

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Kasprzyck v Chief of Army [2001] ADFDAT 5

CRIMINAL LAW - PARTICULAR OFFENCES - PROPERTY OFFENCES - receiving and possession of property stolen or reasonably suspected of being stolen or unlawfully obtained - possession of property stolen or reasonably suspected of being stolen or unlawfully obtained - time - whether the property must be in possession at any particular time - whether must be in possession at time of charge or time of investigation

CRIMINAL LAW - PARTICULAR OFFENCES - PROPERTY OFFENCES - receiving and possession of property stolen or reasonably suspected of being stolen or unlawfully obtained - possession of property stolen or reasonably suspected of being stolen or unlawfully obtained - other matters - meaning of "unlawfully obtained".

DEFENCE AND WAR - DEFENCE FORCES - OFFENCES - by members of the forces and persons liable to serve - charges entertained - behaviour in a manner likely to prejudice the discipline of the Defence Force - what constitutes.

Defence Force Discipline Act 1982 (Cth) ss 46, 60, 47

Ex parte Patmoy; Re Jack (1944) 44 SR (NSW) 351 discussed
R v English (1989) 17 NSWLR 149 discussed
Cleary v Wilcocks (1946) 63 WN(NSW) 101 discussed
Aldridge v Marks (1943) 44 SR (NSW) 69 referred to
Moore v Allchurch [1924] SASR 111 referred to
Purden v Dittmar [1972] 1 NSWLR 94 referred to
Chief of General Staff v Stuart (1995) 133 ALR 513 applied

**RANDOLPH WINFRIED KASPRZYCK v CHIEF OF ARMY
NO DFDAT 1 OF 2001**

**HEEREY J (President), UNDERWOOD J (Deputy President) & MILDREN J (Member)
DARWIN (HEARD IN BRISBANE)
10 SEPTEMBER 2001**

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 1 OF 2001

**BETWEEN: RANDOLPH WINFRIED KASPRZYCK
 APPELLANT**

**AND: CHIEF OF ARMY
 RESPONDENT**

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

DATE OF ORDER: 10 SEPTEMBER 2001

WHERE MADE: DARWIN (HEARD IN BRISBANE)

THE TRIBUNAL ORDERS THAT:

1. The appeal is allowed.

2. The convictions are quashed and the penalties set aside.

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 1 OF 2001

BETWEEN: RANDOLPH WINFRIED KASPRZYCK
APPELLANT

AND: CHIEF OF ARMY
RESPONDENT

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

DATE: 10 SEPTEMBER 2001

PLACE: DARWIN (HEARD IN BRISBANE)

REASONS FOR JUDGMENT**HEEREY J (President)**

1 The appellant, a Lieutenant in the Australian Army, was convicted by a Defence Force Magistrate (DFM) on one count of possession of property suspected of being unlawfully obtained contrary to the *Defence Force Discipline Act* 1982 (the DFD Act), s 46(1), and five counts of prejudicial behaviour contrary to the DFD Act, s 60. Section 46 provides:

"Possession of property suspected of having been unlawfully obtained
46¾ (1) *A person, being a defence member or a defence civilian, who is in possession of property that may be reasonably suspected of having been unlawfully obtained is guilty of an offence for which the maximum punishment is imprisonment for 6 months.*

(2) *It is a defence if a person charged with an offence under this section:*

(a) *was not aware that he or she was in possession of the property to which the charge relates;*

(b) *was not aware of the circumstances by reason of which that property may be reasonably suspected of having been unlawfully obtained; or*

(c) *had a reasonable excuse for his or her possession of the property.*

(3) *It is a defence to a charge of an offence under this section if the property to which the charge relates was not unlawfully obtained."*

2 The charge under this section was that the appellant

"... being a defence member at Enoggera, Queensland between 17 April 00 and 4 May 00 was in possession of property, namely a mobile telephone and

battery charger which may be reasonably suspected of having been unlawfully obtained."

3 The DFD Act, s 60, provides

"Prejudicial behaviour

A defence member who, by act or omission, behaves in a manner likely to prejudice the discipline of, or bring discredit upon, the Defence Force is guilty of an offence for which the maximum punishment is imprisonment for 3 months."

4 The charge under this section was that the appellant

"... being a defence member at Enoggera, Queensland on 18 April 00 did behave in a manner likely to prejudice the discipline of the Australian Army by using a mobile telephone, the property of Lt P J Ketton without the consent of the said Lt P J Ketton while the said Lt P J Ketton was on active service, Operation Tanager, East Timor."

Charges in identical terms alleged breaches of s60 on 19 April, 23 April, 26 April and 1 May 2000.

5 The evidence and the reasons for decision of the DFM are set out in the reasons for judgment of Underwood J. I shall not repeat them except to the extent necessary to explain the conclusions which I have reached.

Contemporaneous Possession and Suspicion

6 The primary argument of counsel for the appellant in relation to the s46 count was that the section does not apply where the defendant has parted with possession of the property prior to any reasonable suspicion being formed.

