DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Hoffman v Chief of Army [2003] ADFDAT 4

DEFENCE AND WAR – conviction for Territory offence of common assault – whether Defence Force Magistrate had jurisdiction to try charge – whether importation of general Territory offences into defence specific legislation constitutionally valid – service offence constituted by same alleged facts – service offence outside limitation period – Territory offence not subject to any limitation period – whether prosecution for Territory offence open

CRIMINAL PROCEDURE – same facts giving rise to more than one offence – limitation period prescribed for one offence but not the other

CRIMINAL LAW – common assault – "physic assault" – *mens rea*

CRIMINAL LAW – factors influencing plea of guilty – inducement

Constitution ss 51(vi), 70, 80
Crimes Act 1900 (ACT) ss 22, 24, 26
Defence Force Discipline Act 1982 (Cth) ss 5, 33, 34, 61, 75, 96

Saraswati v The Queen (1991) 172 CLR 1 – distinguished
Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1 – distinguished
Thompson v Goold & Co [1910] AC 409 – cited
Fairclough Whipp (1951) 35 Cr App R 138 – cited
DPP v Rogers [1953] 1 WLR 1017 – cited
R v Wallis; Ex parte Employers Association of Wool Selling Brokers (1949) 78 CLR 529 – cited
Re Nolan; Ex parte Young (1991) 172 CLR 460 – followed
Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672 – cited
Parsons (1997) 97 A Crim R 267 – cited
R v Kouroumalos [2000] NSWCCA 453 – cited
Re Tracey; Ex parte Ryan (1989) 166 CLR 518 – followed
Re Tyler & Ors; Ex parte Foley (1994) 181 CLR 18 – followed
R v Kardogeros [1991] 1 VR 269 – cited
Macpherson v Brown (1975) 12 SASR 184 – cited
Watson v Gardiner (1993) 177 CLR 378 – cited
Jago v District Court (NSW) (1998) 168 CLR 23 – cited
Meissner v The Queen (1995) 184 CLR 132 – cited

Pearce & Geddes, Statutory Interpretation In Australia, 5th Edition

MICHAEL WILLIAM HOFFMAN V CHIEF OF ARMY
DFDAT 2 OF 2003

HEEREY J (President), MILDREN J (Member) and DUGGAN J (Member)
1 SEPTEMBER 2003
MELBOURNE (HEARD IN SYDNEY)

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

FEDERAL COURT OF AUSTRALIA REGISTRY **DFDAT 2 OF 2003**

BETWEEN:	**MICHAEL WILLIAM HOFFMANN** **APPELLANT**
AND:	**CHIEF OF ARMY** **RESPONDENT**
JUDGE:	**HEEREY J (President), MILDREN J (Member) AND DUGGAN J (Member)**
DATE OF ORDER:	**1 SEPTEMBER 2003**
WHERE MADE:	**MELBOURNE (HEARD IN SYDNEY)**

THE TRIBUNAL ORDERS THAT:

1. Extension of time for appeal be granted.
2. The appeal be dismissed.

GENERAL DISTRIBUTION

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FEDERAL COURT OF AUSTRALIA REGISTRY **DFDAT 2 OF 2003**

BETWEEN:	**MICHAEL WILLIAM HOFFMANN** **APPELLANT**
AND:	**CHIEF OF ARMY** **RESPONDENT**
JUDGE:	**HEEREY J (President), MILDREN J (Member) AND DUGGAN J (Member)**
DATE:	**1 SEPTEMBER 2003**
PLACE:	**MELBOURNE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

HEEREY J

1 The appellant appeals (subject to being granted an extension of time, which is not opposed) against a conviction for common assault contrary to s 26 of the *Crimes Act 1900* (ACT) (the Crimes Act). By virtue of s 61 of the *Defence Force Discipline Act 1982* (Cth) (DFDA) the appellant's conduct constituted an offence against that Act. Section 61 of the DFDA, which constitutes Div 8 of Pt III "Offences based on Territory offences", relevantly provides as follows:

> ***"61 Offences based on Territory offences***
>
> *(1) A person who is a defence member or a defence civilian is guilty of an offence if:*
> *(a) the person engages in conduct in the Jervis Bay Territory; and*
> *(b) engaging in that conduct is a Territory offence.*
>
> *(2) A person who is a defence member or a defence civilian is guilty of an offence if:*
> *(a) the person engages in conduct in a public place outside the Jervis Bay Territory; and*
> *(b) engaging in that conduct would be a Territory offence, if it took place in a public place in the Jervis Bay Territory.*
>
> *(3) A person who is a defence member or a defence civilian is*

guilty of an offence if:
(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
(b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

(4) The maximum punishment for an offence against this section is:
(a) if the relevant Territory offence is punishable by a fixed punishment – that fixed punishment; or
(b) otherwise – a punishment that is not more severe than the maximum punishment for the relevant Territory offence.

(5) …

(6) …"

See also par (b) of the definition of "Territory offence" in s 5 of the DFDA.

2 The sequence of events was as follows:

August 1996	alleged assault
Late 1999	complaint
September 2000	appellant interviewed
January 2003	reference for trial
February 2003	charge

3 This long drawn out process for a straightforward matter has caused much distress to the appellant and his family. Irrespective of the legal significance of the delay, the course this case has taken is unsatisfactory.

4 The conduct alleged against the appellant also constituted the service offence of assaulting an inferior contrary to s 34 of the DFDA (at the time the appellant was a Major and the complainant a Lieutenant). In February 2003 the appellant could not have been charged with that offence. The relevant limitation period at the time of the alleged conduct for a charge under s 34 was 3 years: DFDA s 96(1) (that period was subsequently amended to 5 years by the *Defence Legislation Amendment Act (No 1) 1999* (Cth)). However the Crimes Act did not provide any limitation period for a charge under s 26.

