

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Havord v Chief of Navy [2001] ADFDAT 3

DEFENCE AND WAR - appeal from conviction by Defence Force Magistrate - charge of committing an act of indecency - conflict of evidence between appellant and complainant - whether conviction unsafe or unsatisfactory - complainant making initial complaint not alleging central allegation in his testimony - DFM finding this not necessarily inconsistent with offence having occurred on the basis that victims of sexual assault often need time to decide what to do and may initially deny a sexual assault has occurred - whether taking judicial notice - questions asked by DFM in course of evidence - whether excessive

Defence Force Discipline Act 1982 (Cth) s 61

Defence Force Discipline Appeals Act 1955 (Cth) s 23(1)(d)

M v The Queen (1994) 181 CLR 487 at 494-5 applied

Kilby v The Queen (1973) 129 CLR 460 applied

R v Davies (1985) 3 NSWLR 276 applied

R v Esposito (1998) 45 NSWLR 442 applied

TIMOTHY PETER HAVORD v CHIEF OF NAVY
NO DFDAT 2 OF 2001

HEEREY J (President), UNDERWOOD J (Deputy President) & MILDREN J (Member)
MELBOURNE (HEARD IN PERTH)
22 AUGUST 2001

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 2 OF 2001

**BETWEEN: TIMOTHY PETER HAVORD
 APPELLANT**

**AND: CHIEF OF NAVY
 RESPONDENT**

**TRIBUNAL: HEEREY J (President), UNDERWOOD J (Deputy President)
 AND MILDREN J (Member)**

DATE OF ORDER: 22 AUGUST 2001

WHERE MADE: MELBOURNE (HEARD IN PERTH)

THE TRIBUNAL ORDERS THAT:

The appeal is dismissed.

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 2 OF 2001

**BETWEEN: TIMOTHY PETER HAVORD
 APPLICANT**

**AND: CHIEF OF NAVY
 RESPONDENT**

**TRIBUNAL: HEEREY J (President), UNDERWOOD J (Deputy President)
 AND MILDREN J (Member)**

DATE: 22 AUGUST 2001

PLACE: MELBOURNE (HEARD IN PERTH)

REASONS FOR JUDGMENT

THE TRIBUNAL:

1 The appellant was found guilty by a Defence Force Magistrate (DFM) of one count of committing an act of indecency contrary to the *Defence Force Discipline Act* 1982 (Cth), s 61 and the *Crimes Act* 1900 (ACT) s 92J(1). The particulars of the charge were that on 24 February 2000, at sea, in HMAS Darwin, the appellant touched the penis of the complainant without his consent and knowing that he did not consent, or without his consent and being reckless as to whether he consented.

2 The notice of appeal against this conviction contains seven grounds. However, one of the grounds was abandoned at the hearing and of the remaining six grounds, four can be reduced to the single complaint, made pursuant to the *Defence Force Discipline Appeals Act* 1955 (Cth) s 23(1)(d), that "in all the circumstances of the case, the conviction ... is unsafe or unsatisfactory."

The Law

3 In order to succeed upon the ground that the conviction is unsafe or unsatisfactory, the appellant has to satisfy this Tribunal that it was not open on the evidence for the DFM to be satisfied to the requisite degree of the guilt of the appellant. In *M v The Queen* (1994) 181 CLR 487 Mason CJ, Deane, Dawson and Toohey JJ said at 494 - 495:

"That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the Court is not substituting trial by a Court of Appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

The Evidence

- 4 At the material time, the appellant was a Lieutenant and the complainant was an AB Electrical Technician. The appellant was the Deputy Weapons Electrical Engineering Officer and the complainant's Divisional Officer. Both men worked in the weapons electrical engineering department on HMAS Darwin.
- 5 It was common ground at the hearing before the DFM that on Wednesday 23 February 2000 the complainant commenced duty at 0400 hours and that he remained on duty continuously until 0630 hours the next day. At that time HMAS Darwin was engaged in exercises off the coast of New South Wales. The complainant's duties were carried out in the Internal Communication and Gyro compartment. This compartment contains the Local Area Network server and other computer equipment as well as the ship's electronic navigation equipment. The compartment is entered through two watertight doors, the opening of one of which alters the air pressure in the compartment.
- 6 It was not disputed that at 0630 hours on Thursday 24 February 2000 it would have been difficult, if not impossible, for the complainant to return to his mess because of the exercise in which the ship was taking part. Accordingly, the complainant decided to lie down on the floor of the compartment and catch up on his sleep there. He was wearing a pair of navy issue coveralls and, as was the complainant's practice when wearing this garment, he had on no underclothing. He had with him a doona jacket which he wrapped around his head when he lay down to sleep in order to keep the light out of his eyes. A pair of the coveralls was handed to the DFM at the hearing before him but they were not made an exhibit. It appears from the transcript that they had a row of metallic press studs all down the centre of the front.