7 A line of New South Wales cases beginning with *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351 and concluding with *R v English* (1989) 17 NSWLR 149 holds that under the equivalent New South Wales provision (now the *Crimes Act 1900* (NSW), s 527C(1)(a)) it is for the court to decide whether it is satisfied, at the time of its decision, that it is then proper to entertain a reasonable suspicion that the goods were stolen or unlawfully obtained. The New South Wales provision is in these terms:

"Any person who:

- (a) has any thing in his or her custody,*
- (b) has any thing in the custody of another person,*
- (c) has any thing in or on premises, whether belonging to or occupied by himself or herself or not, or whether that thing is there for his or her own use or the use of another, or*
- (d) gives custody of any thing to a person who is not lawfully entitled to possession of the thing,*

which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained, shall be liable on conviction before a Local Court constituted by a Magistrate sitting alone to imprisonment for 6 months, or to a fine of 5 penalty units."

8 Courts in other Australian jurisdictions have reached a different conclusion, albeit on statutory provisions which may be distinguishable from that in New South Wales. In *McDonald v Webster* [1913] VLR 506, *Hofstetter v Thomas* [1968] VR 199 at 206 - 207 and *Nicholls v Young* [1992] 2 VR 209 at 215, it was held that the time to be looked at for the formation of suspicion was the time when the accused was found in possession of property. In *Ryan v Dimitrovski* (1996) 16 WAR 457 at 471 - 476, the Full Court of the Supreme Court of Western Australia held that the relevant time at which the grounds for suspicion must exist is that at which the person charged is brought before a justice. However in the course of refusing an application for special leave in that case (*Dimitrovski v Ryan* (1998) 72 ALJR 1172) the High Court, (Gaudron, Gummow and Hayne JJ) said

"We are of the view that the preferable construction of s 69 [of the Police Act 1892 (WA)] requires reasonable grounds for suspicion when the person concerned is charged. However, that question does not arise on the evidence in the present case."

9 But the critical issue in the present case is not whether suspicion must be formed at the time of possession (or apprehension, or charge) as opposed to time of hearing. Rather it is whether possession which has ceased before any suspicion was formed at all comes within the section.

10 *English* did not hold the offence could be committed by a person who had parted with possession prior to apprehension or charge. On the contrary, the Court of Criminal Appeal answered in the affirmative the case stated (at 150) which asked whether s527C(1)(a) required

"... that at the time that a person is apprehended for an offence under that section that that person must have custody of the goods in question."

11 The case of the defendant who has parted with possession prior to apprehension or charge was squarely before Herron J in *Cleary v Wilcocks* (1946) 63 WN(NSW) 101. On 17 May 1945 a police officer went to the defendant's shop and told the defendant he was looking for 220 wrist watches of a particular make which had been stolen. The defendant acknowledged to the police officer that he had sold some thirty-two watches answering that description three days before. At the hearing that evidence was confirmed by a witness who said he had in fact purchased the watches from the defendant on 14 May 1945. The magistrate dismissed the summons on the grounds that at the relevant time the respondent did not have the goods. Herron J said (at 102):

"In my opinion the magistrate's decision was a correct one. The history of the section as revealed by the judgment of the Chief Justice in Ex parte Patmoy (1994) 44 S.R. 351 shows the section to be an independent offence creating section, and not merely as a complement of other sections which are designed to give constables of police a wider power of arrest than that conferred at common law The words 'having anything in his custody' also imply a present or actual dominion over the goods, and not something which is at that time a past or antecedent state of affairs."

12 Nothing was said in *English* to question the correctness of *Cleary v Wilcocks*. Gleeson CJ (with whom Enderby and McInerney JJ agreed) said (at 155) that "it plainly support[ed]" the appellant who, as already mentioned, was successful.

13 One reason for the controversy which has attended the offence of unlawful possession is that in its earliest statutory form it was part of statutory provisions governing powers of arrest. The seminal provisions were the *Metropolitan Police Act* 1839 (Imp), s66, and the *Metropolitan Police Courts Act* 1839 (Imp), s24. The former empowered a constable to stop, search and detain any person who might reasonably be suspected of having or conveying in any manner anything stolen or unlawfully obtained. The latter provided that every person who should be brought before a magistrate charged with having in his possession etc anything reasonably suspected of being stolen or unlawfully obtained and should not give an account to the satisfaction of the magistrate how he came by the same should be guilty of a misdemeanour.

14 However s46 is a free standing offence. It appears in a modern statute of military discipline. A number of offences prescribed by the DFD Act are essentially military in

nature, eg leaving post (s 17), endangering morale (s 18) and behaviour after capture by enemy (s 19). Others, like s46 and s47 (stealing and receiving) are little, if any, different from their civilian equivalents. But, relevantly for present purposes, the principles of the common law with respect to criminal liability apply (s 10) including the onus of proof beyond reasonable doubt on the prosecution (s 12(1)).

15 In the ordinary application of the criminal law the crime must be complete, in the sense that all necessary elements must be in existence, as at the date or dates specified in the charge. One of the elements of the offence created by s46(1) is possession of property that has a certain quality or attribute, namely that it may be reasonably suspected of having been unlawfully obtained. In the same way, s45 creates the offence of being in possession of service property without lawful authority. The property in question would have to answer the description of being service property at the time of the defendant's possession. In my opinion, s 46 does not extend to possession of property which once was, but is not at the time it is in the defendant's possession, reasonably suspected of being unlawfully obtained. Conversely, neither does it extend to property previously possessed by the defendant which is only reasonably suspected of being unlawfully obtained at and from some time after the defendant's possession ceased.

16 The defences prescribed by s46(2) all proceed on the implicit assumption that the defendant was in possession of the property in circumstances which *then* gave rise to the relevant suspicion. The defendant can make out the defence if, although legally in possession, he was not aware of such possession (par (a)), or although circumstances might objectively give rise to reasonable suspicion he was not then aware of them (par (b)), or that he had a reasonable excuse for his then possession, notwithstanding that the circumstances gave rise to reasonable suspicion (par (c)).