5 I agree with Duggan J that there was no legal impediment to a charge being brought under s 26 of the Crimes Act. The critical factor which distinguishes the present case from

Saraswati v The Queen (1991) 172 CLR 1 is the language of s 96 of the DFDA, which relevantly provided:

> *"**96 Time limitation on charges***
>
> *(1) A person shall not be charged with:*
> *(a) an offence against this Act (other than section 61) or the regulations; or*
> *(b) a service offence that is an ancillary offence in relation to an offence referred to in paragraph (a);*
> *after the expiration of a period of 3 years after the time at which the offence is alleged to have been committed.*
>
> *(2) Notwithstanding anything in subsection (1), a person may be charged with:*
> *(a) an offence against any of sections 15 to 16B, section 20 or section 22; or*
> *(b) a service offence that is an ancillary offence in relation to an offence referred to in paragraph (a);*
> *at any time.*
>
> *(3) …*
>
> *(4) A person shall not be charged with an offence against section 61 or a service offence that is an ancillary offence in relation to an offence against section 61 if the time that has elapsed since the offence is alleged to have bee committed equals or exceeds the period of time that would bar trial by, or institution of proceedings in, a court exercising jurisdiction in or in relation to the Jervis Bay Territory for the relevant Territory offence.*
>
> *(5) …*

6 The statutory setting in the present case is not one calling for the application of the principle stated by Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7:

> *"When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power"*

7 The drafters of the DFDA have specifically turned their attention to the question of limitation periods for the hundreds of offences created by that Act, whether directly under Pt III Div 1 to 7 and 9 or by incorporation of offences based on Territory offences under Pt III Div 8. Not only does s 96(1) exclude Territory offences or service offences ancillary thereto

from the general limitation provision, but specified service offences such as some of the offences relating to operations against the enemy (ss 15 to 16B) and mutiny (s 20) and desertion (s 22) are also excluded.

8 There is not, as there was in *Anthony Hordern*, a general power and a more limited power subject to restrictions and conditions. Rather there are prescriptions of various types of conduct, each of which is to constitute an offence. Although the offences vary in seriousness, as indicated by the different maximum penalties prescribed, for present purposes they are equal. In each case it can be said that facts A plus B plus C constitute offence X.

9 It must have been contemplated that in a given situation the facts alleged might constitute more than one offence. For policy reasons, some offences have been made subject to limitation periods and some have not. I do not think it is permissible to read s 96(1)(a) as conveying the meaning

> *"an offence against this Act (other than section 61 – except where the conduct alleged also constitutes a service offence) …"*

As was said by Lord Mersey in *Thompson v Goold & Co* [1910] AC 409 at 420,

> *"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."*

10 No question of abuse of process arises. There is no suggestion in the material before the Tribunal of personal animus against the appellant, nor of any ulterior or improper purpose to be achieved by bringing the charge against him. The appellant was legally represented and pleaded guilty after the question of limitation periods was specifically raised by the Defence Force Magistrate.

11 I agree generally with Duggan J that, for the reasons his Honour gives, the appeal should be dismissed.

MILDREN J

12 The facts and issues concerning this appeal are set out in the judgment of Duggan J, which I have had the privilege of reading. I have reached the conclusion that this appeal should be allowed and the conviction quashed, because the appellant could not have been

charged with the offence of common assault vide s 61 of the *Defence Force Discipline Act* (Cth) 1982 (DFDA) and s 26 of the Crimes Act 1900 (ACT) (the Crimes Act).

13 The charge against the appellant alleged an assault upon a Captain Higgins, which allegedly occurred in August 1996. At that time, the appellant was the commanding officer of a company in a Commando Regiment and Captain Higgins was a Lieutenant in the same regiment. The assault is alleged to have occurred at the Shoalwater Bay training area which, it is common ground, is service land. No complaint of this alleged assault was made until late 1999. The appellant was not interviewed until 19 September 2000. The charge was not referred for trial by a Defence Force Magistrate (DFM) until 24 January 2003. The charge sheet is dated 7 February 2003. It charges the appellant with common assault, as I have said.

14 At the time of the alleged assault, s 34(1) of the DFDA provided:

> *"A defence member who assaults, or ill-treats, a member of the Defence Force who is of inferior rank to the defence member is guilty of an offence for which the maximum punishment is imprisonment for 2 years."*

15 By virtue of s 96(1) of the DFDA, the time limit for bringing a charge against the appellant for a breach of s 34(1) expired in August 1999. It is obvious that the prosecution chose to bring the charge of common assault in order to defeat the limitation period fixed by s 96(1).

16 In my opinion, this could not be done. The governing principle is expressed by McHugh J, in *Saraswati v The Queen* (1990-1991) 172 CLR 1 at 30, that effect must be given to "the context rule of statutory construction which holds that a general provision in a statute is not to be construed so as to avoid the conditions or limitations contained in a specific provision in the same statute": see also the discussion in *Pearce & Geddes, Statutory Interpretation In Australia,* 5th Edition, paras 4.28 and 4.29. It might be thought that s 61 is not a general provision. I reject this view. The effect of s 61 is to pick up a number of offences applicable in the relevant territory. It is a short-hand way of setting out these offences in full. Looked at in this way, s 26 of the Crimes Act is a general offence of common assault, whereas s 34(1) is the specific offence of assaulting a subordinate.