7 According to the evidence of the complainant, he was awoken by the "popping" of his ears caused by the water tight door being opened. He said that he sat up slightly and as he did so the jacket rose above his eyes. He said that he saw the appellant crouched around the area of his waist. The complainant said that he felt the appellant's hand on his penis at that time. He said that the appellant had "it" through the second and third buttons from the bottom. The complainant said that he heard the other door to the compartment make a noise consistent with it being opened and the appellant jumped back into a chair, turned it around and began to log on to a computer. The complainant said that he then got up and walked out of the compartment, passing as he did so Chief Petty Officer Sollitt who, it may be inferred, was the person who opened the second door. The complainant said that he was embarrassed and shocked by what had happened.

8 According to the evidence of the appellant, he entered the compartment and heard someone talking. As he turned the corner past some filing cabinets he saw Leading Seaman Wright sitting on a stool and the complainant lying on the floor. He said that he spoke with LS Wright for a few minutes and then the latter left the compartment. While talking to Wright the complainant was motionless on the floor. The appellant said that he turned his stool around to face the complainant and that he "then became aware that [the complainant] had become erect at my presence". He said that this "excited" him and that he became "aroused" as well. The appellant said that shortly after he became aroused he said jokingly, "So, [complainant], I see you are happy to see me." He said that the complainant made no verbal response but had a "wry smile on his face". The appellant went on to say that they sat there for several minutes looking at each other and that he could feel himself becoming more aroused and that he could see that the complainant was also becoming more aroused. He said, "after a while I extended my hand and said, 'can I touch you?'" The appellant said that thereupon the complainant buried his head in his jacket, rolled over and brought his knees up. The appellant said that the complainant's response to his request made him feel confused and stunned. He said that he just sat on the stool for about five minutes and stared at the gyro in front of him thinking about what "it" meant for his friendship with the complainant. The appellant said that at that stage CPO Sollitt came into the compartment and the complainant got up and left, speaking to Sollitt as he did so.

9 The issue for the DFM was whether he was satisfied beyond reasonable doubt that the account given by the complainant was truthful and accurate. There were no eye witnesses,

and a critical issue was the credit of the two principal witnesses. Notwithstanding the absence of eye witnesses, evidence was given by six other witnesses.

10 The complainant said that immediately after the occurrence of the assault he went to the upper deck to have a smoke and then to the transmitter room where he met AB Simon whom he knew well. Both the complainant and AB Simon said that the former told the latter that he had been asleep and woke up to find that the appellant had his hand on his penis. AB Simon described the complainant as being "pretty shook up." It appears that the evidence of what the complainant told AB Simon and others later on, was admitted pursuant to the *Evidence Act 1995 (Cth)*, s 66(2) as evidence of the truth of the facts asserted.

11 The complainant said that after speaking to AB Simon he spoke to LS Schultz in the Coxswain's office. He said that by this time about one or two hours had elapsed. He said that he told Schultz that he thought that the appellant had put his hand on his penis but he was not sure, because he had been asleep after not having slept for many hours. He explained that he did not tell Schultz the whole truth because, had he done so, Schultz would have had to act on it as he was a coxswain. The complainant said that he wasn't sure what he wanted to do about it at that stage. LS Schultz said in his evidence that the complainant told him that he was asleep and when he opened his eyes he saw the appellant leaning over him and going back from that position. As he gave that evidence Schultz demonstrated a withdrawing movement with his hand and arm.

12 The complainant said that the day after the assault the ship was alongside in Sydney and he was due to go ashore. He said that he spoke to Commander Dunbabin, the ship's Weapons Electrical Engineering Officer. There was a difference between the account of this conversation given by the complainant and that given by Commander Dunbabin. According to the complainant he walked into the officer's cabin and said that he had some good news and then he said that the previous morning he was asleep on the floor of the compartment and woke up to find that the appellant had "his hand on his cock". The appellant said that he then said to Comander Dunbabin "have a nice weekend" and walked out of the cabin. Commander Dunbabin confirmed that the complainant told him that he woke up and found the appellant's hand on his penis. He said that the complainant also said that he was unsure how he could cope working with the appellant after that. Commander Dunbabin said that he told the complainant to proceed on leave and that he would see him next week. He denied

that the complainant said that he had some good news and he had no recollection of the meeting concluding in the manner described by the complainant.