17 The second of these defences (subs (2)(b)) in particular is difficult to reconcile with a construction of s46(1) which extends to a defendant who has parted with possession long before any suspicion generating circumstances came into existence. The natural reading of par (b) is that the defendant "was not [then] aware of the circumstances", that is at the time he was in possession. This is consistent with par (a), which obviously deals with the time the defendant is in law in possession, although he is not aware of it.

18 Another consideration is that s 46 is somewhat Draconian. Unlike receiving (s 47(2)), where the prosecution has to prove beyond reasonable doubt that the defendant knew the property was stolen, it is sufficient for the prosecution to prove objective circumstances giving rise to reasonable suspicion (not proof) of unlawful obtaining of the property, without establishing any state of mind (let alone a dishonest one) on the part of the defendant. The onus is then on the defendant, albeit on the balance of probabilities (s 12(2)), to make out if he can the defences under subss (2) or (3). It would be a harsh construction of s 46 to make it apply in circumstances where the defendant had departed with possession, perhaps years ago, and the prosecution says that there is now suspicion that the property was unlawfully obtained and it is up to the defendant to make out the defences if he can.

19 The history and language of s 46 can be reconciled in the following way. Section 46, unlike its ancestors, is unconnected with any regulation of arrest powers. There is no question of tempering a power of arrest on suspicion by requiring a defendant to be brought immediately before a court and give an explanation to that court. Reasonable suspicion is an element of the offence which has to be in existence at the time of the charge. The section does not operate as though the charge read

"being a defence member ... was in possession of property ... which may reasonably be suspected by the Defence Force Magistrate before whom this prosecution is brought of having been unlawfully obtained."

However the basic historical link between possession and suspicion remains. It is the defendant's possession and the circumstances surrounding it which must give rise to the suspicion, like the beggar with the diamond ring.

20 In my opinion, the facts found did not constitute an offence against s46 because the appellant had parted with possession of the phone before any investigation or charge.

Unlawfully obtained

21 Although perhaps not clearly apparent from the notice of appeal, this issue was debated on the hearing.

22 In my opinion, "unlawfully" in s46 connotes dishonesty. It does not extend to an obtaining which does no more than confer on another person a civil remedy in trespass,

conversion or the like. Nor would "unlawfully" extend to conduct which is no more than socially inappropriate or morally blameworthy. In *Aldridge v Marks* (1943) 44 SR(NSW) 69 the Full Court of the Supreme Court of New South Wales held that "unlawfully" in the corresponding unlawful possession section had to be read *ejusdem generis* with the words "stolen". In delivering the judgment of the Court, Jordan CJ said, (at 70):

"... the whole question is as to the meaning of the phrase 'unlawfully obtained'. Does it mean obtained in any way which involves or has involved some breach of the law, criminal or civil, or at any rate of the criminal law, or should it be read ejusdem generis with the word "stolen" which precedes it? There is no doubt that the word 'unlawfully' may be controlled by its context. Lyons v Smart (1908) 6 C.L.R. 143 is an instance of this. I think it is so in the present case. I think that in its context it refers to things the obtaining of which was unlawful because it took a form analogous to theft, such, for example, as embezzlement, obtaining property by false pretence with intent to defraud, or taking for the purpose of unlawfully using. But I do not think that it covers, for example, the case of a man who has in his possession a bottle of beer which he is suspected of having bought after closing hours or at a higher price than is allowed by law, or a man who has in his possession money which is suspected to be the proceeds of selling or pawning something which he has stolen, unless he could be reasonably suspected of having also obtained the money from the buyer or pawnbroker by some practice which was itself ejusdem generis with theft."

23 In the DFD Act, s46 simply uses the expression "unlawfully obtained", rather than "stolen or unlawfully obtained". This is probably explicable as a drafting choice because the common law concept of stealing has been replaced by the complex definition in s 47. This being a statute imposing criminal liability, I see no reason for now departing from the reasoning in *Aldridge*.

24 In the circumstance of the present case the only person who could have "obtained" the mobile telephone was the appellant. That obtaining could only have been unlawful if it contravened s47, which provides for the statutory equivalent of stealing and receiving in these terms:

"(1) 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 person with the intention of permanently depriving the other person of it is guilty of an offence for which the maximum punishment is imprisonment for 5 years.

- (2) *A person, being a defence member or a defence civilian, who receives property that to the person's knowledge has been appropriated in circumstances constituting an offence against subsection (1) or that has otherwise been unlawfully obtained is guilty of an offence for which the maximum punishment is imprisonment for 5 years."*

Subsection (3) contains various extensions of the terms of subs (1). Paragraph (a) deems intent in certain cases to amount to intent to permanently deprive the owner. None of them appear to be relevant in the present case. The only other possible relevant provision is par (f) which provides:

- "(f) *[S]ubject to paragraph (g), an assumption by a person of the rights of an owner with respect to property (including, where the person has come by the property in circumstances that do not constitute an offence against this section, a subsequent assumption of a right to the property by keeping or dealing with it as owner) amounts to an appropriation of the property;"*

Even if, in the circumstances of the present case, what the appellant did amounted, by virtue of par (f), to an appropriation of the phone, there would still need to be an intent to permanently deprive Lt Ketton. There was no finding as to this and it seems impossible on the facts to conclude that there could be.