17 Like all rules of statutory interpretation, the rule referred to above must give way to a contra-indication to be found in the words of the Act, but I have been unable to find any such contra-indication and nor would I expect to find any. If the time limit fixed by s 96(1) could thus be so easily avoided by a side-wind, one must ask, rhetorically, what purpose does s 96(1) serve? It is difficult to accept that the Parliament intended that a general provision such as s 61 could be used to circumvent the limitation imposed by s 96(1).

18 It was submitted that the decision in *Saraswati v The Queen* was distinguishable because the relevant provisions, s 34(1), s 61 and s 96(1), were all enacted at the same time. However, in my opinion, the principle applies irrespective of whether or not the general provision appears as an amendment by a later enactment. None of the authorities to which McHugh J referred in *Saraswati*, at pps 24-25, were cases where the general provision was introduced by a later amendment. Indeed, it is not even necessary for the two powers to be distinctly a general and a special power. In *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678, Mason J said, after referring to passages from *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7, and to *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529 at 550-551:

> *"We have here, not two distinct powers, the one general and the other special, but one power in general terms followed by specific powers which may be no more than particular expressions or exemplifications of what may be done in the exercise of the general power. This circumstance in itself would not make inapplicable the principle of construction which was adopted in the two cases to which I have referred."*

19 In my opinion, it is not open to infer that, because common assault is not subject to a time limit, the legislature intended that persons subject to the DFDA might be prosecuted for that offence when a prosecution under s 34(1) is statute barred. First, the argument pays no heed to the principle of construction to which I have referred. Second, the argument overlooks the different purposes which are to be served by provisions such as s 34(1) and an offence of common assault *vide* s 61. Clearly, the DFDA did not specifically provide for every kind of assault which may be committed by those subject to the DFDA. For example, an assault by a serviceman upon another serviceman of the same rank, or upon any other person not in the Defence Force, is not a specific offence unless it occurs on service land, on a service ship, or service vehicle, or a public place: see s 33 of the DFDA. In peace-time, it may be difficult to argue that an assault in a private place on a member of the public is

sufficiently connected to the discipline of the Defence Force, as to enable a service tribunal to exercise jurisdiction over the matter: see *Re Nolan; Ex parte Young* (1991) 172 CLR 460 per Brennan and Toohey JJ. The same considerations would not necessarily apply in wartime or where the offence was committed in a foreign country. Be that as it may, even if the views of Mason CJ and Dawson JJ in *Re Nolan and Another; Ex parte Young*, are to be preferred, it is clear that s 61 has a limited application so far as the offence of common assault is concerned, as a catch-all. It is not surprising to me that offences committed upon members of the public in a private place, for example, are not subject to a time limitation.

20 It is true that s 96(1)(a) specifically exempts offences against s 61(1). However, that does not assist the respondent, because there are numerous offences which are brought in under s 61 for which there is no equivalent statutory offence in Part III of the DFDA (which deals with offences). The most obvious examples are offences of a serious kind, such as murder, rape, grievous harm, and the like. In a similar position would be various kinds of aggravated assaults, eg. assault occasioning actual bodily harm (s 24 of the Crimes Act), or assault with intent to commit another indictable offence (s 22 of the Crimes Act). Moreover, both of those offences carried a maximum penalty of 5 years' imprisonment, whereas common assault (s 26 of the Crimes Act) carried a maximum penalty of 2 years' imprisonment, which is also the maximum penalty fixed by s 34(1). However, a breach of s 33 of the DFDA carried only a maximum penalty of 6 months. If the respondent's argument is correct, not only could the prosecution avoid the limitation period, but in cases where it was appropriate to bring a charge under s 33, the offender stood to be punished against a higher maximum.

21 I would give leave to extend the time to file the notice of appeal. As the appellant could not have been convicted of the offence of common assault, it is appropriate that the appeal be allowed and a verdict of not guilty entered: see *Parsons* (1997) 97 A Crim R 267 at 271-272; *R v Kouroumalos* [2000] NSWCCA 453 at [16].

DUGGAN J

22 The appellant was convicted of the offence of common assault after pleading guilty to that offence in proceedings before a Defence Force Magistrate (DFM). He was convicted without punishment pursuant to s 75 of the *Defence Force Discipline Act 1982* (Cth) (DFDA). He now appeals against conviction on the grounds discussed below.

23 At the time of the incident upon which the charge was based, the appellant was the commanding officer of a company in a Commando Regiment. The following statement of agreed facts was placed before the DFM:

> *"In August 96 MAJ Hoffman (the accused) was the OC 2 Coy 1 Cdo Regt. At that time the unit was taking part in Exercise Night Crocodile 96 in the Shoalwater Bay training area (SWBTA). 240262 CAPT P. B. Higgins was at that time a LT in 1 Cdo Regt. Higgins was present at a briefing in the 1 Cdo Regt briefing tent at Samuel Hill, SWBTA together with other officers and senior NCOs, including the accused.*
>
> *During the briefing, the accused made a comment that prior to the exercise he had been receiving many calls from a Media Liaison Officer in Melbourne and that he was tired of receiving such calls. Higgins suggested that the accused get the calls put through to Higgins. Higgins intended this comment as a joke. He was on exercise and could not receive calls.*
>
> *The accused drew his pistol and pointed it at Higgins. The accused then made a comment to Higgins which had the effect of causing alarm to Higgins. The accused did not intend to alarm Higgins. He then returned the weapon to its holster.*
>
> *Higgins felt shock. He also felt threatened and scared. Higgins was unaware of the state of the weapon. He was not aware as to whether the weapon was at load, action or instant. He was aware that at that range even a blank cartridge could cause injury or worse.*
>
> *The accused has stated that he did not intend to assault Higgins by this action. The accused concedes that he was reckless as to the consequences of his action. Immediately after the incident Higgins spoke to a number of his fellow junior offices and because of his position as a recent officer graduate he believed that the matter if reported may affect his subsequent career.*
>
> *A formal complaint was made in late 1999 and a service police statement was taken on 19 Sep 00, which has led to the present proceedings."*

24 The charge sheet alleged that the appellant:

> *"Being a defence member at Shoalwater Bay Training Area, Queensland, on a date unknown, between 31 July, 1996 and 1 September 1996, did assault 240262 Captain Paul Barrie Higgins, by pointing a pistol at him during an orders group on Exercise NIGHT CROCODILE 96."*

The charge was brought pursuant to s 61 of the DFDA. Reference was also made in the charge sheet to s 26 of the Crimes Act which is picked up by s 61.

