DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Hogan v Chief of Army [1999] ADFDAT 1

COURTS AND TRIBUNALS – jurisdiction of Defence Force Magistrate to hear 70 charges of dishonestly appropriating property contrary to s 47 of the *Defence Force Discipline Act 1982* (Cth) – power of a commanding officer to deal with a charge – s 110 *Defence Force Discipline Act 1982* (Cth) – power of a convening authority to amend a charge pursuant to s 141 *Defence Force Discipline Act 1982* (Cth)

BIAS – apprehended bias – communication between the prosecutor and the Defence Force Magistrate not revealed to the Defence

Defence Force Discipline Act 1982, ss 3, 47(1), 86, 87, 103(1)(c), 104, 107(2), 110, 129(1), 141A
Defence Force Discipline Appeals Act 1955, ss 20(1), 23
Defence Force Discipline Rules, rr 8, 9(2), 15, 23
Acts Interpretation Act 1901 (Cth), ss 2(1), 15AA
Justices Act 1921 (SA), s 112
Defence Legislation Amendment Act No. 43 of 1995 (Cth), s 28, Schedule 2

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, referred to
R v Minister of Transport ex p H C Motor Works Ltd [1927] 2 KB 401, referred to
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, referred to
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, referred to
Craig v State of South Australia (1995) 184 CLR 163, cited
Pearlman v Harrow School [1979] QB 56 at 59, distinguished
R v Gray ex p Marsh (1985) 157 CLR 351, referred to
The Returned & Services League Of Australia (Victoria Branch) Inc (Pascoe Vale Sub Branch) Liquor Licensing Commission [1999] VSCA 37 (15 April 1999) , referred to
Re Tracey ex p Ryan (1989) 166 CLR 518, considered
Grassby v R (1989) 168 CLR 1, referred to
Metropolitan Gas Co v Federated Gas Employees' Industrial Union (1924) 35 CLR 449, referred to
Patman v Fotographics Pty Ltd (1984) 6 IR 471, referred to
K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309, cited
Makin v Attorney-General for New South Wales [1894] AC 57, referred to
Boardman v Director of Public Prosecutions [1975] AC 421, referred to
Re JRL; Ex parte CJL (1986) 161 CLR 342, cited
R v Magistrates' Court at Lilydale, ex parte Ciccone [1973] VR 122
Vakauta v Kelly (1989) 167 CLR 569, cited

IN THE MATTER OF *THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955* and IN THE MATTER OF AN APPEAL AGAINST CONVICTION AND PUNISHMENT BY A DEFENCE FORCE MAGISTRATE OF 552805 SGT RICHARD JAMES HOGAN
RICHARD JAMES HOGAN v CHIEF OF ARMY

DFDAT No. 1 of 1999

GALLOP, UNDERWOOD AND MILDREN JJ
ADELAIDE
4 NOVEMBER 1999

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL **No. 1 of 1999**

RE:	**IN THE MATTER OF *THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955***
AND:	**IN THE MATTER OF AN APPEAL AGAINST CONVICTION AND PUNISHMENT BY A DEFENCE FORCE MAGISTRATE OF 552805 SGT RICHARD JAMES HOGAN**
Between:	**RICHARD JAMES HOGAN** **Appellant**
And:	**CHIEF OF ARMY** **Respondent**
MEMBERS:	**GALLOP, UNDERWOOD and MILDREN JJ**
DATE OF DETERMINATION:	**4 NOVEMBER 1999**
WHERE MADE:	**(Heard in Adelaide) CANBERRA**

THE TRIBUNAL DETERMINES THAT:

1. The appeal be allowed.

2. The convictions be quashed.

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL No. 1 of 1999

RE:	**IN THE MATTER OF *THE DEFENCE FORCE DISCIPLINE APPEALS ACT 1955***
AND:	**IN THE MATTER OF AN APPEAL AGAINST CONVICTION AND PUNISHMENT BY A DEFENCE FORCE MAGISTRATE OF 552805 SGT RICHARD JAMES HOGAN**
Between:	**RICHARD JAMES HOGAN** **Appellant**
And:	**CHIEF OF ARMY** **Respondent**
MEMBERS:	**GALLOP, UNDERWOOD and MILDREN JJ**
DATE:	**19 NOVEMBER 1999**
WHERE MADE:	**(Heard in Adelaide) CANBERRA**

REASONS FOR DECISION

Introduction

1. This appeal was heard in Adelaide on 2 and 3 November 1999. We allowed the appeal, quashed the convictions and said that we would give our reasons later. These are those reasons.

2. This is an appeal against conviction on 64 charges of an offence contrary to s 47(1) of the *Defence Force Discipline Act 1982* (Cth) (the Act) which provides:

> *"A person, being a defence member or a defence civilian, who dishonestly appropriates (whether or not with a view to gain or for the person's own benefit) property belonging to another with the intention of permanently depriving the other person of it is guilty of an offence for which the maximum punishment is imprisonment for 5 years."*

3. Jurisdiction for the Defence Force Discipline Appeal Tribunal to hear the appeal is to be found in s 20(1) of the *Defence Force Discipline Appeals Act 1955* (Cth), as the impugned convictions were imposed by a Defence Force Magistrate (DFM).

4. The appellant was a defence member as defined by s 3 of the Act. At all material times he was the supervising sergeant at the Army Officers' Mess, Perth, Western Australia. In broad terms, the 64 charges (as finally amended) in respect of which the DFM imposed convictions, each alleged that on divers dates between 28 June 1996 and 20 June 1997, the appellant dishonestly appropriated a quantity of food being the property of the members of the Mess. The particulars to each charge alleged that the appellant raised, or caused to be raised, a purchase order, used it to buy food and then dishonestly appropriated the food.

5. With respect to the 64 convictions the appellant was sentenced to an effective term of four months imprisonment and ordered to make reparation in the total sum of $8,078.88. A further order was made directing the appellant's conditional release from custody after serving two months of the four months sentence of imprisonment.

The Grounds of Appeal

6. The notice of appeal contains 13 grounds grouped under six separate heads. Rather than set out the grounds *seriatim*, it is more convenient to summarise them as they were argued viz:

    (1) The DFM had no jurisdiction to determine any of the charges or alternatively, any of the charges apart from count 62, because:

        (a) his jurisdiction was confined to charges that had been referred to him by the convening authority pursuant to s 103(1)(c) of the Act;

        (b) the convening authority's jurisdiction to so refer is relevantly confined to charges that had been referred to him under s 110(1)(d) of the Act; and

(c) with the exception of count 62, none of the charges was the subject of an order of referral of the summary authority pursuant to s 110(1) of the Act.