25 Then there is the further difficulty that there would need to be a finding that, if there was an appropriation with intent to permanently deprive Lt Ketton that appropriation was dishonest. Even the finding that the appellant did not have an honest belief that Lt Ketton would have consented to his use of the phone (which is in any case flawed for the reasons discussed below), there is not a positive finding that the appellant believed that Lt Ketton would not have consented, or any finding that the appellant acted dishonestly.

26 The DFM has confused consent with the motive for consent. An owner may consent to the taking of his or her property (presently, prospectively or, as in the present case, retrospectively) for an infinite variety of reasons. The owner may be bound by ties of family or friendship or institutional loyalty to the taker. The fact that an owner consents, perhaps indulgently, out of such motives does not make it any the less a real consent. Consenting to taking is just one aspect of an owner's right to deal with his or her property as he or she pleases. The conduct of the appellant, before any investigation commenced, in returning the phone together with \$150 in cash and a promise to pay any shortfall seems impossible to reconcile with any finding of dishonesty. The appellant did not have access to the telephone

company's account and \$150 seems not a wholly unreasonable estimate for usage from 17 April to 4 May, even though the actual charges for that period turned out to be \$242. Importantly, the appellant identified himself as the user. He was a friend and fellow officer of Lt Ketton who had entrusted him with other property. There was no ground for concluding that Lt Ketton was going to be out of pocket.

27 The foregoing discussion speaks in terms of what findings could properly be made. Strictly speaking of course it is rather a question as to whether there could be a reasonable suspicion of unlawful obtaining, or whether the defence under subs (3) is made out. However, the net result is that the conviction must be set aside.

Prejudicial Behaviour

28 Plainly thieving or abuse of personal property could be very destructive of the trust and loyalty that is essential for proper military discipline. However, once it is concluded that the appellant did not deal with the phone in a dishonest way I do not think the conviction of prejudicial behaviour can stand.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey.

Associate:

Dated: 10 September 2001

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 1 OF 2001

BETWEEN: **RANDOLPH WINFRIED KASPRZYCK**
APPELLANT

AND: **CHIEF OF ARMY**
RESPONDENT

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

DATE: **10 SEPTEMBER 2001**

PLACE: **DARWIN (HEARD IN BRISBANE)**

REASONS FOR JUDGMENT

UNDERWOOD J (Deputy President)

The facts

29 The facts as found by the learned Defence Force Magistrate (the DFM) were largely common ground. At all material times prior to 16 April the appellant, Lt Ketton and certain other officers lived in the 6 RAR Officers Mess. Lt Ketton had a mobile phone and a charger pursuant to an agreement with Optus. Lt Ketton departed for East Timor as part of Operation Tanager on 16 April 2000. On departure he left his mobile phone and charger in his pigeonhole, having made arrangements for his sister to collect them. These arrangements were not communicated to the appellant. Lt Ketton had lent his video-player to the appellant who had permission to use it.

30 At some time after Lt Ketton's departure, the appellant took possession of the phone and charger. The appellant used the phone on a number of occasions which resulted in charges being debited to Lt Ketton's account. The appellant subsequently placed the phone in Lt Ketton's room sometime between 11 May and 16 May 2000. At the same time the appellant left \$150 in cash and two notes concerning the phone, and its use by the appellant, explaining that the money was to pay for calls made, and offering to pay any balance if that was not enough. No attempt had been made to contact Lt Ketton whilst he was away.

31 Lt Ketton did not in fact consent to the appellant having the phone and using it but indicated that if asked, he would have consented. The appellant did not give evidence, but two records of interview were tendered by the prosecution to which the DFM had regard. The appellant said in a record of interview of 17 May, that he took possession of the phone and charger four to five days after Lt Ketton's departure and that Lt Hedges was with him. The DFM observed that Lt Hedges said that he departed for East Timor on 21 April 2000. The DFM found that the phone had been used on every day from 17 April to 4 May 2000, and he was satisfied beyond reasonable doubt that the appellant had possession of the phone from 18 April 2000, and to this extent the appellant's assertion that he took possession of the phone some days after Lt Ketton's departure was rejected. The DFM found that the appellant took the phone, not to afford it security, but for the purpose of using it himself and that the appellant had no honest belief that Lt Ketton would have consented to the use of the phone in the circumstances. In arriving at the latter conclusion, the DFM found that there was no established understanding between Lt Ketton and the appellant that he might use the phone, and that Lt Ketton's evidence that he would have consented "is a matter going more to his loyalty to a comrade than anything else."

32 The DFM found that it "was proper to entertain a suspicion that the property may be reasonably suspected of having been unlawfully obtained" because of a combination of the fact that the appellant did not have Lt Ketton's consent to take the phone into his possession, and charges were incurred which were debited to Lt Ketton's account as a result of the appellant's use of the phone in circumstances where no meaningful attempt had been made to contact Lt Ketton. It followed from this, that the DFM was satisfied that none of the statutory defences to the first charge provided by the DFDA, s 46(2), had been made out.