25 The grounds of appeal claim that the DFM had no jurisdiction to try the charge. It is also asserted that the proceedings resulted in a miscarriage of justice arising out of the circumstances in which the plea of guilty was entered and, further, that the circumstances leading to the conviction gave rise to an abuse of process.

26 In order to deal with the arguments as to jurisdiction it is necessary to have regard to the general scheme of the DFDA. It has been held that the jurisdiction of tribunals established pursuant to the DFDA derives from the power to make laws with respect to the defence of the Commonwealth under s 51(vi) of the Constitution. Accordingly, the disciplinary code for the Defence Force stands outside Chapter III of the Constitution: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, *Re Nolan & Anor; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler & Ors; Ex parte Foley* (1994) 181 CLR 18.

27 Part III of the DFDA sets out the service offences (defined in s 3) which are punishable under the Act. Sections 15 to 60 deal with traditional service offences ("specific service offences") such as failing to carry out orders, absence from duty, negligent performance of duty, conduct likely to prejudice discipline and various offences in relation to service property.

28 Section 61 purports to incorporate a much broader spectrum of offences into the military justice system. It does so by picking up those offences which are applicable to the Jervis Bay Territory "Territory offences". Section 61 provides as follows:

> "***61 Offences based on Territory offences***
>
> *(1) A person who is a defence member or a defence civilian is guilty of an offence if:*
>
> *(a) the person engages in conduct in the Jervis Bay Territory; and*
> *(b) engaging in that conduct is a Territory offence.*
>
> *(2) A person who is a defence member or a defence civilian is guilty of an offence if:*
>
> *(a) the person engages in conduct in a public place outside the Jervis Bay Territory; and*
> *(b) engaging in that conduct would be a Territory offence, if it took place in a public place in the Jervis Bay Territory.*

> *(3) A person who is a defence member or a defence civilian is guilty of an offence if:*
>
> *(a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and*
> *(b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).*
>
> *(4) The maximum punishment for an offence against this section is:*
>
> *(a) if the relevant Territory offence is punishable by a fixed punishment – that fixed punishment; or*
> *(b) otherwise – a punishment that is not more severe than the maximum punishment for the relevant Territory offence.*
>
> *(5) Strict liability applies to paragraphs (1)(b), (2)(b) and (3)(b).*
>
> *(6) To avoid doubt, section 10 of this Act does not have the effect that Chapter 2 of the* Criminal Code *applies to the law in force in Jervis Bay, for the purpose of determining whether an offence against this section has been committed."*

29 The Constitutional validity of the jurisdiction conferred by the DFDA was challenged in the cases referred to above. As stated, the source of the power to enact the DFDA was identified as s 51(vi) of the Constitution. However, in keeping with the nature of that head of power, those judges who were in favour of upholding the validity of the jurisdiction to try offences under the DFDA stipulated the requirement of a nexus between the offence charged and the maintenance of discipline in the Defence Force. Differing views were expressed as to the extent of that nexus. The view of Mason CJ, Wilson and Dawson JJ in *Re Tracey* was confirmed and summarised by Mason CJ and Dawson J in *Re Nolan* at 474:

> *"We consider now, as we concluded then, that it is open to Parliament to provide that any conduct which constitutes a civil offence shall constitute a service offence, if committed by a defence member. The proscription of that conduct is relevant to the maintenance of good order and discipline in the defence forces; so long as the rule prescribed is sufficiently connected with the regulation of the defence forces and the good order and discipline of members, it will be valid. Indeed, we do not understand how it can be suggested that the prescription of a rule of conduct to be observed by defence members, when that rule of conduct is required to be observed by the general community for the good of society, is not sufficiently connected with the regulation of the defence forces and the good order and discipline of those forces. Plainly Parliament can take the view that what is good for society is*

> *good for the regulation of the defence forces and can give effect to that view by creating service offences which are cumulative upon, rather than in substitution for, civil offences: McWaters v. Day* (1989) 166 CLR at 297."

30 For their part, Brennan and Toohey JJ held that the purpose of maintaining service discipline is narrower than the purpose of criminal proceedings in a civilian context. In their view, proceedings for an offence under the Discipline Act may be brought "if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline": *Re Tracey* at 570.

31 Despite these differences of opinion, there was a majority view in the three authorities in favour of the validity of the bestowal of a disciplinary jurisdiction under the Act and the validity of including within that jurisdiction conduct which would amount to an offence against Territory laws.

32 This view must provide the answer to the formal submission made to this tribunal by Mr Street SC, for the appellant, that the DFM was, in effect, exercising the judicial power of the Commonwealth and that such exercise was invalid in that he had not been appointed as a judicial officer pursuant to s70 of the Constitution. A consequential argument that the appellant was denied the right to trial by jury under s 80 of the Constitution must be rejected for the same reason.

