DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Ferdinands v Chief of Army [2002] ADFDAT 3

CRIMINAL LAW - appeal from decision of President of Tribunal refusing to grant an extension of time within which to appeal against conviction – construction of Defence Force Discipline Appeals Act 1955 (Cth) s 21 – consideration of matters relevant to the exercise of the discretion to grant an extension of time within which to appeal.

CRIMINAL LAW - whether alleged victim of assaults gave inconsistent account of relevant events prior to trial – whether magistrate's finding that first count not proved inconsistent with acceptance of alleged victim's evidence on second count.

CRIMINAL LAW - whether verdict unsafe and unsatisfactory**.**

CRIMINAL LAW – assault – whether touching must be violent or hostile.

Defence Force Discipline Appeals Act 1955 (Cth) s 21

Gallo v Dawson (1990) 93 ALR 479 applied
M v The Queen (1994) 181 CLR 487 referred to
Boughey v The Queen (1986) 161 CLR 10 applied
Van Damme v Chief of Army [2002[ADFDAT 2 applied.

FERDINANDS v CHIEF OF ARMY
DFDAT No 5 of 2001

UNDERWOOD J (Deputy President) and
MILDREN and DUGGAN JJ (Members)

ADELAIDE

26 JULY 2002

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE
APPEAL TRIBUNAL **DFDAT No. 5 of 2001**

BETWEEN: **TREVOR KINGSLEY FERDINANDS**
APPLICANT

AND: **CHIEF OF ARMY**
RESPONDENT

JUDGE: **UNDERWOOD J (Deputy President)**
MILDREN & DUGGAN JJ (Members)

DATE OF ORDER: **16 August 2002**

WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1 The time within which to file the notice of appeal from the decision of Heerey J (President) extended to 29 August 2001.

2 Appeal dismissed.

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE

APPEAL TRIBUNAL **DFDAT No. 5 of 2001**

BETWEEN: **TREVOR KINGSLEY FERDINANDS**
APPLICANT

AND: **CHIEF OF ARMY**
RESPONDENT

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

DATE OF ORDER: **16 August 2002**

PLACE: **ADELAIDE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 The applicant, who was at all relevant times a corporal in the Army Reserve, was tried before a Defence Force Magistrate on a charge sheet which alleged two offences of assaulting an inferior contrary to s 34(1) of the *Defence Force Discipline Act 1982* (the *Discipline Act*). He was acquitted on the first count and convicted on the second count. The magistrate sentenced him to reduction in rank to private in relation to the second count. The notice of appeal against conviction filed by the applicant was out of time.

2 The applicant filed a notice of appeal against conviction which was out of time.

3 On 15 August 2001 the President of the Tribunal (Heerey J) refused to grant an extension of time for the filing of the notice of appeal and the applicant has appealed against that order. The notice of appeal against the decision of Heerey J is also out of time by a few days, but the

respondent does not object to an extension of the time to appeal in this respect.

4 The applicant was convicted on 1 November 1999. The notice of appeal against conviction was lodged on 17 April 2001. Section 21 of the *Defence Force Discipline Appeals Act 1955* (the *Appeals Act*) provides that, subject to any extension granted by the tribunal, an appeal must be lodged with the Registrar within a period which is defined in the *Appeals Act* as the period of 30 days commencing immediately after -

> "(2)(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."

5 A review pursuant to s 152 of the *Discipline Act* took place after the conviction was recorded. It is not altogether clear on the material before the tribunal as to when the applicant was notified of the result of the review, but the applicant and the respondent agree that we should proceed on the basis that the notification occurred on 31 August 2000.

6 Section 21(2) of the *Appeals Act* provides for two periods of time within which to appeal. The first expires 30 days after the results of a section 152 review are notified and the second expires 30 days after "the last day of the period of 30 days after the conviction …" The latter period in this case commenced to run on 30 November 1999 and expired on 30 December 1999. This was the expiry date for the filing of the notice of appeal against conviction in the present case.

Section 21 leads to an odd result in the event of the results of the section 152 review not being notified within 30 days of conviction, as is most commonly the case. In some cases the time for appealing will expire

before the results of the section 152 review are notified. In other cases, the period in which to consider an appeal after notification of the results will be shortened considerably. As some appeals may be rendered otiose as a consequence of the automatic review procedure under s 152 it would seem more appropriate if the legislation allowed an appeal to be brought within 60 days of the conviction or within 30 days of the notification of the result of the s 152 review, whichever is the later.

7 In exercising the discretion to grant an extension of time to appeal against the conviction we think it appropriate to have regard to the fact that the applicant was not aware of the results of the s 152 review in this case until 31 August 2000.