33 As to counts 2 - 6, the DFM was satisfied that on the relevant dates the appellant used the phone, that the phone was the property of Lt Ketton, and that the use was without Lt Ketton's consent. He was further satisfied that the appellant knew that he did not have Lt Ketton's consent or was reckless as to whether he had that consent or not. Because the appellant used the personal property of a comrade who was overseas at the time in those circumstances, and because no meaningful effort was made to contact Lt Ketton, the DFM concluded that the appellant's behaviour was such as to be likely to prejudice the discipline of the Australian Army, primarily because "there is plainly a risk that his (ie, Lt Ketton's) trust in his comrades at home will be disturbed". In arriving at the latter conclusion, the DFM

relied upon his own knowledge as a member of the Defence Force, directed himself that the word "likely" meant "probable" rather than merely "possible", and directed himself:

"... that to prejudice the discipline in this context means to injure or impair discipline necessary to maintain an orderly, well managed and well controlled service. The conduct concerned must be such that it cannot be tolerated in an armed service if discipline among its members is to be maintained. In light of those directions it is not necessary for me to be satisfied that discipline was, in fact, prejudiced. To that extent the test is an objective one for the Tribunal."

Grounds of appeal

34 The grounds of appeal with respect to the first conviction as set out in the notice of appeal are:

- 1 *The DFM erred in concluding that under s46 DFDA there is no requirement upon the prosecution to prove that the property is in the possession of the accused at the time the reasonable suspicion is formed.*
- 2 *The DFM erred in failing to find that voluntary dispossession of the property prior to apprehension or charging meant the offence was not made out.*
- 3 *The DFM erred in failing to find no case to answer.*

Particulars

- (a) *He failed to direct himself as to the drawing of inferences;*
 - (b) *In the premises, he could never be satisfied beyond reasonable doubt that the obtaining of the phone by the Appellant was unlawful.*
- 4 *The verdict is unsafe and unsatisfactory and/or no reasonable Tribunal could have convicted the Appellant.*

Particulars

- (a) *The Appellant said he took possession of the telephone for security, at least to start with.*
 - (b) *There was no evidence to contradict the Appellant's assertions.*
- 5 *The DFM failed to adequately direct himself as to defences available under s 46 and as to mistake of fact."*

35 The grounds of appeal with respect to the second to sixth convictions:

- 1 *The DFM erred in failing to find a case to answer.*
- 2 *The verdicts are unsafe and [sic] unsatisfactory and/or no reasonable Tribunal could have convicted the appellant.*
- 3 *The DFM failed to adequately direct himself as to a mistake of fact."*

36 Further particulars of the grounds were set out in the notice of appeal, but it is not necessary to set them out.

The relevant time of possession

37 The DFM's finding of fact was that the appellant had possession of the phone between 17 April 2000 and 4 May 2000. The investigation began on or shortly before the 16 May and the charge was laid on 22 February 2001. The appellant had divested himself of possession of the phone by the time the investigation began and of course, by the time the charge was laid.

38 In this respect, the facts are indistinguishable from those in *R v English* (1989) 17 NSWLR 149. The respondent in that case was not in possession of the relevant property at either the time the investigation began nor at the time of charge, but admittedly had been in possession of it eight days earlier. The charge in that case pleaded that on the 10 October 1986 she had in her custody bank notes may be reasonably suspected of being stolen or otherwise unlawfully obtained.

39 It is now beyond question since *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351 that under the *Crimes Act* (NSW) 1900, s527C, the element of "may be reasonably suspected of being stolen or unlawfully obtained" does not require proof that a reasonable suspicion that the property is stolen or unlawfully existed at the time the defendant was found in possession of the property. That element requires proof that at the time of the hearing, the property was such that there attached to it a reasonable suspicion that it had been stolen or otherwise unlawfully obtained. The existence of a reasonable suspicion that the property may reasonably be suspected of having been unlawfully obtained is an objective description of the property in question. The position in this respect is well described by the NSW Court of Appeal in *R v Madden* (unrep) No 6057/1994 where Hunt CJ at CL said at 2:

"The issue which the prosecution must establish under s 527C is not whether the arresting police officer or the court reasonably suspects that the thing was unlawfully obtained; rather, it is whether such a description may objectively relate to the thing itself - that it is something which might reasonably be suspected of having been unlawfully obtained. (Willis v Burnes (1921) 29 CLR 511 at 514; Cleary v Hammond (1976) 1 NSWLR 111 at 116-117; Regina v Michael Ernest Carter (CCA, 9 March 1978, unreported) at 4,6; Regina v Abbrederis (1981) 1 NSWLR 530 at 544 (SLAR 8 October 1981, at 281); Anderson v District Court (1992) 27 NSWLR 701 at 714-715; Regina v Chan (1992) 28 NSWLR 421 at 425, 433, 435-436). The issue is one of suspicion (which must be a reasonable one), not of either knowledge or belief. (Tucs v Manley (1985) 62 ALR 460 at 461, 464; Anderson v District Court (at 714); Regina v Chan (at 437)). It is unnecessary to prove that the person

charged entertained, or may have entertained, such a suspicion. (This is an issue which may be raised in relation to the defence afforded by s 527C(2). Note that this defence does not amount to a statutory reversal of the onus of proof. Ex parte Patmoy; Re Jack (1944) 44 SR 351 at 356; Tegge v Caldwell (1988) 15 NSWLR 226 at 227-228; Anderson v District Court (at 716-717)). Nor is it necessary to prove that the thing was in fact unlawfully obtained. (Rex v Grace (1930) 30 SR 158 at 163; Regina v Michael Ernest Carter (at 10); Regina v Chan(at 433)."