33 The same authorities defeat the alternative submission that, whatever the proper limits of the power under s 51(vi) to make laws for the maintenance of discipline in the Defence Force, the section cannot authorise the enactment of a provision such as s 61 of the DFDA to pick up civilian offences. This argument was rejected by five members of the court in *Re Tracey*: Mason CJ, Wilson and Dawson JJ at 545, Brennan and Toohey JJ at 570. Furthermore, in *Re Nolan*, Mason CJ, Brennan, Dawson and Toohey JJ held that a member of the Defence Force was properly charged with using a false instrument contrary to s 61(1) of the Discipline Act which picks up s 135C(2) of the *Crimes Act 1900* (NSW) in its application to the Australian Capital Territory.

34 Next, it was argued in the alternative that s 61 of the DFDA was intended to supplement and not duplicate the specific service offences created by the Act. It followed, so it was said, that s 61 must be read down so as to pick up Territory offences only where there is no service

offence under ss 15 to 60 with substantially the same physical and mental elements. It was argued that, in this case, there were specific service offences which applied to the alleged conduct. Attention was drawn to ss 33 and 34 of the DFDA. Section 33 makes it an offence for a defence member or defence civilian to assault another person if that person is on service land, in a service ship, service aircraft or service vehicle or in a public place. The maximum punishment is imprisonment for two years. Section 34 makes it an offence for a defence member to assault or ill-treat another member of the defence force who is of inferior rank to the defence member. The maximum punishment is imprisonment for two years.

35 According to the appellant's argument, s 61 cannot be used to pick up the offence of common assault under Territory law because ss 33 and 34 specifically provide for a service offence comprised of substantially the same physical and mental elements. Counsel for the appellant also drew attention to the fact that there is a time limit for commencing prosecutions for offences against the DFDA other than those offences picked up by s 61. At the time of the alleged offence in the present case the time limit for commencing a prosecution for such offences was three years. It has since been increased to five years. There is no time limit for the charging of common assault under the Territory law. In this case the time for a prosecution for an offence against either s 33 or s 34 had expired at the time the appellant was charged with the Territory offence.

36 A literal reading of the DFDA does not support the appellant's argument that the charging of s 61 offences is restricted in the manner suggested by the appellant. Nevertheless, it is appropriate to consider whether such a restriction is to be inferred by reason of the context, purpose and history of the legislation.

37 I have referred to the manner in which the Act proscribes conduct so as to bring it within the jurisdiction of military tribunals. After prescribing a range of specific service offences, the legislature incorporated into the DFDA all offences which are applicable to the Territory. It would not be surprising if this scheme produced some curious results: *Re Tracey* at 545. It is a scheme which is bound to result in some overlapping of offences. However, this is not unusual. It is commonplace under criminal codes for a given course of conduct to result in the commission of a number of offences. Indeed, it is clear that the conduct alleged against the appellant in the present case might have been charged under either s 33 or s 34 of the DFDA. By way of further example, if a defence member assaults a guard who is of inferior

rank at a military establishment, the offence might be charged under s 30 (assaulting a guard), s 33 or s 34 of the Act. There seems to be no reason why s 61 should not further expand the range of offences available to meet allegations of assault.

38 If the appellant's argument is correct, the circumstances in which such a limitation would apply could not be restricted to cases of assault. The same reasoning would apply to a range of Territory offences which overlap in varying degrees with specific service offences. These include offences of driving while intoxicated, dangerous driving, driving without due care, damaging property, unlawful possession of property and fraudulent conduct. At the time of the passing of the DFDA, the prospect of overlapping offences consequent upon creating a body of disciplinary law from two sources would have been obvious. In these circumstances, it is difficult to accept that the legislature intended to leave an important qualification on the scope of s61 to be implied from the Act. The extent to which, on the appellant's argument, s 61 should be read down is unclear and this gives rise to practical difficulties which would flow from an acceptance of the submissions. According to the argument, a Territory offence cannot be charged if it is "the same or substantially the same" as a specific service offence. In the present case, however, it could not be said that the offence of common assault was the same or substantially the same as the offences created by ss 33 and 34 of the DFDA. Both s 33 and s 34 contain elements which clearly distinguish them from the Territory offence of common assault.

39 The appellant's counsel put forward a further argument that a Territory offence could not be charged if the alleged conduct also amounted to a specific service offence. As I have pointed out, it is not unusual for a given course of conduct to amount to the commission of a number of offences and it would require a clear indication in the legislation if resort to the charging of Territory offences was to be restricted in the manner suggested. Mr. Street also provided the tribunal with the explanatory memorandum prepared for Parliament at the time the Defence Force Disciplinary Bill was being debated. However this document is of no assistance in interpreting the Act.

40 The appellant placed considerable reliance on *Saraswati v The Queen* (1991) 172 CLR 1. In that case, the accused was convicted upon three counts of committing an act of indecency with a person under the age of 16 years contrary to s 61E(2) of the *Crimes Act 1900* (NSW).

The High Court considered the nature of this offence in the context of certain other sexual offences created by the Crimes Act. The relevant provisions were as follows:

> *"61E. (1) Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to imprisonment for 4 years or, if the other person is under the age of 16 years, to penal servitude for 6 years.*
>
> *(2) Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with that or another person, shall be liable to imprisonment for 2 years.*
>
> *…*
>
> *71. Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, shall be liable to penal servitude for ten years.*
>
> *72. Whosoever attempts unlawfully and carnally to know any girl of or above the age of ten years, and under the age of sixteen years, or assaults any such girl with intent carnally to know her, shall be liable to penal servitude for five years…*
>
> *78. No prosecution in respect of any offence under section 61E (1), 71 or 72,… shall, if the person upon whom the offence is alleged to have been committed was at the time of the alleged offence over the age of fourteen years and under the age of sixteen years, be commenced after the expiration of twelve months from the time of the alleged offence."*

41 Section 61E(2) under which the accused was charged was an amendment to the Act intended to overcome a deficiency in the statutory provisions relating to sexual offences which had been highlighted in *Fairclough Whipp* (1951) 35 Cr App R 138 and *DPP v Rogers* [1953] 1 WLR 1017. In both cases it was alleged that an act of indecency was committed by reason of the accused inviting a young child to masturbate him, but without the accompanying element of an assault. In the absence of this element, the charges of indecent assault were dismissed.