With respect to count 62, it was argued that even though it was the subject of an order of referral purportedly pursuant to s 110(1) of the Act, the order was a nullity because the commanding officer did not "deal" with the charge as required by s 110(1)(d) of the Act in particular, in that at the time he made the order of referral there had been non compliance with r15 of the *Defence Force Discipline Rules* (the Rules).

(2) The amendment by the convening authority of charge 62 into 70 separate charges was not authorised by s 141A of the Act.

(3) The DFM erred in law in failing to disqualify himself upon the ground of bias.

(4) There were certain irregularities at the trial that resulted in a miscarriage of justice.

7. Ground 2.13 of the notice of appeal which alleges that the findings of guilt were against the weight of the evidence was abandoned.

The Jurisdiction of the DFM

8. A DFM has the same jurisdiction as a restricted court martial (s 129(1) of the Act), and a restricted court martial has, subject to an immaterial qualification, jurisdiction to try "any charge against any person". Section 3 of the Act, defines charge to mean charge of a service offence, and the same section defines a service offence to mean (inter alia) an offence against the Act.

9. Section 87 of the Act provides for the charging of a defence member in the circumstances prescribed by the section. In accordance with that section the appellant was charged on 24 April 1998 and ordered to appear before a summary authority. In

this instance, the summary authority was the appellant's commanding officer, Lt Col Howard, now retired.

10. The charge alleged that on 29 May 1997 the appellant stole property contrary to s 47(1) of the Act in that:

> *"... he, being a defence member at Defence Centre – Perth [Defence Corporate Support Centre – WA] ... did dishonestly appropriate the sum of $261.06 being the property of the Army Officers Mess Perth with the intention of permantly [sic] depriving the Army Officers Mess Perth thereof."*

11. For reasons which will become apparent, this charge will be referred to as charge 62. At the time he was charged, the appellant was not given copies of the statements of witnesses upon which the charge was based. This omission was a breach of r 15 of the Rules, which provides:

> *"Where an authorised member of the Defence Force or a commanding officer, as the case may be, causes a person to be given a copy of a charge under subsection 87(1) or 95(3) of the Act or to be served with a summons under subsection 87(3) of the Act, that member or officer shall cause the person to be given, before the person appears before a summary authority for a purpose relating to the charge, a copy of each statement in writing obtained by the prosecution from material witnesses to the alleged offence."*

12. On 28 April 1998 the appellant was paraded before his commanding officer. The only document then in the possession of the commanding officer was the Summary Proceeding Sheet (PD 105). It set out the charge. The PD 105 states "Attached List" under the heading "Documentary Evidence", but no documents were attached. Although r 15 requires that the person charged be given a copy of the statements of material witnesses, there is no requirement that the summary authority be furnished with a copy of such statements. However, r 23 which is set out later, clearly contemplates that the summary authority may be handed such statements by either the prosecutor or the accused when that authority is dealing with the charge pursuant to s 110(1) of the Act.

13. After reading the charge, the commanding officer referred the charge to a convening authority. At the time he did so, he had no information concerning the circumstances giving rise to the charge other than those that might be inferred from the words of the charge itself. On behalf of the appellant it was submitted that the absence of written statements of material witnesses in breach of r 15, and/or the absence of any material other than the charge itself, rendered the summary authority's exercise of the statutory discretion and the order of referral to a convening authority a nullity.

14. Section 110(1) of the Act relevantly provides:

> *"In dealing with a charge, a commanding officer may:*
>
> *(a)* …
>
> *(b)* …
>
> *(c)* …
>
> *(d) refer the charge to a convening authority; or*
>
> *(e)* …*"*

15. Counsel for the appellant submitted that the commanding officer failed to "deal" with charge 62 as required by s 110(1). He submitted that the expression "dealing with a charge" required the commanding officer to inform himself sufficiently with respect to the relevant facts to enable him to exercise the discretion vested in him by the terms of the subsection. Counsel for the appellant submitted that at the least, "dealing with a charge" required the commanding officer to be in possession of the witness statements as is prescribed by r15. As charge 62 was not a prescribed offence (s 104), the commanding officer had jurisdiction to try the charge himself, see s 107(2) of the Act. Accordingly, it was submitted on behalf of the appellant that as one of the options prescribed by s 110(1) was for the summary authority to try the matter himself or herself, "dealing with the charge" required an exercise of a discretion based on relevant material. Rule 23 is relevant. Subrule (1) provides that

the provisions of this rule apply to "the hearing of a proceeding (other than a trial) by a summary authority". The balance of r 23 provides as follows:

> *"(1) …*
>
> *(2) The accused person is entitled to be represented at the hearing.*
>
> *(3) The prosecutor shall commence the proceedings by reading the charge to the accused person.*
>
> *(4) Where, at any time after the charge is read, the summary authority requires further information before the authority decides:*
>
> > *(a) where the charge is within the authority's jurisdiction to try – whether the authority should try the charge;*
> >
> > *(b) where the charge is not within the authority's jurisdiction to try – whether the authority should direct that the charge not be further proceeded with; or*
> >
> > *(c) in any case - whether the authority should refer the charge to another summary authority or to a convening authority, as the case may be,*
> >
> > *then:*
> >
> > *(d) the authority shall call upon the prosecutor to outline the case for the prosecution and the prosecutor shall state briefly:*
> >
> > > *(i) the elements of the offence charged which, on a trial of the charge, would have to be proved in order to obtain a conviction;*
> > >
> > > *(ii) the alleged facts upon which, on a trial of the charge, the prosecutor would rely to support the charge; and*
> > >
> > > *(iii) the nature of the evidence which, on a trial of the charge, the prosecutor would propose to adduce to prove the alleged facts; and*
> >
> > *(e) if, after paragraph (d) is complied with, the authority considers that he should hear evidence in support of the charge before he makes his decision, the authority shall hear such of that evidence as he thinks fit."*

16. In addition to the failure of the commanding officer to inform himself sufficiently of the relevant facts, there were other failures to comply with r 23. It was submitted on behalf of the appellant that the commanding officer should have required further information before referring the charge to a convening authority. He should have

required compliance with r 23(1)(d) and should have called upon the prosecutor to outline the case for the prosecution, which would have included the elements of the offence charged, the alleged facts upon which the prosecutor would rely to support the alleged charge and the nature of the evidence which on the trial of the charge the prosecutor would propose to adduce to prove the alleged facts. The commanding officer should also have considered whether he should hear evidence in support of the charge before he made his decision and heard such of the evidence as he thought fit.