40 However, this does not answer the appellant's argument which is that even if proof of the existence of the reasonable suspicion falls to be determined at the time of the hearing, upon its proper construction, the Act, s 46(1), requires proof that either at the time of being charged, and/or at the time of going before a justice, the defendant then had possession of the property to which there is attached the reasonable suspicion that it was unlawfully obtained.

41 In *Cleary v Wilcocks* (1946) 63 WN (NSW) 101, it was held that pursuant to the terms of the *Crimes Act* (NSW), s 527C(1), there must be proof that the defendant was in possession of the relevant property at the time he or she is charged, even though application of *Re Patmoy* means that the time of the hearing is the time at which there must be proof of the existence of a reasonable suspicion that the goods were stolen or unlawfully obtained. At the time of that decision the "goods in custody" offence was enacted in the *Police Offences Act* (NSW) 1901, s 27. It provided:

"Whosoever being charged before a justice with:

- (a) having anything in his custody; or*
- (b) knowingly having anything in the custody of another person; or*
- (c) Knowingly having anything in a house, building, lodging, apartment, field or other place, whether belong to or occupied by himself or not, or whether such thing is there, had or placed for his own use or the use of another,*

which think may be reasonably suspected of being stolen or unlawfully obtained ..."

42 The introductory words of the section were influential in the decision that there must be proof of possession at the time of the charge being laid. Herron J said at 102:

"The section in its natural meaning, however, deals with the position of a person who is being charged before a justice, and the section in its natural and ordinary language means that when a person is being charged before a justice with having anything in his custody which thing may be reasonably suspected of being stolen, he is called upon to account for his possession of it

satisfactorily to the justice. Apart from any authority on the point I would have been prepared to hold that the natural meaning of the section was that the time at which the section begins its operation is when the person is charged before a justice with having a thing in his custody."

43 In 1970, the "goods in custody" offence was enacted in the *Summary Offences Act* (NSW), 1970, s 40. At that time two changes were made to the provisions of *Police Offences Act* (NSW) 1901, s 27. The first was the replacement of the introductory words "Whosoever being charged before a justice" with the words "Any person who: (a) has anything in his custody ... " and the second was to add par (d) which provided:

"Any person who:

...

(d) gives custody of any thing to a person who is not lawfully entitled to possession of the thing, which thing may be reasonably suspected of being stolen ...".

44 Those provision are presently enacted in the *Crimes Act* (NSW), s 527C(1)

45 All of the foregoing matters were canvassed and discussed by Gleeson CJ in *English* (supra), with whose reasons for judgment the other members of the Court agreed. He came to the conclusion that where the charge is laid under the *Crimes Act*, s 527C(1)(a) ³/₄ "has any thing in his or her custody ..." there must be proof of custody at the time of being charged. He reasoned:

- the history of the legislation shows that it used to concern only cases where persons were caught *flagrante delicto*;
- the history provided a "clue" to modern interpretation;
- if the historical view does not apply to s527C(1)(a), there was no need to enact s 527C(1)(d) for that expressly deals with cases where the goods are not in possession at the time of being charged.

46 All of the foregoing the Parliament was presumed to know when it enacted the *Defence Force Discipline Act* 1982, ("the Act"), s46(1). The section is enacted in simple terms:

"A person, being a defence member or a defence civilian, who is in possession of property that may be reasonably suspected of having been unlawfully

obtained is guilty of an offence for which the maximum punishment is imprisonment for 6 months"

47 The inference to be drawn from the reasoning in *English* is that having regard to the legislative developments since the early 20th century, and having regard to the judicial consideration of those developments, had the section under consideration in that case simply referred to "any person who has any thing in his or her custody which may reasonably be suspected of having been stolen" there would be no requirement to prove coincidence of the requisite suspicion with possession, nor a requirement to prove coincidence of possession and the time of being charged. The Act, s46(1) has been enacted in simple terms, shorn of its history and like similar sections which create offences, requires proof beyond reasonable doubt that:

- on or about the date or dates alleged the defendant was a defence member of defence civilian;
- he or she then had possession of a thing; and
- it may be reasonably suspected that that thing was unlawfully obtained.

48 The foregoing analysis is supported when one has regard to two propositions viz:

- it is unlikely that in 1982, the Parliament would have wished to enact legislation that owed its origins to circumstances that existed more than a century earlier; and
- the Act conferred no power of arrest in the case of a person being found in possession of property reasonably suspected to having been unlawfully obtained contrary to s 46(1).

Unlawfully obtained

49 There is no definition of "unlawfully obtained" but it would obviously include "stolen". As the prescribed penalty for a breach of the section is imprisonment it seems improbable that Parliament intended that expression to include mere breaches of the civil law. Further, as the Act, s 46(1) requires proof only of a suspicion that the property was unlawfully obtained, it is not necessary to establish any particular unlawful act which gives rise to the suspicion the would not require proof of any particular unlawfulness. For example, there may attach to the property a suspicion that embraces a number of criminal scenarios such as that it might have been stolen or that it might have been received knowing

that it was stolen or that it might have been obtained a result of a fraud and so on. See *Moore v Allchurch* [1924] SASR 111 (tickets that were suspected of having been obtained by stealing or embezzlement); *Forrest v Normandale* (1973) 5 SASR 524 (property suspected of having been obtained by false pretences). When, as was commonly the case, the words "unlawfully obtained" were enacted as an alternative to stealing, it has been held that they are to be construed *eiusdem generis* with "stolen". See *Purden v Dittmar* [1972] 1 NSWLR 94; *Aldridge v Marks* (1943) 44 SR (NSW) 69. Common to all the cases is the notion of dishonesty and it seems likely that the Parliament intended this concept to lie at the heart of the expression "unlawfully obtained" as enacted in the Act, s 46(1).

