DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Coleman v Chief of Army [2003] ADFDAT 2

CRIMINAL LAW – theft- appellant's property in possession of police after search and seizure – whether "property belonging to another person"

CRIMINAL LAW – plea of guilty - circumstances in which conviction may be set aside

WORDS AND PHRASES – "property belonging to another person"

Defence Force Discipline Act 1982 (Cth) s 47
Defence Force Discipline Appeals Act 1955 (Cth) s 23 (1) (b) and (c)

Meissner v The Queen (1995) 184 CLR 132 applied
R v Kardogeros [1991] 1 VR 269 cited
R v Hough (1894) 15 LR(NSW) 204 cited
R v Cameron (1924) 24 SR(NSW) 302 cited
Rose v Matt [1951] 1 KB 810 cited
R v Turner (No 2) [1971] 2 All ER 441 cited

C R Williams, *Property Offences*, 3rd ed, 1999, at 15

Rupert Cross *Larceny by an Owner and Animus Furandi* (1952) 68 LQR 99

DEAN WILLIAM COLEMAN V CHIEF OF ARMY
DFDAT 1 OF 2003

HEEREY J (President), UNDERWOOD J (Deputy President)
and MILDREN J (Member)
1 AUGUST 2003
MELBOURNE

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL **DFDAT 1 OF 2003**

BETWEEN:	**DEAN WILLIAM COLEMAN** **APPELLANT**
AND:	**CHIEF OF ARMY** **RESPONDENT**
TRIBUNAL:	**HEEREY J (President), UNDERWOOD J (Deputy President) and MILDREN J (Member)**
DATE OF ORDER:	**1 AUGUST 2003**
WHERE MADE:	**MELBOURNE**

THE TRIBUNAL ORDERS THAT:

The appeal is dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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AND: **CHIEF OF ARMY**
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TRIBUNAL: **HEEREY J (President), UNDERWOOD J (Deputy President) and MILDREN J (Member)**
DATE: **1 AUGUST 2003**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The appellant appeals against convictions by a Defence Force Magistrate (DFM) on two charges. The first was a charge of burglary contrary to s 61 of the *Defence Force Discipline Act 1982* (Cth) (DFDA) incorporating s 102(1) of the *Crimes Act 1900* (ACT) in that, being a Defence member, at the Military Police Office, Simpson Barracks, Macleod, Victoria between 3 and 4 December 2001 he did enter a building as a trespasser within intent to steal. The second was a charge of stealing contrary to s 47(1) DFDA (as it then stood) in that, being a Defence member, at the place mentioned between 3 and 4 December 2001 he did dishonestly appropriate a Military Police exhibit namely WAW/5 comprising two VHS video tapes being the property of the Commonwealth with the intention of permanently depriving it thereof.

2 The appellant was also convicted on a charge of damaging service property, namely a glass panel on a door of the Military Police Office. No appeal is brought against that conviction.

3 The appellant, who was represented by a legally qualified officer, pleaded guilty to all charges. Thus the appellant must bring himself within the limited circumstances in which convictions after a plea of guilty can be set aside: *Meissner v The Queen* (1995) 184 CLR 132.

4 Broadly speaking, the case of the appellant is that the evidence before the DFM

disclosed no offence because the video tapes in question were his own property.

Seizure of tapes

5 The appellant was serving in the Australian Army Band which was based in Melbourne. On 14 October 2001 the band visited Bendigo to give a performance. A female member of the band complained that while she was changing her costume in the women's toilets at the venue in Bendigo she was spied on by a male. The appellant was suspected of being the person concerned. When questioned by Military Police on the following day he denied involvement. His quarters were searched pursuant to a warrant but nothing relevant was discovered.

6 Subsequently, at his request, a further interview took place at the Military Police Office, Macleod, on 3 December 2001. The appellant was there interviewed by Staff Sergeant Wridgway and Sergeant O'Brien of the Military Police Special Investigation Branch (SIB). In the course of this interview the appellant admitted that he had been in the women's toilets at the Bendigo venue but said he had gone there for the purpose of defecating in the mistaken belief that they were the men's toilets. The police questioned the appellant about other incidents involving spying on servicewomen in showers. The appellant denied any involvement. The police stated that in view of the seriousness of those allegations they would like to conduct a search of property under the appellant's immediate control. The appellant consented to such a search and signed an Acknowledgement of Consent to Search form.

7 The interview was suspended and in the presence of the appellant the police searched his quarters, which consisted of a room in the barracks at Macleod. The police located, taped to the back of drawers in a cupboard in the appellant's room, two plastic videotape cases containing video tapes. The appellant told them that they were VCR tapes of his wife and himself. The police told him that they were going to take possession of them and would speak to him about them at a later date. The appellant said that he wished to obtain legal advice. In the course of phone calls being made for that purpose the appellant said that he did not have a problem with the continuing of the search. His concern was "just in relation to those videos" and he was happy for the search to continue. Upon the resumption of the interview the police showed the appellant the videotapes. He agreed that those were the tapes that had been taped behind the drawers. Staff Sergeant Wridgway told the appellant that he

had taken possession of the videotapes and placed them into a plastic bag to which he attached service police identification labelled WAW/5 and that he would speak to the appellant about them at a later date.