13 Evidence was given Chief Petty Officer Grey who was drinking with the complainant on the evening of Friday 25 February 2000. There was a variance between this witness's evidence and his prior statement made on 1 March 2000 as to whether the complainant told him that the appellant had his hand on his penis or whether the complainant told him that he woke up to find the appellant drawing away from the area of his crutch. In essence, the evidence of this witness was that the complainant told him that he saw the appellant pulling his hand away from his crutch area and that the "dirty bastard was playing with my cock". Chief Petty Officer Grey said that later that evening the complainant said that he could not say for sure if the appellant touched his penis or not.

14 A significant piece of evidence was an e-mail that the appellant admittedly sent to the complainant on the following Wednesday, 1 March. It read:

"I'm sorry
The lunatic in my head escapes now and then.
This will be my last Email until peace between us is restored.
I will NEVER look at you in that light again
I will only see you as a friend
If you trust me you may understand
I don't know how I got your signals wrong.
Forgiveness is your choice.
Talk to me. (ext.116 anytime)

Tim"

15 The e-mail was shown to Commander Dunbabin and he ordered the appellant to be taken off the ship that day by helicopter. With respect to the e-mail the appellant said that he wanted to explain to the complainant that their friendship was based upon trust and not lust. He said that by the e-mail he meant that he was sorry for seeing the complainant in an intimate light instead of just as a friend. The appellant said that the reference to the "lunatic in my head" was a reference to a popular song which said, or inferred, that some people think differently

from others.

16 Commander Dunbabin was concerned for the mental stability of the appellant and accordingly asked Lieutenant Downie to sit with him while he was waiting to be taken off the ship. Lieutenant Downie said that while doing this the appellant said to him that he had "allegedly interfered" (sic) with the complainant and quickly added "No, I did do something wrong". In his evidence, the appellant said that he told Lieutenant Downie that it had been alleged that he had sexually harassed the complainant and that he then said to Downie "No, I did it", by which he meant that he had "crossed that mental line between friendship and intimacy".

The Reasons for Decision

17 In his reasons for decision, the DFM correctly directed himself with respect to the law. He said that the complainant was an impressive witness. He said that for the prosecution to succeed it was essential that the complainant was not only truthful but also reliable, and that he had carefully considered the risk that, due to tiredness, the complainant had mistaken the position when he woke up. The DFM also referred to the complainant's lie to LS Schultz that he was not sure if the appellant had touched his penis. He said that he had carefully considered that matter as well, and that such conduct by the complainant was consistent with him having recently been the victim of a sexual assault and, inferentially, it did not damage his credit on the critical issue.

18 The DFM found that the appellant was not an impressive witness. He regarded certain aspects of the appellant's account as improbable. These aspects included the appellant's assertion that he and the complainant looked at each other for several minutes, becoming more aroused, and that notwithstanding the concern that the appellant claimed he had for his friendship with the complainant, he did nothing and said nothing for five minutes after the alleged misunderstanding had occurred. All these observations were well and truly open upon the evidence led at the hearing before the DFM.

19 The DFM rejected the appellant's explanation of the meaning of the e-mail that he sent to the complainant the following Wednesday. This he was perfectly entitled to do. *Prima facie*, it is an incriminating admission. Although there were discrepancies in the evidence of the various complaints that the complainant made after the alleged assault had occurred, they all

generally were consistent with the account given by the complainant. That evidence was supported by the evidence of some of the witnesses that the complainant appeared to be upset and shocked by the events that he recounted to others. Although the appellant disputed the account of the conversation between him and Lieutenant Downie, the latter's evidence was not challenged in cross examination and the DFM was entitled to have regard to it as supporting the claim made by the complainant.