17. Counsel for the respondent submitted that the summary authority had complied with r 23 in that subrule (4) clearly contemplates that a commanding officer may act as provided by s 110(1) of the Act without conducting a hearing or being aware of anything more than the charge itself, provided always of course the accused is afforded natural justice, in particular is given the right to be heard. Consideration of that submission requires an examination of the nature of the power conferred on a commanding officer by s 110(1) of the Act.

18. The power conferred by the subsection is neither conditioned nor fettered by the statute. On behalf of the appellant it was submitted that the "dealing" referred to in s 110(1) was akin to a committal hearing before a Magistrate or a justice, but the statutory power to commit for trial is always conditioned by the requirement that before an order is made the Magistrate must be satisfied that there is a case for the defendant to answer or, as is provided in s 112 of the *Justices Act 1921* (SA), that the evidence is "sufficient to put the defendant on trial for an indictable offence". Section 110(1) of the Act imposes no condition on the exercise of the powers therein set out. Had the Parliament intended to require a summary authority to be satisfied about any particular matter before exercising the power conferred by the subsection, it

could easily have so specified in terms similar to those acts which condition the power of a Magistrate to commit for trial.

19. While s 110(1) imposes no statutory fetter or condition on the exercise of the commanding officer's discretion, and r 23 contemplates that the power may be exercised at any time after the charge has been read (subject to the requirements of natural justice), there is ample authority for the proposition that the power must be exercised reasonably: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Irrelevant matter must be excluded in the exercise of the discretion and regard must be had to relevant considerations: *R v Minister of Transport ex p H C Motor Works Ltd* [1927] 2 KB 401. Whether an unfettered discretionary power has been properly exercised will depend upon the circumstances of each case, but in every case the power must be exercised in accordance with the policy of the Act: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

20. On behalf of the appellant it was submitted that "without material before him, what happened on 28 April was no more than a sham". There is no basis for upholding that submission. The rules of procedure, r 23, authorised the commanding officer to make the order he did without requiring any more than the reading of the charge. There is no material before this Tribunal to suggest that in making that order the commanding officer acted unreasonably, took into account material that he ought not to have taken into account, or failed to take into account any material that he should have taken into account. There is nothing in the Act or Rules to support the proposition that before a commanding officer can make **any** order under s 110(1) he has to enquire into the facts of the case either by looking at the statements of material witnesses that have, or should have, been given to an accused person or otherwise. Of course, if a summary

authority orders that a charge not be proceeded with as is authorised by s 110(1)(b), the proper exercise of the discretion requires a consideration of the evidence before that order is made. To so order without such consideration would be an unreasonable and unlawful exercise of the power. However, in another case, the very nature of the charge itself may be such that it is reasonably apparent to the summary authority that it is a matter that ought to be referred to a convening authority to make the decision as to the appropriate tribunal to try the charge. In such a case the reading of the charge is all that is required for the proper exercise of the discretion to refer it to a convening authority.

21. Assuming that there was a statutory obligation upon the summary authority to consider more material than he did consider before he exercised one of the powers conferred by s 110(1), what is the legal result of a failure to do so? The answer to that question must bear in mind that the issue is not whether the order should be reviewed as on the return of an order nisi for a prerogative writ, but whether the order was made without jurisdiction, for it is only in the latter circumstance that any error will deprive the convening authority and thus the DFM of jurisdiction to try charge 62.

22. It has been said with respect to administrative tribunals that a failure to take into account a matter that, on a proper construction of the statute, the tribunal was obliged to take into account means that any consequential order is a nullity having been made without jurisdiction, see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. That proposition is part of the common law of Australia, see *Craig v State of South Australia* (1995) 184 CLR 163. The following passage is taken from the judgment of the Court at 179,

> *"If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to*

> *ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."*

23. It maybe said that in the United Kingdom this proposition applies equally to courts (*Pearlman v Harrow School* [1979] QB 56 at 59), but this is clearly not the case in Australia, see *R v Gray ex p Marsh* (1985) 157 CLR 351 at 371-372. In this respect, the Court said in *Craig* (supra), also at 179, that the observations of Lord Reid in *Anisminic* (supra):

> *"... should not be accepted here as an authoritative statement of what constitutes jurisdictional error by an inferior court for the purposes of certiorari"*.

The Court said that unless the Parliament conferred a power on a tribunal to decide questions of law authoritatively, the tribunal was authorised to act only in accordance with the terms of the statute. Hence, error of law results in loss of jurisdiction. However, the jurisdiction of a court is to decide questions of law as well as fact within its jurisdictional limits. The Court said at 189-190:

> *"In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."*

24. *Craig* was considered by the Court of Appeal of Victoria in *The Returned & Services League Of Australia (Victoria Branch) Inc (Pascoe Vale Sub Branch) Liquor Licensing Commission* [1999] VSCA 37 (15 April 1999). Although the Court was there concerned with the decision of an administrative tribunal, it focused on the nature of the error that will result in prerogative relief being granted. Phillips JA held that not all errors of an administrative tribunal, such as failing to take account of matters that should have been taken into account, will vitiate the decision and nullify the order, but only those such errors which affect the purported exercise of jurisdiction. His Honour said at para 16:

> *"Ultimately, at all events when what is in question is error in the course of decision-making (as was the case here), the task for the court from which certiorari is sought must be to distinguish between, on the one hand, those matters which the tribunal is given the jurisdiction to decide, and even to decide wrongly (so that error does* not *go to jurisdiction), and on the other hand those in respect of which, while it may have the power to inquire into them, it does not have the jurisdiction to decide wrongly (so that error* does *go to jurisdiction)."*

25. As Phillips J said at para 18, it is becoming increasingly difficult to apply the distinction between courts and tribunals with any confidence.