Plea of guilty

8 On 12 December 2002 the appellant pleaded guilty to the three charges. The DFM explained to the appellant, who was legally represented, the elements of the offences. In relation to the charge of stealing the DFM said:

> *"The elements of this offence are that the accused was a Defence Member.*
> *Next, that at the Military Police Office Simpson Barracks, Macleod between 3 December 2001 and 4 December 2001.*
> *Next, that you acted dishonestly.*
> *Next, that you appropriated, that is, took for yourself a Military Police Exhibit, namely WAW/5 comprising two VHS video tapes.*
> *Next, that this was the property of the Commonwealth.*
> *Next, that you were acting with the intention of permanently depriving the Commonwealth of the tapes concerned.*
> *Finally, that you were not acting pursuant to any claim of right.*
> *Now do you understand those elements as I have explained them to you?"*

The appellant replied "yes" and agreed that he adhered to his plea of guilty.

9 The DFM further told the appellant that had he pleaded not guilty to any of the charges the prosecutor would have been required to prove each and every one of the elements connected with the charge concerned to a standard of beyond reasonable doubt. The DFM said that if he accepted the plea of guilty that would not occur and that the prosecutor would merely outline the facts as the prosecution understood them to be. The plea meant that the appellant did not necessarily accept the truth of everything the prosecutor put to the DFM but did accept the truth of sufficient matters to substantiate his guilt. The appellant indicated that he understood that and adhered to his plea.

10 In outlining the case to the DFM the prosecutor said that after the interview with the appellant on 3 December 2001 Staff Sergeant Wridgway had conducted a "cursory examination" of the two videotapes seized from the appellant's room. He then left the Military Police Office, leaving the seized property in the interview room, and locked the premises. The prosecutor said that after the interview the appellant went to the room of a servicewoman. She was one of the women shown on the videos, the other one being the

appellant's former wife. The appellant told her about the seizure and the nature of the tapes. He appeared very distressed. He spoke of attempting to retrieve the tapes from the Military Police and said that he would try legitimate means such as discussing the matter with them. The servicewoman told him "not to do anything silly". He left her room at about 3.00 am on the morning of 4 December. Later that morning at about 7.30 am a military policeman arrived and observed that the centre glass panel on the rear door of the office had been damaged and a large amount of glass splinters were in the vicinity. A search of the office disclosed that the police exhibit WAW/5 with two video tapes had been substituted. The two tapes that appeared in the exhibit bag had been taken and replaced by two other tapes.

11 In the course of his remarks on sentencing the DFM said:

> *"It is common ground that the tapes contained sexually explicit footage of acts of intimacy between the accused and his now estranged wife and between the accused and a female service acquaintance. There is nothing from a reconstruction of such of the tape as was recovered to suggest the tape seized by the Military Police afforded evidence of the commission of any offence by the accused. The accused has said through his counsel that his motivation in recovering the tapes lay in his desire to protect the privacy and reputation of the two females shown on the footage."*

Legislation

12 Section 47(1) of the DFDA provided:

> *"47(1) A person, being a defence member or a defence civilian, who dishonestly appropriates (whether or not with a view to gain or for his own benefit) property belonging to another person with the intention of permanently depriving the other person of it is guilty of an offence for which the maximum punishment is imprisonment for five years.*
> *(2) …*
> *(3) For the purpose of sub-s 1, but without affecting the generality of that section …*
> *(e) property shall be deemed to belong to a person if the person has possession or control of it or a proprietary right or interest in it (not being an equitable interest arising by reason only of an agreement transfer or grant an interest)."*
> *(4) It is a defence to a charge of an offence under subsection (1) if the person charged:*
> *(a) appropriated the property in the belief that he had in law the right to interfere with the rights of the other person concerned in respect of the property;"*

Appeals from convictions on plea of guilty

13 In *Meissner* at 157 Dawson J said:

> *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. But the accused may show that a miscarriage of justice occurred in other ways and so be allowed to withdraw his plea of guilty and have his conviction set aside. For example, he may show that his plea was induced by intimidation of one kind or another, or by an improper inducement or by fraud."*

See also *R v Kardogeros* [1991] 1 VR 269.

The appellant's case on appeal

14 In an affidavit sworn on 5 May 2003 the appellant deposed that the defending officer assigned to him had advised him that he should plead guilty to all charges. The appellant listened to the DFM explaining the elements of each of the charges as they were read out and "began to have doubts as to whether (he) should properly be pleading guilty" to the two charges the subject of this appeal. However his defending officer "continued to insist" that he should plead guilty to all charges and so he did.

15 After the trial had ended and the penalties been imposed the appellant sought different legal advice and was told that the pleas of guilty to the two charges in question had been "inappropriate". In relation to the two video tapes the appellant deposed:

> *"(a) both were my property;*
> *(b) both had been improperly seized by SIB following the events that led to the first charge. It is patent on the face of the material that the video tapes were not relevant to nor even connected with any offence then or later alleged to have been committed by me;*
> *(c) the content of the video tapes was of an entirely private nature, and they were therefore not considered relevant for the Court to view and;*
> *(d) they were not in view in my quarters at the time of the search by the SIB, and the SIB did not have any grounds on which to seek video*

tapes."