42 In *Saraswati* it was alleged that the accused had committed acts of indecency with a 15-year-old girl. In the case of two of the incidents it was alleged that the accused touched the girl on the breasts, buttocks, vagina. The third incident relied on the complainant's evidence that the accused had sexual intercourse with her. If the time limit had not expired, the accused could have been charged with two counts of indecent assault pursuant to s 61E(1) and one count of

carnal knowledge pursuant to s 71. However, as the time limit for charging the offences had expired, he was charged under s 61E(2) which was not subject to any time limit.

43 McHugh J, with whom Toohey J agreed, concluded that no offence under s 61E(2) had been committed. He held that the words "act of indecency" in s 61E(2) did not bear their literal meaning. First, he relied on the history of this sub-section which, he said, was intended to cover those cases of indecency which did not involve indecent assaults. He also relied on the principle that "a statutory power, expressed in general form, is not to be construed so as to avoid any condition or limitation placed on the exercise of a specific power" *Saraswati* at 24. Reference was made to *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trade Union of Australia* (1932) 47 CLR 1 at 7, *R v Wallis* (1949) 78 CLR 529 at 550 – 551 and *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678.

44 Applying this principle, McHugh J said at 24:

> *"The Act makes it an offence for a person to have carnal knowledge of or to indecently assault a girl under the age of sixteen. But if the girl is over fourteen years of age, the Act requires the prosecution to be instituted within twelve months of the commission of the offence. It is difficult to accept that, when Parliament enacted s. 61E(2) and authorized the institution of prosecutions for acts of indecency under s. 61E(2), it intended that general power to be used to circumvent the limitation which s. 78 placed on ss. 61E(1), 71 and 72 of the same Act. To use the words of Gavan Duffy C.J. and Dixon J. in* Anthony Hordern & Sons Ltd., *the enactment of ss. 61E(1), 71, 72 and 78 'excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power'. Accordingly, in my opinion, the context of s. 61E(2) indicates that Parliament did not intend the words 'an act of indecency' to cover conduct which constitutes an indecent assault or carnal knowledge. And as s. 34 of the* Interpretation Act *makes plain, 'the ordinary meaning' of a legislative provision in New South Wales can be ascertained only after taking account of its context in the Act."*

45 Gaudron J agreed that the words "act of indecency" in s 61E(2) did not include an act which constituted indecent assault or carnal knowledge, but she based her conclusion on the consideration that the section creating the offence of committing an act of indecency was enacted after the sections which created the offences of carnal knowledge and indecent assault. This led her to say at 17:

> *"It is a basic rule of construction , that in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a*

> *later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other: see* Butler v. Attorney-General (Vict.)*, (1961) 106 CLR 268 at 276 per Fullagar J., and per Windeyer J (at 290). More particularly, an intention to affect the earlier provision will not be implied if the later is of general application (as is the provision by which indecent dealing is constituted an offence under the Act) and the earlier deals with some matter affecting the individual (as does the limitation provision of s. 78). Nor will an intention to affect the earlier provision be implied if the later is otherwise capable of sensible operation."*

46 Deane and Dawson JJ dissented. They held there was no justification for concluding that the legislature intended to exclude carnal knowledge and indecent assault from the words "an act of indecency".

47 The appellant has argued that the circumstances of the present case are, for relevant purposes, on all fours with *Saraswati.* It was said that s 61 of the DFDA is a general supplementary provision which picks up offences which, on their face, do not have any service connection. The general nature of this provision is to be contrasted with the specific provisions in ss 33 and 34 of the DFDA. The prosecution of these offences is subject to a limitation period, whereas this is not the case with the offence of common assault provided for in s 26 of the *Crimes Act.*

48 In my opinion, *Saraswati* does not assist with the present case. The court was there dealing with the construction of an amendment in a particular context. McHugh J was able to rely on that context, including the historical background to the amendment, to construe the wording of the amendment in the manner referred to above. There is in the present case no scope for narrowing the meaning of common assault. The issue is whether there is any restriction on the charging of that offence in the present circumstances.

49 The principle of interpretation expressed in *Anthony Horden* does not govern the present case. Section 61 is expressed in general terms in the sense that it picks up all offences applicable to the Territory. However, the effect of the section is to add an extensive group of offences to those which may be charged against a defence member. In those cases where the conduct could amount to the commission of more than one offence, the particular offence to be charged is left to prosecutorial discretion.

