should have prompted an immediate rebuke from CPO Leonard and the other Petty Officer present, and might well have led to some protest from the two WRANS, they could not be said to be provocative within the meaning of s.33 of the Act. In our view, the appellant's conviction on the first charge should be quashed.

With respect to the second charge, there was some confusion as to which of two incidents deposed to by WRAN Glew constituted the subject matter of the charge. Before the commencement of the taking of oral evidence, the Defending Officer sought an order that further and better particulars be delivered, having regard to the lengthy period of time wihin which the offence was said to have occurred, namely between 1 November 1988 and 24 March 1989. The application was refused. The first witness to give evidence in relation to this charge, WRAN Voullaire, referred to an incident which she claimed had occurred in late December 1988 or January 1989. When the complainant WRAN Glew gave evidence, she spoke of the same incident, but also mentioned a further similar incident involving the appellant and the two WRANS. No objection was, however, taken by the Defending Officer to this evidence; and the Magistrate did not refer to it in making his findings. Accordingly we say no more about it, except that it served to highlight the unsatisfactory nature of the particulars.

The Defence Force Magistrate in announcing his finding said:

> "The second charge is that on a date between the 1st day of November 1988 and the 24th day of March 1989 at HMAS Cerberus, the accused did use provocative words to WRAN SR Rachel Lee Glew W143737 and WRAN Cook Lisa Kaye Waterman Voullaire by saying 'I've got this uncontrollable urge to make love to you. Why don't you come and visit me' or words to that effect. Here again, the crucial issues are whether the words were so used and if so, whether they were provocative.

WRAN Voullaire said that at some stage, she and WRAN Glew were walking towards 2 block, between the Petty Officers' Mess and the car-park and the hockey change rooms. They saw the accused; he said hello. There was a short exchange between them. She said she only recalled a statement - 'He has an uncontrollable urge to make love to us and he'd like us to see him, to go and see him some time.' I apologise, my note is not clear; whether it is 'come' or 'go', I cannot say from the basis of my notes.

She said that she wasn't sure of the time but it was while she was doing her course, but she wasn't sure. It would be a month or a month and a half into her course, she said. Her course started on 13 November. She estimated that it was late December or January. The time of the day, she said, was after 5.30 when they were coming back from scran.

In cross-examination, she was asked whether she had not said on some previous occasion that they were not going to block 2, where they lived, but to a place called Millie's. Without detailing all of the cross-examination in this regard, it ended up, it seemed to me, saying in effect that if she had said that she was going to Millie's on some previous occasion, she was mistaken. She seemed to be unsure in cross-examination whether the expression was 'make love to you' or 'go to bed with you'.

She agreed that she thought that it was strange for the petty officer - for the accused to say something like that after having said hello. She gave no evidence, as I recall it, of any effect that those words had on her. WRAN Glew gave evidence that she and WRAN Voullaire were near the hockey club on some occasion after secure. They were heading to block 2. The accused came out of the car-park. There was conversation and he said 'I have got this uncontrollable urge to make love to you. I'm DRSI tonight at the rec. school. Why don't youse come over and see me'. She said that she was heading to block 2 from the communications school after secure.

In cross-examination, she said it would have been about last January and it was at about 1615. She said they were coming from com school and not from where they'd had any meal, that they'd marched up together, that they'd been dismissed and that they walked together. She said that the accused came straight out and said it. She said she was not troubled by it. The accused dealt with this charge of course in his evidence.

The charge was put to him in chief. He was asked whether he said the words alleged or anything like that and he said 'No'. In cross-examination he confirmed his denial of the allegation in the charge. He said that he had seen WRANs Glew and Voullaire around the depot. He didn't recall seeing them at the hockey park. 'There was every chance.' he said 'that I'd said hello to them'. He said that there was no chance he said what they alleged; it was not his vocabulary.

My assessment of the witnesses and their evidence, the respective evidence, involved considerations similar to those I've expressed in relation to the first charge and I will not repeat them here. I should add - and this is also perhaps a relevant consideration to a lesser extent in relation to the first charge - that there was no evidence that I preceived of any concoction or fabrication between WRANs Voullaire and Glew in relation to the allegation and indeed I did not detect any suggestion of any.

There is - shall I say - imprecision as to precisely when the matter occurred but it seems to have been late one afternoon in about January 1989. I find myself on this basis at the end of the trial satisfied that beyond a reasonable doubt that in or about January 1989 at HMAS Cerberus the accused did say to WRSR Rachel Lee Glew and WRCK Lisa Kaye Waterman Voullaire words to the effect 'I've got this uncontrollable urge to make love to you. Why don't you come and visit me'.