20 In his submissions in support of this appeal, counsel for the appellant placed considerable stress on his cross-examination of the complainant about whether it was his claim that the appellant had his hand or his finger or fingers on the complainant's penis. In his evidence-in-chief, the complainant said that he felt the appellant's hand on his penis. The cross-examination demonstrated that unless the press studs were undone, only three fingers up to about the second knuckle could be inserted between two press studs. Further, because of some material on the inside of the flap that opens when the studs are undone, the cross-examination also demonstrated that three fingers could not have reached past this material to the complainant's penis. The complainant's penis could only have been touched if a single finger had been pushed in between two studs and past the flap of material on the inside. Counsel for the appellant submitted that as the cross-examination demonstrated that no more than a finger could have made contact with the complainant's penis, his claim that the appellant's hand had been on his penis must have been false, or at the least, the DFM could not have been satisfied to the requisite degree that the complainant's account was correct. However, a complete reading of this part of the cross-examination of the complainant shows that the complainant considered that a finger or fingers was part of the hand. The complainant said at the end of this part of the cross-examination that "I am saying that I felt his hand on my penis. The direct contact was through his fingers." This is consistent with a statement that it appears the complainant made on 29 February in which he said:

"When I first saw Lieutenant Havord, he was crouching over the bottom half of my body. I also felt his hand on my penis. I believe his hand or at least his fingers were inserted through the gaps in my coverall press studs. I can't be sure which hand he had placed on my penis. I think it may have been his right hand but I cannot be exactly sure."

21 The DFM did not see the significance in this part of the cross-examination of the appellant that the appellant's counsel did, for in his reasons for judgment he merely referred to the

complainant's evidence that "he felt LEUT Havord's hand (or fingers) on his ([the complainant's]) penis." This too, was a view of the evidence that the DFM was entitled to take.

22 There was ample evidence, upon which the DFM was entitled to be satisfied beyond reasonable doubt, that the offence charged was committed. Whilst it is true that there were some discrepancies in the prosecution evidence to which the DFM referred in his reasons for judgment, they were certainly not of such nature or extent to persuade this Tribunal that upon the whole of the evidence it was not open to the DFM to be satisfied beyond reasonable doubt that the appellant was guilty. The unsafe or unsatisfactory ground is not made out.

23 We now turn to the other grounds of appeal which were argued.

Judicial Notice

24 The DFM, in the course of analysing the complainant's evidence, discussed his failure to tell LS Schulz that the appellant had actually touched the complainant's penis. The explanation given was that the complainant believed that to make such an allegation to a member of the naval police would have resulted in an investigation and that he was not sure what he wanted to do about the matter at that stage. The DFM said:

"This is not at all unusual in cases of sexual assault. The victim often needs time to decide what to do and may initially deny that a sexual assault has occurred. In other words, this evidence is not necessarily inconsistent with the offence having occurred."

25 Before the Tribunal it was argued that this amounted to taking judicial notice of the fact that victims of sexual assault often behave in this way. This was, counsel said, "not something so generally known that every ordinary person may be reasonably presume to be aware of it."

26 In our opinion, this is not a question of dispensing with proof of a fact by calling in aid the doctrine of judicial notice. Evidence of complaint was receivable as supporting the complainant's credit (as well as for the purposes of s 66(2)). Conversely, lack of complaint or inadequacy of complaint would reduce that credibility: *Kilby v The Queen* (1973) 129 CLR 460 at 465-466; *R v Davies* (1985) 3 NSWLR 276 at 277. A good reason why a complainant might not make a complaint, or a full complaint, is the other side of the coin:

Davies at 278. An observation why persons in a particular situation might act or not act in a particular way is not a matter of evidence but merely the common sense application of the fact finder's experience and understanding of human nature.

Entering into the Arena

27 It was submitted that the DFM interfered in the proceedings and adopted an inquisitorial role to such an extent that the appellant was denied a fair trial. By entering the arena in which he did the DFM exhibited bias or, at least, created an appearance of bias, in favour of the prosecution case.

28 The instances relied on fall into two categories. The first occurred when the prosecutor stated he had completed his examination-in-chief of the complainant. The DFM said to the prosecutor:

"Just before you sit down, do you want to ask the witness any questions about whether he consented or agreed to what he said occurred in the GYRO Room."

29 Defence counsel objected that this was "plugging the prosecution's case" and that "without that element (he) could have submitted no case to answer". Counsel said he was "estopped" from making a no case submission. The DFM, however, allowed the prosecution to pursue the matter. The prosecutor asked the complainant whether he gave the appellant permission to touch him on the penis, or anywhere. The complainant stated that at no time did he give the appellant such permission.