26. Although it was held in *Re Tracey ex p Ryan* (1989) 166 CLR 518 that the enactment of s 110(1) of the Act does not involve a judicial power of the Commonwealth, Mason CJ, Wilson and Dawson JJ said of the service tribunal (which includes a summary authority) at 537:

> *"It is sufficient to say that no relevant distinction can, in our view, be drawn between the power exercised by a service tribunal and the judicial power exercised by a court."*

27. Although *Ryan* was concerned with courts martial, the observations cited above apply with equal force to a summary authority. Section 110(1) of the Act confers upon a summary authority the power to try a case within the authority's jurisdiction. It confers the power to dismiss a case in the circumstances prescribed, even though that

case could not be tried by the summary authority, and it confers the power to refer the case to another authority. The exercise of the power to direct that a charge not be proceeded with requires the summary authority to act judicially for he or she will have to consider both law and fact in the decision making process. Error committed in the exercise of that power does not render the order made a nullity for the reasons enunciated in *Craig*. All the other powers conferred by s 110(1) simply enable the summary authority to refer the charge to another body for further determination. The exercise of each of these powers is an administrative function as is the power of a committing magistrate, see *Grassby v R* (1989) 168 CLR 1. Accordingly, error in the exercise of any one of these powers may render the order a nullity if the error affects the jurisdiction to make the order. For instance if the summary authority did not apply his or her mind to the issues and merely ordered as told to do so by some other person such an error would render the order a nullity. However, in the present case the only evidence before the Tribunal of what occurred before the summary authority is the agreed fact that the only material before the summary authority was PD 105. That fact by itself does not mean that jurisdictional error occurred when the order was made referring charge 62 to the convening authority. It follows that the order referring charge 62 to the convening authority is valid.

28. The grounds of appeal that rely on the proposition that the referral of charge 62 was not an exercise of the power conferred by s 110(1) of the Act are not made out. There was a clear breach of the Rules by the failure to furnish the appellant with witness statements prior to him going before the commanding officer and it may well be argued that this failure prejudiced the appellant in that he was thereby unable to make any submission, or any useful submission, to his commanding officer, but the failure to comply with r 15 and its possible consequences did not affect the validity of the

exercise of power by the summary authority conferred by s 110(1) nor the validity of the order made pursuant to that subsection.

29. In accordance with the order of the appellant's commanding officer, charge 62 came to the attention of the convening authority, Col Noonan. The powers of a convening authority are prescribed by s 103(1) of the Act, which relevantly provides:

> *"Where a charge is referred to a convening authority under paragraph 109(b) or 110(1)(d), subsection 129A(3), section 131A or subsection 141(8), 145(1) or (3) or 194(7), the convening authority may:*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) refer the charge to a Defence Force magistrate for trial; or*
>
> *..."*

30. Col Noonan signed a document dated 15 June 1998. It is headed "Charge Sheet". It charged the appellant with 70 breaches of s 47(1) of the Act. Charge 62 on the charge sheet was in identical terms to the charge the commanding officer had referred to the convening authority (apart from the omission of some superfluous words). The other 69 counts consisted of charges of breaches of s47(1) of the Act on divers dates between 28 June 1996 and 20 July 1997 all expressed in the same terms apart from the sum of money stolen. It is appropriate to interpolate here that at the trial before the DFM, five charges were withdrawn and the appellant was found not guilty on one charge. Thus, on the 70 charges tried by the DFM there were 64 convictions from which this appeal is brought.

31. By s 110(2) of the Act, the convening authority is only empowered to make an order with respect to a charge referred to him or her pursuant to the sections therein specified, one of which is s110(1)(d). For the reasons already expressed, charge 62 was so referred. It was the only charge referred in accordance with s 110(1). The other 69 charges on the charge sheet sent by the convening authority to the DFM were not referred to the convening authority pursuant to any section in the Act. To justify

the inclusion of the further 69 charges, reliance was placed on s141A of the Act, which provides:

> *"(1) Where it appears to:*
>
> *(a) …*
>
> *(b) a convening authority, at any stage when a charge is before him or her under section 103;*
>
> *(c) …*
>
> *(d) …*
>
> *that, for any reason, the charge should be amended, the summary authority, convening authority, judge advocate or Defence Force magistrate, as the case may be, shall make such amendment of the charge as he or she thinks necessary unless the amendment cannot be made without injustice to the accused person.*
>
> *In subsection (1), "amendment" includes the addition of a charge or the substitution of a charge for another charge."*

32. Counsel for the respondent conceded that unless s 141A authorised the making of all charges except charge 62, the DFM had no jurisdiction to make the orders of conviction that he did make on those charges. On behalf of the appellant it was submitted that this section did not authorise the course taken by the convening authority.

33. On behalf of the respondent it was submitted that by virtue of the provisions of s 23(b) of the *Acts Interpretation Act 1901* (Cth), the singular includes the plural and that accordingly, the plain words of s 141A(2) of the Act authorised the "addition of charges". It may well be that the singular does include the plural upon a construction of the Act, for no contrary intention therein appears, see s 2(1) of the *Acts Interpretation Act 1901* (Cth). However, s 15AA of the same Act requires that in the interpretation of s 141A regard be had to the purpose of the Act.

34. The power to charge a person with a charge is set out in s86 and the following provisions of the Act. Those provisions comprise a code that has to be followed in order to lawfully charge a person. The provisions prescribe in detail what must be

done in the event of a relevant person proceeding to charge a person, whether there is to be an arrest or not. A convening authority has no power to charge a person with an offence. However, if the argument put on behalf of the respondent is correct, all of the provisions of the Act governing the laying of a charge can be avoided by the use of the amendment power set out in s 141A provided that one charge has been lawfully referred to a convening authority. Such an interpretation is tantamount to conferring upon a convening authority a power to file an ex officio indictment. Such an interpretation would not promote the purpose of the Act as enacted in s86 and following.

35. Section 141A has to be construed in the context of the Act, read from beginning to the end. See *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1924) 35 CLR 449 at 455; *Patman v Fotographics Pty Ltd* (1984) 6 IR 471 at 474–5. In *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 Mason J (as he then was) said at 315:

> *"On its face s133 which is expressed in general terms, contains no limitation on the nature of the claim to damages or other remedy to which it refers. However, to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context:* Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation *(1981) 147 CLR 297 at 304, 319-320;* Attorney-General v Prince Ernest Augustus of Hanover *[1957] AC 436 at 461,473."*

36. Application of this proposition leads to the conclusion that s 141A must be read down and construed in the light of the preceding provisions of the Act which include the requirement that, absent arrest, a person be charged with an offence in accordance with s 87 and ordered or summonsed to be brought before a summary authority. Section 110(1) of the Act requires that authority to deal with the charge in the manner prescribed, which includes in an appropriate case, trying the charge himself or herself and dismissing it for lack of sufficient evidence. All of those procedures and rights

could be set at nought if the submission made on behalf of the respondent was accepted and any charge could be laid by exercise of the power of amendment provided that the convening authority is lawfully seized of at least one charge. Such an interpretation would require clear words from the Parliament. Had it intended to, in effect, confer a power to lay an *ex officio* indictment and permit the by-passing of procedures prescribed by the Act and Rules, it could easily have said so in plain language.