8 In any event, however, the notice was not filed until approximately seven months after the date of notification of the result of the review and approximately 17 months after the date of conviction. The period of delay was lengthy and any explanation for it must be scrutinised closely.

9 The matters relevant to the exercise of the discretion to extend the time for filing a notice of appeal were referred to by McHugh J in *Gallo v Dawson* (1990) 93 ALR 479. His Honour was dealing with an application for extension of time within which to notify an appeal to the High Court, but his comments are equally applicable to the present case. When referring to the High Court Rule regulating extensions of time within which to appeal his Honour said (480):

> "The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether

the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-5; 70 ALR 185. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263-4; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: *Vilenius v Heinagar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935:

> 'The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion'."

10 The applicant filed an affidavit dated 24 July 2002 which was tendered before us. The affidavit refers to a number of events which have taken place since the date of the conviction. However, it does little to explain why the appeal was not lodged on time.

11 Mr Amey, for the applicant, drew our attention to the fact that, after the hearing before the magistrate, the applicant complained to various authorities about the conduct of the trial, including the manner in which the prosecution and the defence presented their cases. There was also an internal defence enquiry into the allegations made by the applicant

concerning the conduct of the trial. These circumstances were put forward as indicating that the applicant was dissatisfied with the finding and that he made various authorities aware that he wished to pursue whatever remedies were available to him. He was unrepresented during this period following the trial.

12 The applicant appears to have considered an appeal as early as December 1999. He wrote to the Chief Legal Officer, Defence Centre Adelaide on 27 December 1999 requesting that "a copy of the relevant sections of the *Defence Force Disciplinary Act* with regards to Appeals and initiating a mistrial and conviction quashed verdict by the Reviewing Authority" (sic) be forwarded to him. There is no information before the tribunal as to whether the copies of these sections of the Act were forwarded to him. Nevertheless, the applicant did not state in his affidavit how and when he became aware of the time limit imposed on lodging an appeal. It has to be said that the material placed before the tribunal by the applicant on this aspect does not disclose a satisfactory explanation as to why the notification of the appeal was so late.

13 Next, it is necessary to assess the prospects of an appeal succeeding. In order to do this it is appropriate to refer briefly to the evidence led before the Defence Force Magistrate.

14 In January, 1999 the applicant attended a training camp at a Range Complex near Murray Bridge in South Australia. Whilst there he was assigned the role of Company Clerk. The camp was also attended by Private McLaughlin, a female member of the Army Reserve. She gave evidence before the magistrate that on Friday 15 January 1999 the applicant asked her to drive him to Murray Bridge in order to pick up some provisions. She said that at the applicant's direction she drove to a bottle shop where he gave her $20.00 and asked her to purchase a bottle of whisky. She did so and they returned to the camp. She said the applicant told her that she could put a cap of whisky in her soft drink whenever she wanted to do so. She accepted this invitation when they returned to the

camp by taking a measure of whisky from the bottle on two occasions and drinking it with her soft drink.

15 Private McLaughlin said that on the second occasion she did this the applicant followed her into the Q store where he had placed the bottle. She said he grabbed her and tried to kiss her. She resisted and he again attempted to kiss her. This second incident of alleged grabbing and attempting to kiss formed the basis of the first charge on the charge sheet.

16 Shortly after this incident, Private McLaughlin spoke to Private Chhoy, another member of the Army Reserve who attended the camp. Private McLaughlin said that she spoke to Private Chhoy about the incident, but did not go into any detail. Private Chhoy gave evidence of the conversation and there were discrepancies between Private McLaughlin's version of the conversation and what Private Chhoy said he was told by Private McLaughlin. Private McLaughlin denied making various statements about the incident which were attributed to her by Private Chhoy.

17 Private McLaughlin also gave a statement to another witness, Warrant Officer Heseltine. The statement was typed, but not signed by Private McLaughlin. In the statement Private McLaughlin gave an account of the kissing in the Q store and she alleged that there was a second grabbing of her by the applicant on this occasion. However she did not say that he attempted to kiss her at the time of the second grabbing.

18 The offence charged in the second count is alleged to have occurred on the following day, Saturday 16 January. Private McLaughlin said in evidence that she was helping to load vehicles for the return to Adelaide. She said she had an infected ear which had been covered in part with a plaster. According to the witness, the applicant approached her from behind and squeezed her ear. He said "Does that hurt?" and added "I am sorry". According to her, she said "if you made that bleed I am going to make you bleed". She sought medical attention as a result of the incident.

19 Private Chhoy gave evidence that he was present on the occasion of the Saturday incident. He said he was standing about two metres away from Private McLaughlin at the time. He said he saw the applicant approach Private McLaughlin from behind and squeeze her left ear. He said Private McLaughlin then rebuked the applicant.

