JUDGMENT No. DF2 / 87

# CATCHWORDS

Appeal - Offence of assaulting a superior officer - elements thereof - statutory defence that the accused neither knew, nor could reasonably be expected to have known that the victim was a superior officer - onus of proof of defence - standard of proof

Criminal Law - onus of proof of statutory defence contained in provision creating the offence - standard of proof

Defence Force Discipline Act 1982, ss.25 and 12

R v Reynhoudt (1962) 107 CLR 381

In Re M (summarised in Justitia In Armis Vol.4 No. 1, p.78)

He Kaw Teh v The Queen (1985) 157 CLR 523

Sherras v De Rutzen [1895] 1 QB 918

IN THE MATTER OF The Defence Force Discipline Appeal Act 1955
AND IN THE MATTER OF An appeal against conviction from Restricted Court-Martial of 312924 Corporal Steven Paul McInnes

No. DFDAT 2 of 1987

Adelaide, 27 August 1987

Before: The Hon FX Connor, President
The Hon Mr Justice Gallop ) Members
His Honour Judge Broad )

IN THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

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IN THE MATTER OF:

THE DEFENCE FORCE DISCIPLINE APPEAL ACT, 1955

AND IN THE MATTER OF:

AN APPEAL AGAINST CONVICTION FROM RESTRICTED COURT MARTIAL OF 312924 CORPORAL STEVEN PAUL McINNES

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Before

The Hon FX Connor, President

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This is an appeal against a conviction of the appellant at a Restricted Court-Martial held at Bandiana Barracks on Friday, 27 March 1987. The appellant was found guilty of assaulting his superior officer contrary to s.25(1) of the Defence Force Discipline Act 1982 (the Act). The only grounds of appeal argued on the hearing were that the Judge Advocate erred in his directions to the Court that in order to establish the offence the prosecution had to prove that the accused assaulted the victim and that at the time of the assault the victim was a superior officer of the accused; and further, that the Judge Advocate erred in directing the Court that the accused bore the onus of satisfying the Court on the balance of probabilities that he did not know and could not reasonably be expected to have known that the person assaulted was in fact his superior officer.

Section 25 of the Act is contained in "Part III - Offences" and "Division 3 - Offences relating to Insubordination and Violence" and is in the following terms:

> 25. (1) A defence member who assaults a superior officer is guilty of an offence for which the maximum punishment is imprisonment for 2 years.
>
> (2) It is a defence if a person charged with an offence under this section neither knew, nor could reasonably be expected to have known, that the person against whom the offence is alleged to have been committed was a superior officer.

It is necessary to refer to those parts of the summing up to which the grounds of appeal relate. At the commencement of his summing up the Judge Advocate dealt with the onus upon the prosecution to establish its case beyond reasonable doubt. He then said:

> The accused is not obliged to prove anything except in certain unusual situations one of which arises here ... I will refer to that later.

In dealing with the elements of the offence against s.25(1) of the Act the Judge Advocate directed the Court that they had to be satisfied beyond

reasonable doubt that the appellant had assaulted the person and that the person was a superior officer of the appellant. He did not include as an element of the offence that the appellant knew or could reasonably be expected to have known that the person assaulted was a superior officer. He said:

> Now the section which creates the offence to this particular charge also creates a defence and in the second part of the section it says that the accused who is charged with the offence has a defence if he neither knew nor could reasonably be expected to have known that the person against whom the offence is alleged to have been committed was a superior officer.

And a little later, he said:

> Normally it is for the prosecution to prove its case beyond reasonable doubt but where the accused relies, as he does here, on a defence that he neither knew nor could reasonably be expected to have known that the person he assaulted was his superior officer, then the onus shifts and the accused must prove that defence. But it is very important to understand that in proving that defence he does not have to reach the standard, the very high standard that the prosecution has to reach.
>
> The prosecution must prove those elements beyond reasonable doubt. The accused only has to prove this particular defence on the balance of probabilities.

He then went on to explain proof on the balance of probabilities.

At the end of his summing up the Judge Advocate invited the prosecutor and the defending officer to address him in relation to any further directions to the Court. No further directions were sought. On the hearing of this appeal, counsel for the respondent intimated that no reliance was placed on any failure by or on behalf of the accused to seek further directions.