The words constituted an aggressive sexual approach. They were used by a petty officer instructor to two junior WRANs. These matters dictate the conclusion that they constituted the use of provocative words notwithstanding the benign reactions of the young ladies. Accordingly, I am persuaded beyond reasonable doubt that the offence alleged in the second charge has been made out. Accordingly, I find the accused guilty of the second charge."

The accused's right to adequate particulars is specifically contained in R.9(5) of the Defence Force Discipline Rules. That sub-rule provides

> "5. Particulars of any offence shall contain a sufficient statement of the circumstances of the offence to enable the accused person to know what it is intended to prove against that person as constituting the offence."

It has been said in any event that, apart from statute, a court possesses an inherent authority to require that particulars of a charge be furnished (Johnson v Miller (1937) 59 CLR 467, Wickham v Cole [1957] Tas SR 111, Ex Parte Graham: re Dowling [1969] 1 NSWR 231, Marchesi v Barnes

and Keogh [1970] VLR 434, Barnes v Polito ex parte Polito [1967] QR 155 and Smith v Moody [1903] 1 KB 56). In Johnson v Miller (supra) at p 497 Evatt J said,

> "It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him. This fundamental principle has been deemed applicable to bodies which are not strictly judicial in character."

We find it unnecessary to express a concluded view whether or not in the circumstances adequate particulars were provided, although in the light of the evidence given by both WRANs it would seem that the prosecution ought to have been able to restrict the date of the offence to a much shorter time frame.

However, we are of the view that the Defence Force Magistrate again applied an incorrect test to the question of whether or not the words complained of were provocative within the meaning of s.33 and that, had he applied the correct test, he could not, in the circumstances disclosed by the evidence, have been satisfied to the requisite degree that the offence had been made out. Again we observe that the remark was, in the circumstances, clearly tasteless and improper but it did not amount to an offence against s.33. The conviction on the second charge should be quashed.

In respect of the third charge, WRAN Martin gave evidence that on a day about a fortnight after her induction into the Navy, she had been present as a member of recruit squad Romeo on the parade ground during the ceremony of Colours. Her squad had fallen in to the front of recruit squad Victor, of which the appellant was the PO Instructor. She was a member of the rear rank and the appellant and the recruit acting as class leader of Victor squad were to the front of that squad. On the parade being ordered to turn about, she and the members of her squad were facing Victor squad's position, the appellant and the class leader thereof being approximately one metre in front of her and facing in the same direction. She gave evidence, which the Defence Force Magistrate accepted, that she had heard the appellant say to his class leader concerning the WRANs in his own squad, "What would you give them out of 10 for their bums?". The class leader had said something in a muffled voice. She also said that at the time the comment was made there were a few people in the rank she was in "who made a bit of a giggle" and that the appellant had turned around. Not long thereafter the parade had again turned about, so that WRAN Martin was now in a position about one metre to the front of the appellant who had then asked his class leader "What would he give WRAN Martin a score out of 10 for her bum, and once again the class leader muffled something", and the appellant had said, "Only a 4".

The only other prosecution witness to this incident was Smn Walker who was also a member of Romeo squad and who deposed to hearing the appellant say "What would you give Martin out of 10?" He said he had not heard the words "for her bum" used, and that he had been 3 metres away from the appellant at the time. He did not claim to have heard any other person laugh or give an indication of having heard the remark. No other members of either squad were called by the prosecution.

The conduct alleged in the charge was the giving of encouragement to members of the recruit school to give a score out of 10 in respect of the female recruits' posteriors. In our view, although the evidence justified a finding that such encouragement was given to the recruit class leader, there was no basis for a finding that the appellant had encouraged any other member of his or of Romeo squad to engage in this exercise. The only evidence which suggests his words in respect of the female members of his own squad were heard by anyone other than the class leader and WRAN Martin was the latter's evidence that at the time a few members in her own rank "had made a bit of a giggle". The conduct charged involves active and intentional encouragement of more than one recruit to make an assessment of the above kind. The evidence does not justify the making of such a finding. Since the charge related to conduct prejudicing discipline, the distinction is important. A private joke, in bad taste, which happens to be overheard by a few others is one thing. A general invitation to male

recruits to embarrass and demean female recruits is a very different matter. The conviction on this charge must be quashed.