20 Sergeant Douglas, another member of the Army Reserve who attended the camp, said in evidence that he was standing with his back to Private McLaughlin and the applicant at the time of this incident. He said his attention was drawn to them when he heard Private McLaughlin call out "If you have made it bleed, I'll fucking well make you bleed". He said he was about three metres away at the time.

21 The applicant gave evidence at the hearing before the magistrate. He denied being involved in any way in the two incidents. He said he did not ask Private McLaughlin to buy any whisky and he was not in the Q store on the occasion deposed to by Private McLaughlin when she said he attempted to kiss her. He denied any knowledge of the Saturday incident. He said he was not in the vicinity at the time. He claimed that there was a conspiracy against him and that the main prosecution witnesses were parties to it.

22 The Defence Force Magistrate concluded that Private McLaughlin, Private Chhoy and Sergeant Douglas were honest and reliable witnesses and that the applicant was totally unreliable. He summarised the evidence of the witnesses in his reasons for decision and he dealt with the criticisms made of the prosecution witnesses by the defending officer. He referred to the discrepancies between the accounts given by Private McLaughlin to other witnesses and the evidence she gave at the hearing. These discrepancies did not alter the magistrate's view that Private McLaughlin and these witnesses were honest and truthful in their evidence. He concluded that there was an incident which took place in the Q store which was generally along the lines of Private McLaughlin's evidence but, because of the evidence of Private Chhoy and Warrant Officer Heseltine,

he was not satisfied beyond reasonable doubt that an assault took place in relation to the second grabbing and kissing which the prosecution had nominated as the basis for the assault charged in the first count. Accordingly, he found the applicant not guilty of that charge. However, he said he was satisfied beyond reasonable doubt that the offence charged in the second count had been proved.

23 The main criticism of the magistrate's reasoning which was made by the applicant's counsel was that, having dismissed the first charge, the magistrate should not have found that the evidence in relation to the second charge was of sufficient reliability to found a conviction on that charge.

24 In our view there is no substance in this criticism. It was open to the magistrate to find, as he did, that an incident of the type deposed to by Private McLaughlin took place in the Q store involving the applicant. The magistrate was not satisfied as to the accuracy of Private McLaughlin's account of events towards the end of the incident which had been put forward as constituting the basis of the charge. However, this finding is not incompatible with his conclusion that Private McLaughlin was an honest witness.

25 When considering whether this finding was sufficient to shake the magistrate's confidence in Private McLaughlin's evidence concerning the offence charged in the second count, it is of particular importance to bear in mind the support which her evidence in relation to this count received from other witnesses. As we have pointed out, Private Chhoy said he observed the applicant take hold of Private McLaughlin's ear on this occasion and he heard and observed her reaction to it. Sergeant Douglas also gave evidence of Private McLaughlin's reaction which was consistent with her evidence of an assault having taken place. The applicant denied that he was present on this occasion, but Private Chhoy and Sergeant Douglas who knew him were adamant that he was there.

26 Other criticisms were made of the prosecution evidence and the magistrate's findings. We have considered the argument that, because of these matters, the finding of guilt on the second count was unsafe and unsatisfactory. However, we are of the view that a court adopting the approach which is appropriate when considering a ground of appeal of this nature (*M v The Queen* (1994) 181 CLR 487 at 494) would inevitably conclude that no miscarriage of justice had occurred.

27 The applicant's counsel raised a further matter which was not argued before the magistrate. It was claimed that the magistrate should have found that the incident involved in the second count may have been the result of innocent "horse play". This was not suggested by the applicant who, as we have said, gave evidence that he was not present during the incident. Furthermore, the description of the incident by Privates McLaughlin and Chhoy leaves no room for this construction.

28 It was also argued that the touching was not hostile. Hostile intent is not an element of the offence of assault, although evidence of hostility may convert an otherwise unobjectionable contact in the course of social intercourse into a battery (*Boughey v The Queen* (1986) 161 CLR 10 at 25; *Van Damme v Chief of Army* [2002] ADFDAT 2 at para 140). This issue is of no relevance to the present case.

29 In summary, therefore, it is our view that no satisfactory reason has been advanced for the lengthy delay in lodging the appeal. This consideration, coupled with the apparent absence of merit in the proposed grounds of appeal, lead us to the conclusion that the extension of time within which to appeal was rightly rejected.

30 We extend the time within which to file the notice of appeal from the decision of Heerey J to 29 August 2001, the date of the filing of the notice.

31 However, the appeal itself is dismissed.

I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate:

Dated: / /2002

Counsel for the Applicant:	P Amey
Solicitor for the Applicant:	Johnston Withers
Counsel for the Respondent:	B J Skinner with R M O Hawke
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	26 July 2002
Date of Judgment:	16 August 2002