50 Upon the facts of the present case, the only possible suspicion was that the phone had been stolen by the appellant. The crime of stealing is enacted in the Act, s 47(1). It 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 person with the intention of permanently depriving the other person of it is guilty of an offence for which the maximum punishment is imprisonment for 5 years."

51 The Act, s47(3)(f), provides an extended definition of "appropriates" to include the assumption of the rights of an owner (even though the property is acquired lawfully in the first instance). Accordingly, it might well be said that the appellant appropriated the phone when he started to use it to make calls for his own benefit, but there was nothing in the evidence to suggest that he either appropriated it dishonestly or that he did so with the intention of permanently depriving the owner of it.

52 The DFM found that the appellant took the phone not to afford him security as he claimed, but for the purpose of using for his own convenience. He also found that the appellant did not believe that Lt Ketton would have consented to him using the phone in the circumstances. The DFM then proceeded to find that the phone may be reasonably suspected of having been unlawfully obtained. He continued:

"I so conclude from my findings that the accused did not have the consent of Lieutenant Ketton to take his property into the accused's possession, and the fact that the phone was used during the period in question such that charges were debited to Lieutenant Ketton's account in circumstances where no meaningful attempt had been made to contact him."

53 The DFM did not analyse what unlawful conduct attended the obtaining of the phone, but as I have said, in the circumstances of this case, it could only have been a breach of the Act, s47. There was no evidence upon which the DFM could have entertained a suspicion that the phone was obtained dishonestly and/or with an intention to permanently deprive Lt Ketton of it. The extended definitions in the Act s47(3), other than one to which I have referred, are not relevant. It would appear that the DFM failed to distinguish between the obtaining of the telephone and its subsequent use. The only suspicion that could be entertained was that at some stage after the 17 May 2000 the appellant appropriated the phone, and even if there was also a suspicion that he did so dishonestly, there was no material to support a suspicion that he did so with the intention of permanently deprive the owner of his phone.

54 It is an error of law to find a fact when there is no evidence to support the finding. See *McPhee v S.Bennett Ltd* (1934) 52 WN (NSW) 8; *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8 - 9; *Australian Broadcasting Tribunal v Bond* (1990) 170 321 CLR at 355. Such an error attended the finding of guilt on the first charge and the conviction must be quashed. At the hearing before the DFM a submission of no case to answer was made at the conclusion of the prosecution case. It was overruled. The appellant gave no evidence and the hearing concluded with the addresses. In my view the submission of no case to answer with respect to the first charge should have been upheld for the reasons I have given. Ground 3(b) of the notice of appeal is made out.

Prejudicial Behaviour

55 The remaining five charges assert that on the date specified in the charge, the appellant used Lt Ketton's phone. This use was without Lt Ketton's permission although the DFM did not reject Lt Ketton's evidence that he would have consented to the use of the phone in the circumstances, had he been asked to do so. The DFM categorised that evidence as "a matter going more to his loyalty to a comrade than anything else", but as I understand him did not reject it as untrue." The DFM reasoned that the use of the phone was a matter likely to prejudice the discipline of the Australian Army because the taking of the phone was without the permission of the owner who was a comrade, it was used notwithstanding that there would be charge to the comrade's account, the comrade was overseas on service, there was no

contact by the appellant to the comrade and all of this gives rise to "the risk that his trust in his comrades at home will be disturbed."

56 In *Chief of General Staff v Stuart* (1995)133 ALR 513 there is a discussion about the meaning of the expression in the Act, s60 behaving "in a manner likely to prejudice the discipline ... the Defence Force ..." by Black CJ at 519 *et seq*, by Lockhart J at 535 *et seq* and by Lee J at 544. Although all the members of the Court were wary of holding that guilt of a breach of s60 required proof of blameworthy conduct, the Court was united in the proposition that the section was not concerned with trivial matters and matters that only remotely likely to prejudice discipline. The Court took the view that s 60 was only concerned with such behaviour that is likely to have a reasonably direct and palpable effect upon the good order and discipline of the Defence Force.

57 It seems to me that the convictions for breaches of the Act, s60 depend very much upon the findings made that the appellant came by the phone unlawfully. It cannot be doubted that stealing and then using a fellow officer's telephone is behaviour that offends against the provisions of s 60. However, use of the phone not obtained dishonestly, but only borrowed, is quite a different matter altogether, especially in the light of the undisputed evidence that Lt Ketton had entrusted the appellant with his video player and given him permission to use it while he was away and the former's evidence that had he been asked by the appellant if he could use the phone he would have given his permission for him to so. Accordingly, it seems to me that the error made with respect to the finding of guilt on the first charge so infected the finding of guilt on the other charges, that the convictions on those other charges are unsafe and unsatisfactory. I would uphold the second ground of appeal against conviction on counts 2 - 6 inclusive.