With respect to the fourth charge, there was evidence, some of which was disputed, but from which in our view the Defence Force Magistrate was entitled to find that the appellant had said to the members of his recruit squad, "The next module will be a sex module and we will demonstrate on the girls" or words to that effect. It was said during a module or class when he was training the squad in proper kit maintenance. The squad consisted of 2 females and 16 males. The 2 recruit WRANs were present at the time, as were the remaining members of the squad. WRAN Linden described the incident thus, in her evidence-in-chief:

"Q. What occurred in that ironing module that you might recall?

A. PO Anning made a joke, a fairly rude joke. That's about all that happened.

Q. What was the joke that he made?

A. He made a joke about the next module was going to be a sex module.

Q. What did you understand that to be?

A. I just - it didn't really affect me. I just took it as a joke. I didn't take much notice of it really...

In cross-examination, she was asked:

"Q. WRAN Linden, you say that you weren't embarrassed by comments that you allege were made by PO Anning?

A. Not particularly.

Q. It didn't worry you? You weren't troubled?

A It didn't trouble me, but I didn't think it was a nice thing."

WRAN Williams gave this account:

"A. When the module was about to finish PO Anning said 'After this module we'll have a sex module, practical and theory and we'll demonstate on the women, the girls in the class'. And he said 'Sorry, rephrase that, only I will demonstrate on the girls'.

Q. Was your whole class present at that time?

A. Yes, sir.

Q. What was your reaction to that comment or statement?

A. I was embarrassed, sir, and annoyed.

Q. Could you tell the magistrate please why you were annoyed?

A. I was annoyed because I was getting sick and tired of all the comments PO Anning was saying about women."

...

In cross-examination, she said,

"Q. So you didn't feel it warranted any complaint?

A. No, sir.

Q. You weren't really fazed about it or upset?

A. Yes, sir.

Q. You say you weren't concerned about it, you treated it as a joke, don't you?

A. Yes, sir."

Smn Hussey gave the following evidence:

"A. We were doing the ironing module. He was showing how to iron the clothes. He was saying a few jokes as he was going along and then he just said 'The next module will be a sex module', which would be WRAN Linden and WRAN Williams - would have sex with him in block 1 and everyone just started laughing as - to be a joke.

...

Q. What was your reaction to that?

A. I laughed because I thought it was - well, the way I heard it, it was a joke really to me - so did everyone else.

Q. How long had you been the navy at that stage?

A. A week, I think, yes, a week.

...

A. He didn't actually say 'WRAN Linden and Williams' but I was just saying their names to know who they are.

Q. To the best of your recollection what was said?

A. That the next mod would be a sex mod on the two WRANs in block 1 on me [sic]."

Smn Carter, when asked his reaction to the comments said:

"A. I had no reaction to it at the time as, you know, it didn't really mean anything to me.

Q. In what way do you mean it didn't really mean anything to you?

A. I didn't take to - offence of it [sic]".

Once again, it can be said unequivocally that a comment such as this was, in the circumstances, coarse, embarrassing and inexcusable. It seems to have been treated as an intended joke by all concerned, although the female members and possibly some of the males present did not find it in any way amusing. It should not have been said by a petty officer in such company, but while the Defence Force Magistrate found it to have been improper, and we would fully endorse that epithet, the question still remains whether in

saying what he did the appellant behaved in a manner likely to prejudice the discipline of the Royal Australian Navy.

When considering an army officer's conviction under the precursor to s.60, namely AMR 203 (1) (1x) which proscribed conduct to the prejudice of good order and military discipline this Tribunal said in re Nickols' Appeal [1966] 9 FLR 120 at 126,

> "It remains only to consider, under the matters relating to the charge, whether the conduct of the applicant, in signing and causing the subject letter to be forwarded to the Military Board and delivering a copy to his commanding officer, can properly be said to be to the prejudice of good order and military discipline. In answering this question we have taken care to avoid giving any treatise on the meaning of those words but to confine ourselves to the particular matter in hand. Suffice it to say that if there is one requisite for the maintenance of good order and discipline in the army or any other service then it is a due and proper respect for the hierarchy of authority upon which the conduct of service affairs is based. Conduct upon the part of a member of the forces which is in palpable disregard of that concept is calculated to engender disarray and confusion in the conduct of those affairs. We consider, therefore, that a letter couched in the terms referred to in the particulars to the present charge can properly be the subject of an offence under reg. 203 (1) (1x)."

Behaviour likely to prejudice the discipline of the Defence Force may take many forms, and we are unwilling to essay any exhaustive definition of the words employed in s.60. They are clearly not confined to conduct (including the use of language) of an insubordinate or offensive nature.