50 I am also of the view that the existence of a limitation period for charging offences other than s 61 offences does not advance the appellant's argument. I have pointed out that in *Saraswati* McHugh J took into account the principle that a general expression of power is not to be used to defeat a limitation on the exercise of a specific power. However, the issue of limitation periods is dealt with in detail in s 96 of the DFDA which, at the time of the alleged offence, provided as follows:

> ***"96 Time limitation on charges***
>
> *(1) A person shall not be charged with:*
>
> *(a) an offence against this Act (other than subsection 61(1)) or the regulations; or*
> *(b) a service offence that is an ancillary offence in relation to an offence referred to in paragraph (a);*
>
> *after the expiration of a period of 3 years after the time at which the offence is alleged to have been committed.*
>
> *(2) Notwithstanding anything in subsection (1), a person may be charged with:*
>
> *(a) an offence against section 15, 16, 20 or 22; or*
> *(b) a service offence that is an ancillary offence in relation to an offence referred to in paragraph (a);*
>
> *at any time.*
>
> *(3) A reference in subsection (1) to a period shall be read as not including a reference to a period during which the person:*
>
> *(a) was a prisoner of war;*
> *(b) was absent without leave; or*
> *(c) was serving a sentence of imprisonment.*
>
> *(4) A person shall not be charged with an offence against subsection 61(1) or a service offence that is an ancillary offence in relation to an offence against subsection 61(1) if the time that has elapsed since the offence is alleged to have been committed equals or exceeds the period of time that would bar trial by, or institution of proceedings in, a court exercising jurisdiction in or in relation to the Jervis Bay Territory for the relevant Territory offence.*
>
> *(5) A person shall not be charged with, or tried for, an old system offence if the person could not have been charged with, or tried*

> *for, as the case may be, that offence if the provisions of previous service law imposing a time limitation on such a charge or trial were still in force.*
>
> *(6) A person who has ceased to be a member of the Defence Force or a defence civilian shall not be charged with a service offence unless:*
>
> *(a) the period that has elapsed since the person so ceased does not exceed 6 months; and*
> *(b) the maximum punishment for the service offence is imprisonment for a period of 2 years or a punishment that is more severe than that punishment."*

Section 61 offences are excluded from the time limit fixed for other offences under Part III, but restricted by time limits which might be imposed under the law of the Territory. The fact that no limitation has been fixed under Territory law in the case of the particular offence with which the appellant was charged is not to the point. Specific consideration was given to time limits for the prosecution of all offences prescribed by the Act and it was acknowledged that the time limits for s 61 offences might differ from those appropriate to specific service offences.

This is not a case where a statutory power expressed in general form is being used to avoid a condition imposed on the exercise of a special power. Section 61 provides for specific offences which are expressed to be subject to time limits on prosecution if time limits exist in the Territory legislation. The issue of limitation of time with respect to all relevant offences was dealt with in the Disciplinary Act. This is a factor which distinguishes the case from *Saraswati*.

51 In my opinion, the argument that the appellant could not be charged with an offence of common assault must be rejected.

52 The next ground of appeal seeks to set aside the conviction on the basis that the proceedings constituted an abuse of the process of the court. It was argued that the prosecutor charged the appellant with the s 61 offence so as to avoid the limitation period applicable to the offences under ss 33 and 34 of the DFDA.

53 It would appear that the limitation period for the offences under ss 33 and 34 had expired by the time the victim reported the matter. It is stated in the agreed facts that he delayed reporting the incident because he was a recent officer graduate and believed that if he reported the matter it could effect his subsequent career.

54 In these circumstances and bearing in mind that the charging of an s 61 offence was one of the options available to the prosecuting authority, it cannot be said that the exercise of that option was an abuse of the process of the court.

55 In any event, the defence force magistrate drew attention to the time limit issue at the commencement of the proceedings before him. He gave the defending officer the opportunity to object on this ground but the latter stated that, upon his instructions he took no objection.

56 It was also argued that the proceedings should be stayed because there had been a delay of almost seven years since the alleged offence. It was suggested that this would have dramatically reduced the probative value of the evidence of the witnesses. There will be some cases in which delay and its consequences render a fair trial impossible: *Watson v Gardiner* (1993) 177 CLR 378, *Jago v District Court (NSW)* (1998) 168 CLR 23. However, there was no evidence to support that conclusion in the present case. There was no application before the defence force magistrate to stay the proceedings. Instead, the appellant pleaded guilty to the charge. The appellant cannot succeed on this ground.

57 I would reject the further argument that the conviction should be set aside because the appellant was not advised that he could apply to have the charge stayed as an abuse of process. The grounds upon which it was suggested that such an application might have been made could not have succeeded for the reasons I have canvassed.

58 Counsel for the appellant argued that there were a number of grounds upon which the conviction based on the plea of guilty should be set aside. Despite the reticence of an appellate court to set aside a conviction in these circumstances it will do so to remedy a miscarriage of justice: *R v Kardogeros* [1991] 1 VR 269 at 273.

59 First, it was argued that a conviction could not be sustained on the agreed or admitted facts. The appellant admitted in the agreed facts that he drew his pistol during a briefing, pointed it at the victim and made a comment to the victim which had the effect of causing alarm to the victim. It was acknowledged that the victim felt threatened and scared. The victim did not know whether the gun was loaded. Unbeknown to him it was a replica. According to the agreed facts, the appellant did not intend to assault the victim, but he conceded that he was reckless as to the consequences of his actions.

60 It was argued that the appellant's version of the facts amounted to a denial of the *mens rea* for this type of assault. An assault which does not involve battery (sometimes referred to as "psychological assault"), occurs when the victim is put in fear by reason of the defendant's act or actions. An intention to put the victim in fear, or reckless indifference to that prospect, constitutes the *mens rea* of the offence: *Macpherson v Brown* (1975) 12 SASR 184.

61 The appellant conceded by way of the agreed facts that he pointed the gun at the victim while making a comment which had the effect of causing alarm to the victim. He conceded that he was reckless as to the consequences of his actions. In my view, these statements are to be taken as a concession that there was recklessness of the type which can amount to *mens rea* for this offence. Nothing was said in the course of submissions to qualify this concession. I cannot accept Mr Street's further argument that there was doubt on the material before the DFM that the appellant was reckless as to the consequences of his actions in relation to a particular victim. It is clear from the agreed facts that the appellant's actions in pointing the gun and his recklessness were in relation to the victim named in the charge sheet.