30 In our opinion no unfairness occurred. The reality was that consent was not an issue at the trial. Earlier in the complainant's evidence-in-chief there had been a number of instances where he gave an account of his reactions in terms quite inconsistent with consent. For example, he said that after the incident he left the compartment because

"I was embarrassed and shocked. I wanted to get as far away from the compartment as I could."

31 Later, when asked as to how he felt, he said:

"Outraged basically. And very embarrassed about the whole thing."

32 There are a number of other passages. Even without the formal question to which objection was taken, it is plain that either a no case submission would have failed or the prosecution would have been given leave to re-open its case.

33 The second category concerns a number of passages where it is submitted the DFM asked questions which went beyond mere clarification.

34 The principles are well known. The authorities are reviewed in *R v Esposito* (1998) 45 NSWLR 442 at 448 et seq.

35 Counsel referred to some 14 passages in the transcript of which four were said to be the most serious. These were as follows:

1. In the examination-in-chief of the complainant:

“THE MAGISTRATE: Did you stop talking?---Yes, I did.

Why?---Because the Chief Coxswain came into the room. I just wanted to have a conversation with Leading Seaman Schulz on a personal basis and that was it, not as a role as coxswain.”

2. At the end of cross-examination of the complainant:

“THE MAGISTRATE: I have a couple of questions. [Complainant] I want to go back to when you were given the shake on 23 February at 0400 hours?---Yes, sir.

How were you feeling when you woke up then?---I’m unsure.

Pardon?---I’m unsure.

I’m asking if you can remember how you were feeling, if you can, say so, and if you can’t, say so?---I couldn’t say so, sir.

Can you tell me about the lighting in the ICO room, is it – or just what sort of lighting is it?---60 hertz fluorescent lights.

CMDR VICKRIDGE: Sir, if I may, your Worship, it’s just so that people don’t get confused, it’s actually the IC and Gyro room.

THE MAGISTRATE: I see.

CMDR VICKRIDGE: We’ve just told the gentleman, the transcriber about it and it’ll just confuse things further if yet another rendition...

THE MAGISTRATE: Commander Vickridge, thank you.

Yes, could you describe the lighting as it was at the time of the incident that you've given evidence about, the lighting in the IC and Gyro room?---Yes, it's fluorescent lights, it's bright so you can see what you're doing at all times.

It's not coloured light, like red or blue or anything like that?---No. No, it doesn't need to be, it's just white.

Yes. I want to ask you a question or two about the overalls, coveralls?---Yes, sir.

The overalls have metal press stud buttons?---That is correct, sir.

And those buttons can either be open or closed?---That is correct, sir.

After the incident that you've described, what was the state of the buttons?---Closed, sir.

They were all closed. Commander Vickridge anything arising from those questions?

CMDR VICKRIDGE: No, your Worship.

THE MAGISTRATE: Commander Burnett?

LCDR BURNETT: No, Sir."

3. In the examination-in-chief of LS Schulz:

"LCDR BURNETT: Now I understand that [the complainant] entered the office and sat down. Can you recall whether the door was open or closed?---The door was open, sir.

Okay. And he had a conversation with you?---Yes, sir.

Can you tell us what he said?---Basically the ship had had a toxic hazard exercise previous to that time. [The complainant] was in the IC&Gyro. He was actually on the deck in the compartment basically asleep. The sonar had been working all night. Basically what happened then, he heard the compartment door open and he felt the pressure of the compartment push in the air. And it basically – it woke him but he kept his eyes closed apparently. He then lay on the deck. He continued to lay on the deck with his – just basically woken. And then he opened up his eyes and he saw Lieutenant Havord leaning over and then basically going back from that position. Basically Lieutenant Havord then sat down on a chair at a computer bench near where the sailor was laying. From there [the complainant] just lay on the deck and Lieutenant Havord was looking – just staring at him. The compartment door then opened again and Chief Stollitt came into the

compartment. *[The complainant] then got onto his feet and got out of the compartment.*

Right, thank you. Do you recall ---

THE MAGISTRATE: [The complainant] saw Lieutenant Havord leaning over or leaning over him. You extended your arm. Was there a reason for that?--- I believe that – the way the sailor explained to me, it was body action there, sir. That Lieutenant Havord was leaning over I guess the sailor opened his eyes and he kind of pulled back.