37. Further, the power to amend is conferred at all levels of the system from summary authority to judge advocate and Defence Force magistrate. It is unlikely that Parliament intended, by the enactment of s 141A, to permit the addition of any charge at any stage of the process by process of amendment, provided always of course, that such addition causes no injustice, nor presumably, a breach of the pleading rules set out in r 8. Construction of s 141A must bear in mind that it is the charge, not the charge sheet, that may be amended. One might well ask in the present case how it can be said that charge 62, which was the only charge lawfully referred to convening authority, was amended when it appears with the other 69 charges in the same form as it was referred except for the omission of a few superfluous words.

38. Rule 9(2) of the Rules provides that a charge shall consist of two parts, namely, "a statement of the offence which the accused person is alleged to have committed, and particulars of the act or omission constituting the offence". It is this that may be amended by s 141A. It may be amended "in the ordinary way" by the alteration of a charge or charges or by the substitution of a charge for another charge or charges. However, this latter power must be read down to permit only an additional, or substituted charges or charges that is or are based upon the same or very closely related facts as those upon which the original charge was based. To otherwise

construe the section would defeat the purpose of the Act. In the present case, charge 62 concerned events that occurred on 29 May 1997. Section 141A did not authorise the laying of charges with respect to events that occurred on 69 separate days most of which were prior to 29 May 1997. Such action cannot properly be called an amendment of charge 62, notwithstanding the prima facie width of the words used in a 141A(2).

39. Prior to the enactment of the *Defence Legislation Amendment Act No. 43 of 1995* (Cth), the power to amend was confined to cases where the "charge is defective". By s 28 of Schedule 2 of that Act, the words "that for any reason, the charge should be amended" were substituted for the words "the charge is defective". Subsection 2 remained unaffected. The expression "charge is defective" limited the power to amend very severely for in many cases it would have been appropriate to amend the charge to accord with the evidence but that could not be done because as drawn, there was nothing defective about the charge. However, in a case where the charge was defective, it would have been inconceivable that s 141(2) permitted the substitution or addition of any number of other charges, not related by circumstance to the defective charge in order to cure the defect. It cannot be supposed that the intention of Parliament was to radically alter that situation by the substitution of the words "that for any reason, the charge should be amended" for the words "charge is defective".

40. It follows that the DFM had no jurisdiction to try any charge except charge 62. It further follows that by trying all 70 charges the DFM heard a vast body of inadmissible prejudicial evidence upon the trial of charge 62, see *Makin v Attorney-General for New South Wales* [1894] AC 57; *Boardman v Director of Public Prosecutions* [1975] AC 421. This error of law resulted in a substantial miscarriage of justice. None of the convictions can stand. They are quashed. As the DFM was

without jurisdiction to try any of the charges except charge 62, it is not open to make an order for a new trial with respect to any charge except charge 62. With respect to the latter charge, the Tribunal was informed that the appellant has served two months in custody and accordingly, in all the circumstances no order for a new trial will be made with respect to charge 62.

41. Although it is not necessary to consider any of the other grounds of appeal, it is appropriate that we deal with the grounds that alleged bias.

Apparent Bias - Ground 2.5 - The Defence Force Magistrate (DFM) erred in law by finding that he should not disqualify himself on the ground of there being reasonable apprehension of bias.

42. The DFM lives and practises in Hobart, Tasmania. The prosecutor and defending officer were situated in Western Australia. The proceedings were to be heard at Leeuwin Barracks, Fremantle, Western Australia. The reference to the DFM from the convening authority was dated 15 June 1998. The defending officer, Captain Hudson, was appointed on 18 June 1998.

43. Initially the hearing was fixed to commence on 4 July 1998.

44. Both before the hearing commenced, and at the times during adjournments for hearing, the prosecutor and the defending officer both communicated with the DFM directly, on most occasions by facsimile addressed to the DFM, and the DFM responded either by fax or by telephone. The first such communication appears to have been a fax from the defending officer dated 24 June 1998, in which she sought an adjournment of the hearing, setting out in some detail the grounds thereof. On the same date, she sent a fax to the prosecutor, Major Courtis, advising him that she had sent this communication to the DFM and sending to him a copy of it. Apparently the application was not opposed and the DFM adjourned the hearing until 14 July 1998, in the absence of counsel.

45. On 30 June 1998, Major Courtis telephoned the DFM and discussed proposed amendments to the charge sheet (AB 266). This communication was made without the appellant's or his legal officer's knowledge or consent, and was not disclosed to the defending officer by either the DFM or the prosecutor until a considerable time later.

46. On 1 July 1998, when Captain Hudson was informed of the hearing date, she faxed the DFM seeking a further adjournment. A copy of this fax was sent to Major Courtis.

47. Thereafter, throughout the latter months of 1998, both the prosecutor and the defending officer regularly communicated with the DFM by fax on a variety of procedural matters affecting the orderly running of the trial, some of which sought formal rulings from the DFM, and some of which appear to have been for information only. On each occasion, save for certain communications which we will come to, the other party was given a copy of the communication to the DFM. No objection was raised by either party to the course which was being adopted. Indeed, the complexities of the hearing were such that, in the minds of the parties' respective counsel, it was considered necessary to have frequent communications with the DFM covering inter alia the likely time that the adjourned hearing would occupy, and the available dates of witnesses and of counsel.