62 An affidavit sworn by the appellant after the hearing before the defence force magistrate was tendered on the hearing of the appeal. It provides a version of the incident which is more favourable to him than the agreed facts presented to the court. In particular the appellant states in his affidavit that he did not point the gun at the victim. He does not deny instructing his legal advisers in accordance with the agreed facts and no satisfactory explanation has been given as to the discrepancies between the agreed facts and his present version. However, in paragraph 5 of the affidavit he states:

> *"Leading up to my trial on 10 March 2003, I was being advised by two RAAF legal officers. My legal officers advised me that irrespective of the matters above, I was technically guilty of assaulting CAPT Higgins because he felt fear as a result of what occurred. I found this advice very difficult to accept*

> *and I challenged them about whether it was correct on a number of occasions. Eventually I reluctantly accepted their advice. At no stage was I advised that the matters alleged against me did not constitute a technical assault or that I had reasonable prospects of being acquitted. If I had been so advised, I would not have pleaded guilty."*

63 The claims in the affidavit do not sit squarely with the agreed facts and the concession that he was reckless as to the consequences of his actions.

64 An affidavit sworn by Squadron Leader Cardillo, the appellant's solicitor, refers to the instructions he received from the appellant. He states in his affidavit that he agrees that the appellant gave instructions along the lines set out in paragraph 5 of the appellant's affidavit. He adds:

> *"I also agree that Major Hoffmann initially refused to accept that advice. Major Hoffmann told us that he could not accept he was guilty of assault when he did not point the pistol at LT Higgins and he considered that LT Higgins could not have believed that the pistol was loaded. In the end, Major Hoffmann reluctantly accepted our advice that he was technically guilty of assault because his actions had caused LT Higgins fear."*

65 If Squadron Leader Cardillo's affidavit is correct, then it would appear that there was a change of instructions by the time the agreed facts were prepared because, as I have pointed out, the agreed facts state that the appellant did point the pistol at the victim and concede that he was reckless as to the consequences of his actions. Whatever might have passed between the appellant and his legal advisers concerning the elements of the offence of assault, it is my view that the facts admitted by the appellant at the hearing before the magistrate are sufficient to constitute the offence with which he was charged. There was no miscarriage of justice caused by incorrect advice or a misunderstanding on the part of the appellant.

66 Finally, the appellant raised certain matters in his affidavit which he claims led him to believe that he had no realistic option but to plead guilty. He said he was told by his counsel that there was an argument available with respect to the validity of the charge, but that the prosecutor had said that he was not prepared to deal with that issue on the day fixed for the hearing and if that argument was to take place the matter would have to be adjourned for up to twelve months. He said he was told that his options were either to plead guilty today and get the matter over and done with or have the matter adjourned for twelve months. He said his counsel told him he thought he should plead guilty. He then detailed various personal

reasons why he wanted the matter dealt with at that stage. He said that if he had been aware that there were reasonable prospects of succeeding on a challenge to the charge on the grounds advanced in his appeal and that those arguments could have been dealt with much sooner than the twelve months period to which reference was made, he would not have pleaded guilty.

67 In my view, these considerations do not support the claim that he was placed under pressure to the extent that he was deprived of a free choice in the entering of the plea. In my view, the appellant has not displaced the presumption that the plea was freely and voluntarily made and that it was intended to constitute an acknowledgment of the existence of all elements of the charge.

68 There is a final matter which the appellant claims affected his decision to plead guilty. He wanted to know whether a conviction would be reported to the civilian authorities. He was told by his legal advisers that the matter would not be reported to the civilian authorities. Squadron Leader Cardillo referred to this aspect in his affidavit:

> *"8. Later, I had a telephone conversation with Commander Richard Hawke, head of the ADF Prosecutions Cell. Amongst other things, I said to him words to the effect:*
>
> > *'Major Hoffman has a firearm's licence and is concerned that if he is convicted of this charge it will go onto his civilian record and adversely affect his licence'.*
>
> *9. Commander Hawke said words to the effect:*
>
> > *'The only record of the conviction will be in the ADF'."*

69 It was conceded on the hearing of the appeal that Commander Hawke did not knowingly mislead Squadron Leader Cardillo. However, we were advised that a Defence Instruction requires the reporting of a conviction to the civilian authorities.

70 According to the argument, the circumstances constituted an inducement by the prosecutor to the appellant to plead guilty to the charge. An improper inducement by a person in authority which influences a person to plead guilty to a charge may result in the setting aside of the resulting conviction: *Meissner v The Queen* (1995) 184 CLR 132 at 142. However, it is my view that the statements made by Commander Hawke cannot be viewed as an inducement.

The affidavit does not establish that the conversation between Squadron Leader Cardillo and Commander Hawke took place in the context of a discussion concerning a plea of guilty. Commander Hawke simply expressed his understanding as to whether a report to the civilian authorities was required in the event that there was a conviction.

71 The appellant has applied for an extension of time within which to appeal. There was only a short delay in filing the notice of appeal and the appellant has provided a satisfactory explanation for the delay. I would give leave to extend the time to file the notice.

72 However, for the reasons which I have given, I would dismiss the appeal.

I certify that the preceding seventy - two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey (President), Honourable Justice Mildren (Deputy President) and Honourable Justice Duggan (Member)

Associate:

Dated: 29 August 2003

Counsel for the Appellant:	A W Street SC and D A McLure
Solicitor for the Appellant:	David Shearman
Counsel for the Respondent:	R R S Tracey QC and P Kerr
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	25 July 2003
Date of Judgment:	1 September 2003