THE MAGISTRATE: I'm not asking you to guess anything. I am just asking you is – to what the reason was – was anything said to you or why were you doing this when you were explaining what [the complainant] told you?---

CMDR VICKRIDGE: Sir, I am sorry, I have a bit of difficulty with the types of questions that you are asking and the number of questions that you are asking. My understanding is that, with the greatest respect, your function certainly allows you to ask questions to clarify. But it seems to me that this questioning goes right to the very heart of the issue that we are here today. And it goes further, with the greatest respect of clarifying something. It is actually – again, seems to filling in evidence for the prosecution, it appears to me, rather than simply clarifying points and for that reason, sir, I just simply bring it to your attention.

THE MAGISTRATE: Well, Commander Vickridge, it wouldn't appear on the transcript that when the witness said that he was told by [the complainant] that the accused was leaning over him – it wouldn't appear on the transcript that the witness at the time had his arm extended. That is the first thing.

CMDR VICKRIDGE: Sir, if I may just respond to that.

THE MAGISTRATE: Yes.

CMDR VICKRIDGE: I agree entirely and in that case, sir, it is certainly well within your discretion. In fact, I could well imagine – sorry, it is not well imagine. It is appropriate for your Worship to describe the action. But not to do anything further.

THE MAGISTRATE: Very well. Now, I was just asking Leading Seaman Schulz why you were extending your arm as you were giving that evidence. Now could you tell me why you were doing that?---I guess I was just focussing in my own mind, sir, how [the complainant] explained to me – I guess he saw Lieutenant Havord going back. I guess it was just the way the sailor did explain to me, sir.

CMDR VICKRIDGE: I guess, I guess, I guess.

THE MAGISTRATE: Well- - - ?---It was just a body action but - - -

Well I am still not quite understanding why you were extending your arm?---

LCDR BURNETT: Sir, I may be able to assist you in regards to this - - -

THE MAGISTRATE: Very well, carry on.

LCDR BURNETT: - - - by leading some evidence from the statement.

THE MAGISTRATE: Carry on.

LCDR BURNETT: And my friend has given me (the) ability to do that.”

4. In the examination-in-chief of the appellant:

“CMDR VICKRIDGE: Did you say anything to [the complainant] at that time?---No, I didn’t. I – shortly after I became aroused, I said jokingly, “So, [complainant], I see you are happy to see me.”

Did he respond? Did he say anything as a result of that?---He didn’t respond. Sorry, he didn’t say anything.

Right?---He – at that – at me saying that, he took the doona jacket off his face and looked at me. He had a wry smile on his face. We - - -

And after – I am sorry, go ahead?---We sat there for a several minutes looking at each other. I could feel myself becoming more aroused and I could see he was. After a while I extended my hand and said, ‘Can I touch you?’ At this, he buried his head back into his doona jacket. He rolled over and brought his knees up.

What did you do, then, if anything?---I was stunned and confused. I just sat on the stool and stared at the gyro that was in front of me.

THE MAGISTRATE: So you just sat on the stool and what?---Stared at the gyro straight ahead of me. I was thinking about what it meant for our friendship and I sat there for about 5 minutes or so. And I was interrupted by Chief Sollitt. The air tight door opening. Shortly after that, Chief Sollitt came into the room and I turned around and started to log on the computer, check my e-mail. As I was doing that, [the complainant] left the room. And he talked to Chief Sollitt on the way out.”

36 In our opinion, none of these passages show the DFM exceeding his proper role. One in particular (passage 3) is an example of a common occasion where it is important for a judicial officer to intervene. Witnesses often respond to a question by a demonstration of an action about which they are testifying or by giving an estimate of size or distance by reference to some features in the courtroom. Counsel may overlook the need to have the answer explained in a way which is intelligible on the transcript.

37 The passage at the end of the complainant's cross-examination (passage 2) comes at the appropriate time so as not to interrupt the cross-examination flow. The DFM dealt with matters of relevant detail which counsel had overlooked, as counsel understandably and humanly sometimes do. The questions were quite impartial in tone. Counsel were invited to pursue the matters raised by the DFM should they wish.

38 Taken as a whole, the passages deal with subject matter relevant for the DFM's task as fact-finder. They do not indicate a partisan approach. They were limited in point of time. They did not prevent the appellant having his case fully and fairly heard.

39 The appeal is dismissed.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate:

Dated: 22 August 2001

Counsel for the Appellant: G L W Vickeridge

Solicitors for the Appellant: Korr Gunning Lawyers

Counsel for the Respondent: P J Hastings QC and RMD Hawke

Solicitor for the Respondent: The Defence Legal Office

Date of Hearing: 13 August 2001

Date of Judgment: 22 August 2001