48. On 7 January 1999, Captain Hudson wrote to the DFM formally requesting a further adjournment of the trial which was due to be resumed on 11 January 1999. She enclosed a copy of a psychiatrist's report, which concluded that the appellant was suffering from a major depressive disorder which rendered him unfit to be tried, but that, with treatment, it was hoped that his mental state would improve sufficiently after a period of four to six weeks to enable him to participate in his trial. The

psychiatrist also noted that the appellant had heart problems and recommended that he be reviewed by his cardiologist. It is not clear whether a copy of this letter was forwarded to the prosecutor, but the prosecutor was aware that the application was to be made on the grounds of the appellant's ill health. On the same day, the prosecutor wrote to the DFM, advising him that the application would be opposed, that he would require the medical witnesses to be made available for cross-examination and of his available dates should the adjournment nevertheless be granted. After dealing with some other matters of a procedural nature relating to certain of the other witnesses yet to be called, the prosecutor's letter advised the DFM:

1. Captain Hudson had applied to the convening authority to terminate the proceedings;
2. the convening authority had obtained independent legal advice;
3. as part of that advice, comment was made about the availability of the charges (and a copy of the relevant part of the advice was enclosed); and
4. the prosecution proposed to re-draft a sample charge and to seek the DFM's directions and leave to further amend prior to the close of the prosecution case.

49. The appellant complains that the appellant and his legal adviser were not told of this communication to the DFM.

50. On 11 January 1999 the trial resumed. The prosecutor applied to amend the charges. The application was approved. The course of the day's proceedings was taken up with discussing that issue and an application for an adjournment of the trial by Captain Hudson on "non-medical reasons". At 1036 hours on 12 January 1999, the DFM adjourned the proceedings to enable the appellant to attend a medical appointment. The hearing resumed at 1254 hours, when the DFM resumed hearing the appellant's application. Later, evidence was given by the appellant's psychiatrist

and another medical witness. The hearing resumed on 13 January (by which time at least the prosecutor had indicated his consent to the adjournment) and ultimately the DFM adjourned the hearing to 9 March 1999.

51. On 15 January 1999, the prosecutor sent a fax to the DFM in the following terms:

> *"Dear Col Gunson*
>
> *Enclosed is a copy fax I have received from the Military Police.* ***On Thursday, 14 January 1999, the Military Police obtained information relevant to the manner in which Sgt Hogan obtained his adjournment on 13 January 1999. There are serious implications and other matters may follow.*** *The specific issue at the moment is that the police will need to have access to the trial transcript and the exhibits, for the purpose of conducting further investigations. I respectfully seek your leave for the exhibits to be made to the Military Police to enable them to conduct further investigations and interview further witnesses.*
>
> *My difficulty is that I am anxious to preserve both the integrity of the trial and also the integrity of the further investigations that are now being conducted.* ***Consequently, I seek leave on the basis that I have not given notice of my intentions or of this application, to Capt Hudson.*** *I will be absent from Perth for the whole of next week and consequently, I shall be very grateful for your response today.*
>
> *Yours faithfully*
>
> *Sgd Jack Courtis"*

52. Enclosed was the fax from the Military Police:

> *"1. As of today's date, this section is in receipt of new information relevant to the charges laid before SGT R Hogan and currently before a DFM Hearing.*
>
> *2.* ***This new information will necessitate the interviewing of further witnesses and showing them relevant documentation.*** *As you are aware that documentation was collected by this section and handed over to the Magistrate COL Gunson by you during proceedings therefore are now exhibits and belong to the court. As such I ask if you would obtain permission from COL Gunson for us to use the documents required in the way specified.*
>
> *3.* ***As you are also aware this new information is of such a compelling nature I will be briefing COL Noonan first thing AM tomorrow.***
>
> ***4. I have classified the obtaining of new statements and other information as an extreme priority.***

> *5. Please note my E:Mail address if you feel that may be an easier way of communication.*
>
> *6. Regards Peter"*

53. After this fax was received, the DFM spoke to the prosecutor on the telephone on the same day. According to the DFM and the prosecutor, the DFM telephoned the prosecutor to advise him that the DFM would not permit the removal of all documents which had so far been tendered in evidence, but required the prosecutor to specify which documents.

54. Subsequently to this telephone call, the prosecutor sent a further fax to the DFM in the following terms:

> *"Dear Col Gunson*
>
> *Further to my fax and our subsequent telephone conversation of this morning, I seek leave for the following exhibits to be used by the Military Police for the purpose of further investigations. If witness statements are produced relevant to these exhibits, I intend to apply for leave to reopen the prosecution case on 9 March 1999. I shall provide Capt Hudson with a copy of the relevant witness statements and give her notice of my intentions, as soon as I receive them.*
>
> *The exhibits in respect to which leave is sought are as follows:*
>
> *P51, P52, P53, P68, P76, P79, P80, P81, P82, P83, P84, P85, P87, P92, P93, P94, P96, P100.*
>
> *Yours faithfully*
>
> *Sgd Jack Courtis"*

55. Later that afternoon, the DFM sent a fax back to the prosecutor, which was a copy of the fax referred to in para 14 above, and on which the DFM had endorsed in his own hand the following:

> *"I approve and so order.*
>
> *D J Gunson*
> *COLONEL*
> *DEFENCE FORCE MAGISTRATE*
> *15 JAN 99."*

56. None of these communications was made known to the appellant or defending officer until much later. Clearly, it was most improper for the prosecutor to inform the DFM in the absence of the accused or his counsel that the Military Police had obtained information relevant to the manner in which the appellant had obtained his adjournment and implying that the appellant had misconducted himself, to say nothing of the revelation that the Military Police had unearthed new information of a compelling nature, which was relevant to the charges which had been brought. It was not necessary to reveal any of this information if the prosecutor wanted to obtain permission from the DFM to uplift some of the exhibits, even if it was appropriate to apply ex parte to the DFM for that kind of permission.

57. In February 1999, counsel for the appellant became aware for the first time of the communication between the prosecution and the DFM on 30 June 1998 referred to in paragraph 45 above.