16 The appellant deposed that the tapes were his exclusive property and irrelevant to the investigation of the charge relating to his conduct in the toilets at Bendigo which at the time of seizure was the only charge in contemplation. As to the stealing charge, he was "advised that intention to steal is vitiated by a claim of right". There was no evidence that he sought to remove any item of property except his own video tapes and he claimed them "as of right".

17 The primary argument of counsel for the appellant was that the facts did not disclose any offence. He said that the possession of the Commonwealth, through the Military Police, became unlawful once the police were aware that the videotapes were not relevant to any possible charge against the appellant. Further, counsel said that s 47(1)(e) had the effect that the tapes "belonged to" both the Commonwealth and the appellant since the Commonwealth through the Military Police had possession or control of it and the appellant had a proprietary right or interest in them, he being the owner.

Conclusion

18 Section 47 needs to be understood against the historical background of the common law of theft. Stealing was a crime against possession, rather than ownership: C R Williams, *Property Offences*, 3rd ed, 1999, at 15. Thus at common law a person could be found guilty of stealing his or her own property, as for example where that property was subject to an inn keepers lien (*R v Hough* (1894) 15 LR(NSW) 204), or the lien of an unpaid purchaser (*R v Cameron* (1924) 24 SR(NSW) 302), or had been lodged as security for performance of a contract (*Rose v Matt* [1951] 1 KB 810); see Rupert Cross *Larceny by an Owner and Animus Furandi* (1952) 68 LQR 99. The rationale of these cases, according to Cross (at 100), is that an owner can be guilty of stealing his own goods from a person who has possession of them coupled with an interest in the goods which the civil law will protect against their owner.

19 The position under s 47 is no different. In *R v Turner* (No 2) [1971] 2 All ER 441 the appellant was convicted of stealing his own car from a repairer, contrary to s 5(1) of the *Theft Act 1968* (Imp) which provided, in terms substantially to the same effect as s 47(1)(e) of the DFDA,

> *"property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest."*

20 Section 47(1)(e) simply provides alternative bases for the necessary relationship between the property and the complainant that can constitute "belonging to". It is no coincidence that the first limb of s 47(1)(3) is possession or control, that being the traditional common law element. The second limb of proprietary right or interest is an extension of the common law.

21 Accordingly, even though the tapes were the appellant's own property the circumstances of this case do not support the conclusion that he could not, as a matter of law, be guilty of stealing them. The possession of the Commonwealth through the Military Police did not cease to be lawful merely because, after a cursory examination, the police had come to the view that they would not provide any evidence against the appellant in respect of any charge then in contemplation. They retained physical custody of the tapes and were entitled to retain possession of them, at least until they could make appropriate arrangements for their return to the owner. Such arrangements might, for example, include the obtaining of a receipt from the owner. It could hardly be doubted that if some third party had taken the tapes the Commonwealth would not have sufficient possession or control to found a charge of theft. The appellant's argument involves the proposition that even though police have come into possession of a person's property lawfully (as, for example, by consent, as in the present case), the moment a police officer forms an opinion that the property is not going to be of use as evidence against the owner the possession of the police officer becomes instantaneously unlawful. (In rejecting this argument we must not be taken to have necessarily accepted that "possession" in s 47(1) of the DFDA means "lawful possession".)

22 So this is not a case where, upon the facts admitted by the plea, the appellant could not in law have been guilty of the offence. The questions whether the circumstances gave rise to reasonable doubt about the dishonesty element of the offence, or whether the appellant could raise a claim of right under s 47(4), could only be determined on evidence. Since there was no evidence, apart from the prosecutor's statement, at best for the appellant there could only be a new trial on this issue. However the circumstances as outlined, and in particular the surreptitious taking of the tapes and the replacement with other tapes, make it unlikely that the dishonesty element could not be made out.

23 Moreover, there is nothing to suggest that the appellant was asserting a claim of right

at the time he took the tapes. True it is, as he said in the interview, and as was the fact, he was the owner of the tapes. But there was no claim by him that he believed at the time of the taking that he was lawfully entitled to take the tapes in the way he did. At most, his affidavit disclosed a belief as to his rights in the light of the second legal advice he received, this being after the hearing.

24 The appellant had legal representation and advice and no miscarriage of justice occurred in the DFM convicting him on his plea: *Defence Force Discipline Appeals Act 1955* (Cth) s 23 (1) (b) and (c).

25 The appeal will be dismissed.

We certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Heerey (President), Justice Underwood (Deputy President) and Justice Mildren (Member)

Associate:

Dated: 1 August 2003

Counsel for the Appellant:	N Clelland
Solicitor for the Appellant:	Professor Phillip Hamilton
Counsel for the Respondent:	RR Tracey QC and P Kerr
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	22 July 2003
Date of Judgment::	1 August 2003