In the Manual of Military Law 1941 Aust ed. at p.427 a list of instances of offences said to be not uncommonly charged under the equivalent section of the Army Act included offences involving dishonesty, borrowing money from subordinates and negligently injuring self. A similar list noted in Halsbury Vol.41 (4th ed.) para. 430 indicated a broad spectrum of behaviour covered by the phrase "conduct to the prejudice of good order and Naval (etc.)" discipline.

In Heddon v Evans (1919) 35 TLR 642 McCardie J in rejecting the proposition that language amounting to such conduct would need to be insubordinate in nature said (at p 647),

> "Language may be used of such a nature, I think, as to constitute a breach of good order and military discipline although it may fall outside s 8 (which deals with insubordinate language). Military discipline is a grave and delicate thing. An offensive or vulgar observation or remark, e.g., though neither threatening nor insubordinate, may be a breach of good order or discipline. So, too, may language which, though not offensive, vulgar, threatening or insubordinate, is yet of such a character as to be improper and unpermissible [sic] and injurious to discipline. In my view, the last paragraph of the letter was of such a character."

In that case, the paragraph being considered was:

> "I am compelled to lay these facts before you for my own protection and also for the protection of all the men under your Command, and I may say that I have their unanimous and unsought support."

It formed part of a letter of complaint by a private soldier to his Commanding Officer concerning a junior officer of the same unit.

Among the definitions of discipline given in the Oxford English Dictionary is "the order maintained and observed among pupils or other persons under control or command such as soldiers, sailors, the inmates of a religious house, a prison, etc." Behaviour which is prejudicial to the discipline of the Defence Force can include behaviour whereby respect for that order is challenged or undermined not merely by the conduct of a person of inferior rank in respect of his superior officer but also by the conduct of the latter towards the former. Unfair and discriminatory treatment of a subordinate on grounds such as race, religion, sex or physical peculiarities could well prejudice the discipline of the Defence Force. So also could conduct which encouraged divisions or disrespect between service personnel of differing race, religion or sex.

Nevertheless, in the circumstances of this case, we are of the view that a stupid and improper comment such as the one complained of, even though causing the WRANs involved some embarrassment, could not be said to amount to unfair or discriminatory treatment or to be otherwise of sufficient gravity, standing alone, to constitute behaviour prejudicial to the discipline of the Defence Force. Accordingly, we

consider that the conviction on the fourth charge should also be quashed.

Before leaving this case, we should say that we are conscious of the problems facing the Services in dealing with cases of sexual harassment, particularly where rank differences are involved. The Services would not wish to lag behind general community standards in such matters.

The two sections of the Defence Force Discipline Act which were relied upon in this case are probably the most appropriate to be used in most cases where disciplinary action is necessary to punish and deter such harassment.

Although we have found that the words complained of in the first two charges in the present case were not, in law, provocative within the meaning of sub-s 33(d) of the Act, one can easily imagine language which, in given circumstances, would be provocative to anger and could provoke a disturbance. The type of derogatory personal remark which invites a retaliatory slap, even if that slap is unlikely to be delivered by a subordinate in all the circumstances, could be sufficient. A remark to another person about that person's low moral standards could well constitute insulting words.

However it may well be that s 60 would provide the

more appropriate basis for a charge in most cases of sexual harassment. This Tribunal, differently constituted, has today given judgment rejecting an appeal in just such a case. In that matter, a male warrant officer on several occasions privately importuned a female member, working under his direction, to have sex with him. His defending counsel did not dispute that, if the alleged conduct was established, it amounted to a breach of s 60. It would certainly be difficult to maintain proper discipline between two people of different rank in such circumstances. It would also be difficult to maintain discipline generally if such conduct became widely known and the offender lost the respect of his subordinates.

When behaviour is sexist and objectionable but not such as to threaten discipline, and words used are not insulting or provocative in law, the case may well be one for counselling or reprimand rather than the laying of formal charges.

Service establishments must continue to be places where language can be robust without giving rise to disciplinary proceedings. For example, drill sergeants must be given some latitude in the way in which they speak to other ranks on parade who are clumsy or lazy or inattentive. This may even involve a degree of personal abuse which could prove embarrassing or annoying to the victim.

The line between what must be endured in the interests of discipline, and what goes so far that it actually imperils discipline, is one which those in authority may often have to draw.

In the present case, for the reasons given above, we allow the appeal and quash the four convictions.

I certify that this and the 23 preceding pages are a true and accurate copy of the Reasons for Judgment of the Tribunal

Elizabeth Cowser

Associate

Dated: 11 May 1990