58. When the hearing resumed on 9 March 1999, objection was taken by the defending officer to the DFM continuing to hear the matter on the basis of the direct communication between the prosecutor and the DFM on 30 June 1998. At that stage, the defending officer was unaware of the direct communications which took place on 15 January 1999, although she was aware of those which took place on 7 January 1999. The defending officer did not make her application immediately the court resumed, but waited until the prosecutor closed his case later that day, precisely when is not clear. The response of the learned DFM was one of hostility and antagonism to the defending officer's application. Far from allowing her to put in an orderly way what was obviously a difficult submission for her to have to make, the DFM cross-examined her, inter alia suggesting that she had also had direct communications with him which somehow justified what the prosecutor had done. When the defending

officer raised the communication of 7 January 1999, the initial heat had cooled for a time and the DFM wisely allowed her to tender the 7 January correspondence and put her submissions, but not long after, the DFM began to cross-examine the defending officer again, in such a way as to lead her to say, “Well, sir, if you don’t want to hear the rest of my submission, please say so”. As the matter proceeded, the learned DFM suggested (that may not be quite the right word) on a number of occasions that the defending officer ought to tender all of the correspondence which had been sent to the DFM so that “a balanced view can be formed including all of your communications to me …” (see AB 266, 277, 290, 291, 292, 301, and 313). Indeed, as the matter progressed, the DFM requested that both counsel tender the totality of all of the correspondence (AB 282). At one stage, when the defending officer declined to tender a letter she had written to the DFM, the DFM sought to tender it himself, but then managed to have the prosecutor tender it (AB 291). It is in this atmosphere that there is no disclosure by the DFM or by the prosecutor of the correspondence of 15 January 1999. At that stage neither the defending officer, the prosecutor nor the DFM had all of the correspondence available to be tendered, but the defending officer and the prosecutor indicated they would tender the balance thereof as soon as it became available.

59. The matter did not proceed on 10 March because the appellant had collapsed due to a drug overdose and was not fit to attend the trial. He was subsequently admitted as an involuntary patient into a hospital under the provisions of the *Mental Health Act*. The DFM proceeded to issue a warrant for the appellant’s arrest and, on 12 March 1999, to hear submissions on the question of bias in the absence of the appellant. At that stage, the prosecutor tendered a bundle of correspondence (AB 344), which he said was not exhaustive, but in the nature of a sample of the relevant correspondence. The

learned DFM then handed down to the prosecutor some correspondence (apparently from his own file) and invited the prosecutor to tender it, which he did (AB 345). Subsequently, the defending officer also tendered some correspondence (AB 347). The DFM then heard submissions from the prosecutor. At this stage, the correspondence of 15 January 1999 had still not been tendered, although the defending officer had, we were told, become aware of the existence of this correspondence as she had seen it in court on the afternoon of 9 March 1999.

60. The matter of the bias application was resumed on 22 March 1999. At AB 391, the learned DFM pressed the defending officer to tender another document, which he felt should have been tendered, to make the correspondence complete. At AB 396, the defending officer suggested that there may be further correspondence between the DFM and the prosecution which had so far not been tendered. The following exchange occurred:

> *"CAPT HUDSON: That – that is the answer, sir, yes. Now, one other matter that's arisen. At page 1491 of the transcript – no, I'm sorry, page 1377 of the transcript.*
>
> *THE MAGISTRATE: That was the cross-examine – this was the examination-in-chief of Sergeant Hogan's brother. Is that right?*
>
> *CAPT HUDSON: That's correct, sir.*
>
> *THE MAGISTRATE: Yes.*
>
> *CAPT HUDSON: You will see from the transcript there that Gregory Peter Hogan agreed that he had spoken with Staff Sergeant Evans of the Military Police on 22 February '99 - - -*
>
> *THE MAGISTRATE: Yes.*
>
> *CAP HUDSON: - - - and shown a number of documents. Now, if those documents were exhibits, I would ask for any correspondence in relation to the uplifting of those exhibits.*
>
> *THE MAGISTRATE: Yes. That's a reasonable request and my memory is that – I don't have my file here – didn't bring correspondence with me – that Major Courtis, after the adjournment in January, faxed me a letter asking for authority to uplift those documents and that I wrote across the bottom of it: "approval granted" or "so ordered" or something like that, and faxed it back. Do you have that there Major?*

MAJ COURTIS: I have a copy, sir. I have only got one, I am afraid but perhaps I could just show it to my friend first.

THE MAGISTRATE: Pass that to me Staff. Pass that to me first.

MAJ COURTIS: I am sorry, your Honour.

THE MAGISTRATE: No, I think in the – what you did was, you faxed me a letter, you wanted to take up all of them, I rang you, I told you – thank you for producing this – I said that I would not permit all of them to be taken up, and that if you wanted specific documents for leave to take them up, that you were to fax me a letter setting out precisely what documents you wanted to take up.

MAJ COURTIS: Yes, and I will hand up that as well, sir.

THE MAGISTRATE: Pass that to me please. Thank you. Let me read that. Yes. They should be shown to the defending officer. On receipt of the first letter, my memory – and I have no doubt the Prosecutor will correct me if I am wrong, I rang him and said I will not give blanket authority for all the Defence – sorry, all the Prosecution documents to be taken up, for obvious reasons and that any request for Prosecution documents to be uplifted for the purpose of them being shown to potential witnesses should be limited to a specific identified number. And that's the response. Do you see it there?

CAPT HUDSON: Yes. "I approve and so order". Yes, sir.

THE MAGISTRATE: And that was faxed back. They can go into the – I presume you would like them to go in with P142.

CAPT HUDSON: Well, sir, just reading this correspondence, the nature of it, that:

> … on 14 January '99, the Military Police obtained information relevant to the manner in which Sergeant Hogan obtained his adjournment on 13 January '99, there are serious implications and others may follow.

Sir, this has gone, in my respectful submission, beyond what ought to be put to yourself or any Judge in seeking to uplift the exhibits. It's – by it's very nature, sir, must by – if any reasonable observer looked at it, in the Military environment or otherwise, can't help but influence your assessment of my client's credibility."

61. This correspondence referred to is the correspondence of 15 January 1999.

62. After hearing further submissions the learned DFM rejected the application that he should disqualify himself and gave considered reasons on 19 May 1999. The learned DFM specifically referred in his reasons to the correspondence of 15 January, but it is to be noted, not to the offending passages, which imply that the accused has behaved discreditably, and reflected upon his truthfulness, and nor did he deal with the way in

which the existence of that communication was not disclosed by either the DFM or the prosecutor until it was prised out by the defending officer on 22 March, at the very last minute.