58 In all the circumstances of this case I do not consider it appropriate to exercise the power conferred by the Act, s 24, and order a new trial with respect to any of the charges. I would allow the appeal and quash all the convictions and penalties.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Underwood.
Associate:

Dated: 10 September 2001

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 1 OF 2001

BETWEEN: **RANDOLPH WINFRIED KASPRZYCK**
APPELLANT

AND: **CHIEF OF ARMY**
RESPONDENT

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

DATE: **10 SEPTEMBER 2001**

PLACE: **DARWIN (HEARD IN BRISBANE)**

REASONS FOR JUDGMENT

MILDREN J (Member)

59 I have had the advantage of reading the reasons for judgment prepared by Heerey J and by Underwood J. I agree that the appeal in relation to the conviction for being in possession of property that may reasonably be suspected of having been unlawfully obtained, contrary to s 46(1) of the *Defence Force Discipline Act* 1982 must be allowed, but I wish to state briefly my own reasons for arriving at this conclusion.

60 For my part, I do not consider that the many authorities to which we have been referred by counsel are of any assistance, because the legislative provisions which those authorities considered were quite different from the drafting of s 46(1) of the Act. As was submitted by counsel for the respondent Mr Tracey QC, the nearest State equivalent is s 527C(1)(a) of the *Crimes Act* 1900 (NSW), but there are nevertheless such significant differences between that provision and s 46(1) of the Act that I do not consider that the result in this case should be governed by the decisions of the New South Wales Court of Appeal. In my opinion, the correct approach to deciding what was the intention of the Commonwealth Parliament when it enacted this provision, is to construe the subsection by reference to the ordinary rules of statutory interpretation. I agree with Heerey J, for the reasons given in paragraphs 14 to 20 of his Honour's reasons, that on the true construction of s 46(1) there is no offence against that provision where the defendant has parted with possession of the property before any investigation or charge.

61 I also agree with Heerey J and with Underwood J for the reasons which they give, that the learned Defence Force Magistrate erred in concluding that possession of the property may be reasonably suspected of having been unlawfully obtained.

62 I also agree with the other members of the Tribunal that the convictions for breaches of s60 of the Act ought to be set aside. The charges in relation to s 60 relate to the use, as opposed to possession, of the telephone without Lt Ketton's permission. If all that had been known is that the appellant had used the telephone without permission whilst Lt Ketton was serving overseas, I have no doubt that the charges would have been made out. The use of the telephone resulted in Lt Ketton receiving telephone charges which totalled \$251.30. To use another serviceman's property in those circumstances is clearly behaviour likely to prejudice the discipline of the Defence Force for the reason that it strikes at the mutual trust which members of the Defence Force must have that their personal property, which cannot be secured in the same way as it can in civilian life, will not be interfered with.

63 However, as was held in *Re Cottingham's Appeal* (CMAT No 1 of 1972, 8 June 1972, unreported), the Tribunal "will be guided in its determination, both by the evidence of the whole of the surrounding circumstances as well as by its own service knowledge."

64 In my opinion there were several other pertinent relevant facts which needed to be taken into account. First, there was the evidence of Lt Ketton that had the appellant asked to borrow the telephone he would have given him permission and trusted him to repay the money for the phone calls, and that he held no ill-feelings toward the appellant. The learned DFM dealt with this evidence in relation to a defence to the charge against s 46(1) raised by the appellant, (that he honestly and reasonably believed that Lt Ketton would have consented to his use of the telephone), in this way:

The fact that Lieutenant Ketton gave evidence that he would have consented is a matter going more to his loyalty to a comrade than anything else. It plainly does not cast doubt on the accused's state of mind at the relevant time.

65 I infer that what the learned DFM meant was that Lt Ketton's evidence did not assist the appellant in respect of the defence of honest and reasonable mistake.

66 However, when considering the charges against s60, the learned DFM made no reference to Lt Ketton's evidence. Clearly that evidence was very relevant to those charges and to my mind it makes no difference that Lt Ketton was motivated to give this evidence out of loyalty to the appellant. The learned DFM did not find that he disbelieved Lt Ketton's evidence on this topic. There is no reason why the learned DFM should have disbelieved Lt Ketton. His evidence was not palpably false, nor was it inherently improbable. On the contrary there was uncontested evidence that he had entrusted his video player to the appellant for him to use, and there was no suggestion that the appellant had not subsequently reimbursed Lt Ketton for the phone calls he had made. The evidence strongly suggested that there was a close personal relationship of friendship and trust between the appellant and Lt Ketton, and that the latter did not regard the use of his telephone by the appellant as an abuse of that friendship and trust. In this respect it should also be borne in mind that the investigation into the charges against the appellant began whilst Lt Ketton was still overseas, and apparently the investigation was not as the result of any complaint made by him personally, but as the result of a complaint made by Lt Ketton's father. Lt Ketton had not even provided a statement until the day before the trial had begun. The learned DFM, by failing to take relevant matters into account, erred in law. Had these matters been taken into account, I consider that the conclusion to be drawn is that the appellant was not guilty. It is difficult to see how, in all of the circumstances, it could be said that the conduct would have had "a reasonably direct or proximate and clearly perceived effect upon the discipline and credit of the Defence Force" (*Chief of General Staff v Stuart* (1995) 133 ALR 513 at 536, per Lockhart J).

67 Accordingly, I concur with the orders proposed by the other members of the Tribunal.

68 The appeal is allowed and the convictions and penalties are quashed.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mildren.

Associate:

Dated: 10 September 2001

Counsel for the Appellant: Mr D. Campbell
Solicitor for the Appellant: Terry Fisher & Co
Counsel for the Respondent: Mr R.R.S. Tracey QC and Mr P.E. Nolan
Solicitor for the Respondent: Australian Government Solicitor
Date of Hearing: 17 August 2001
Date of Judgment: 10 September 2001