63. It is not necessary to refer in detail to the many reported cases on the subject of bias. The relevant principles to be applied for the purposes of this case are sufficiently identified by Mason J (as he then was) in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350-352. At p 350 his Honour said:

> *"It is inconsistent with basic notions of fairness that a Judge should take into account, **or even receive**, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide."* (Emphasis ours)

64. His Honour then quoted with approval, a well-known passage from the judgment of McInerney J in *R v Magistrates' Court at Lilydale, ex parte Ciccone* [1973] VR 122 at 127:

> *"The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."*

65. At p 351-2, Mason J continued:

> *"As McInerney J pointed out, the receipt by a judge of a private communication seeking to influence the outcome of litigation before him places the integrity of the judicial process at risk. A failure to disclose that communication will seriously compromise the integrity of that process. On the other hand although the terms of a subsequent disclosure by the judge of the communication and a statement of its effect in some, perhaps many, situations will be sufficient to dispel any*

> *reasonable apprehension that he might be influenced improperly in some way or other subsequent disclosure will not always have this result. The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge.*
>
> *The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues: Reg v Watson; Ex parte Armstrong (1976) 136 CLR 248, at pp 258-263; Livesey v NSW Bar Association (1983) 151 CLR 288, at pp 293-294. This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. This concern is expressed in the cognate principle that, not only must justice be done, it must be seen to be done."*

66. The submission of Mr Hevey for the appellant was that each of the communications by the prosecutor with the learned DFM which were made in the absence of the accused and without his knowledge or consent or that of his counsel were improper and, as they were not disclosed by the DFM, gave rise to a reasonable apprehension of bias within the meaning of the principles stated by Mason J.

67. We think that the course which the parties adopted in this case, with the apparent consent of the DFM, of communicating with the DFM by fax or telephone was an unfortunate one which should not be followed, even if done with the approval of the other side. It is no excuse that the DFM does not have an associate or clerk through whom communications can be made. The DFM in this case could have been approached through his secretary or the Chief Legal Officer and asked to convene a pre-trial telephone conference in the presence of both parties, at which procedural issues could have been discussed. Had that course been adopted, the problems which have arisen in this case would have been avoided. That said, there is nevertheless no impropriety merely because the DFM has received a fax from one of the parties, if the fax has been sent with the previous knowledge of the other party. In this case, this

was not always done even by the defending officer. Sending a message with a copy to your opponent, cannot amount in itself to "the previous knowledge and consent of the other party", but what happened here was a course of conduct where the parties waived that kind of irregularity by not objecting to it. However, there was never any waiver of the right to be at least given a copy of any communication sent; nor was there anything in the conduct of the parties which indicated that no objection would be taken to material which was irrelevant to any procedural application and potentially damaging or prejudicial to the appellant's case.

68. Mr Tracey QC, submitted that the application to disqualify for bias must be timely and that the appellant had not made such an application. In *Vakauta v Kelly* (1989) 167 CLR 569, at 587, Toohey J, with whom Brennan, Deane and Gaudron JJ agreed, said:

> *"... when a party is in a position to object but takes no steps to do so that party cannot be heard to complain later that the judge was biased."*

69. So far as the complaint about the communication on 30 June 1998 is concerned, that matter was raised on the first day of the resumed hearing on 9 March 1999, the information only coming to the defending officer's knowledge in February. We do not think there was any waiver of that conduct. The complaint about the fax on 9 January 1999 is more difficult to decide, as clearly the opportunity to raise that objection arose on 11 January 1999 and it was not raised. So far as the faxes and communications of 15 January 1999 are concerned, although it appears that the defending officer had inadvertently read the faxes on 9 March 1999, she did not have copies of them and it is not established, in our opinion, that she was in a position to raise any objection to them until they were produced on 23 March. We would reject the submission that there was any waiver in relation to the communications on 15 January 1999.

70. Counsel for the respondent urged us to take the view that the faxes of 15 January should be seen in the context of a well established culture that both sides were free to communicate directly with the DFM about procedural matters. He conceded that the faxes of 15 January went beyond this and contained prejudicial material which should not have been made known to the DFM, but it was submitted that the evidence showed that the DFM's conduct was that he wanted all of the correspondence to be tendered (so there was no suggestion of hiding anything), that the DFM had himself forgotten about that correspondence until it was raised on 23 March, that he thereafter made it clear that he had taken no notice of the offending material, and therefore had dispelled any possible suggestion or apprehension of bias.

71. We do not accept this submission. In March, the proceedings were conducted in an atmosphere of considerable hostility by the DFM towards the appellant and the defending officer, some of which may well have been justified. However, the fax of 15 January was of such a nature that it ought to have been disclosed immediately by the DFM to the defending officer. To make matters worse, the evidence discloses that the DFM apparently approved not only of the uplifting of certain exhibits, but also, of keeping secret of the offending communication as well. No other explanation was offered by the DFM. Despite the requests of the DFM to the parties to tender all of the communications, this was not properly attended to by the prosecutor; yet the DFM ensured that on 23 March the defending officer tendered documents which he felt ought to be tendered. The offered explanation of oversight until reminded of the existence of this document does not stand careful scrutiny, as by this time, the DFM had had plenty of opportunity to retrieve his own correspondence file. Finally, although complaint was made of it, the true significance of the faxes of 15 January was not dealt with by the DFM in his reasons.

72. We consider that the parties or the public might entertain a reasonable apprehension that the DFM might not have brought an impartial and unprejudiced mind to the resolution of the questions he had to decide. We do not enquire into whether the prosecutor's comments in the fax of 15 January in fact prejudiced the appellant; it is sufficient that they may have done so, see *Re JRL; Ex parte CJL* (supra) at 349-350 per Gibbs CJ. In these circumstances we conclude that the learned DFM should have disqualified himself and that his failure to do so amounted to a material irregularity giving rise to a substantial miscarriage of justice (see s23(1)(c) *Defence Force Discipline Appeals Act 1955* (Cth)) and accordingly that the convictions must be quashed on this ground as well.

Actual Bias – Ground 2.6

73. The appellant further contended that the DFM was guilty of actual bias, arising out of certain comments allegedly made by the DFM in chambers, concerning the appellant's inability to attend the court for medical reasons on 12 March 1999. There is no evidence before us to support that contention and we accordingly dismiss it.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Decision herein of their Honours, Justices Gallop, Underwood and Mildren.

Associate:

Dated: 19 November 1999

Counsel for the Appellant:	Mr G B Hevey with Capt L M Hudson
Solicitor for the Appellant:	Lynn Hudson
Counsel for the Respondent:	Mr R R S Tracey QC with Cmdr D J Letts CSM RAN
Solicitor for the Respondent:	Australian Government Solicitor
Dates of Hearing:	2-3 November 1999
Date of Judgment:	4 November 1999