It was submitted on behalf of the appellant that the above directions were wrong in law and that the Judge Advocate should have defined the elements of the offence charged to comprise an assault, that the victim was a superior officer and an awareness on the part of the accused that the

person assaulted was of superior rank. Counsel for the appellant relied upon the fact that under s.8 of the Army Act 1955 (UK) and reg. 203(1)(xiii) of the Australian Military Regulations, which create comparable offences of striking a superior officer and which are no longer applicable, there was included an element of knowledge on the part of the accused person that the person assaulted was a superior officer.

In R v Reynhoudt (1962) 107 CLR 381 it was held by a majority of the High Court (Taylor, Menzies and Owen JJ, Dixon CJ and Kitto J dissenting) that on a charge of assaulting a police officer in the execution of his duty contrary to s.40 of the Crimes Act 1958 (Vic) it is sufficient to prove intent in relation to the assault only; it is not necessary to show intent in relation to the other elements of the offence, namely that the person assaulted was a policeman and that he was acting in the execution of his duty.

After this decision the Director of Army Legal Services sought an opinion from the Judge Advocate General of the Australian Military Forces about the desirability of an amendment to the relevant part of the Manual of Military Law (Aust. Edn.) providing instruction about the elements of the offence created by s.8 of the Army Act 1955 (UK). The Judge Advocate General's ruling (which, pursuant to reg.575(10) of the Australian Military Regulations, bound all members of the Australian Military Forces) was to the effect that no amendment to the Manual was necessary and that the decision in R v Reynhoudt should not be applied to offences of striking a superior officer and similar charges. Accordingly, since the Judge Advocate General gave his ruling on 8 September 1965, the Army has continued to include knowledge on the part of the accused of the superior rank of the person assaulted as an element of the offence of striking a superior officer and similar offences. Consistently with that ruling, a conviction

by District Court-Martial on 1 November 1982 was quashed on the ground of failure to give a direction in clear terms about the necessity to prove knowledge on the part of the accused that the person against whom he had been convicted of using violence was his superior officer (In Re M, summarised in Justitia In Armis Vol.4 No.1, p.78).

It appears, however, that the Royal Australian Navy took a different view. In an advice dated 26 July 1978 the Judge Advocate General of the Royal Australian Navy advised the Chief of Naval Staff in relation to a conviction by Court-Martial for an offence of striking a superior officer that the accused's state of knowledge did not have to be proved by the prosecution as one of the ingredients of the offence. The Judge Advocate General of the Navy referred to R v Reynhoudt, supra, and, unable to distinguish that decision, advised that it was not necessary for the prosecution to prove knowledge on the part of the accused that the person assaulted was a superior officer.

Counsel for the appellant submitted that there were three ingredients of a the offence of assaulting a superior officer, an assault, a victim superior in rank to the accused and knowledge of the accused that the victim was his superior officer. On this footing, he submitted that s.25(2) was mere surplusage and could not, without the plainest of words, purport to transform a necessary ingredient of the offence, which had to be proved by the prosecution beyond reasonable doubt, into a defence which had to be proved by the accused on the balance of probabilities. He relied also on the fact that the maximum penalty for an offence under s.25 of the Act was two years whereas the maximum penalty for assault was six months. Thus, he argued, the accused could become liable for a substantially increased term of imprisonment by reason of the addition of an-element in respect of which he did not have a guilty mind.

As we have already indicated, it is by no means clear that knowledge on the part of the accused of the superior rank of the victim was an ingredient of the offence.

In construing s.25 and its inter-relation with s.12 of the Act it is important to observe that s.12 appears in "Part II - Criminal Liability" of the Act. Section 10, which is also in Part II, is headed "Common Law to Apply in Relation to Service Offences" and states:

> Subject to this Part, the principles of the common law with respect to criminal liability apply in relation to service offences ...

By that provision the legislature is giving a clear indication that the principles of the common law with respect to criminal liability are preserved in relation to service offences only to the extent that they are not supplanted by specific provisions of Part II of the Act.

In He Kaw Teh v The Queen (1985) 157 CLR 523 each member of the High Court took the relevant principle to be stated in Sherras v De Rutzen [1895] 1 QB 918, at p.921:

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.

In He Kaw Teh the High Court held that, in respect of the provisions of the Customs Act 1901 (Cth) there considered, the presumption that mens rea is required before a person can be held guilty of a grave criminal offence had not been displaced. The question here is whether that presumption has been displaced in s.25 of the Act.

Part of the legislative context in which s.25 appears has already been referred to. Part II of the Act is headed "Criminal Liability" and includes ss.10-14. Section 10 has already been set out. Section 12 provides:

12. (1) Subject to this section, in proceedings before a service tribunal, the onus of proving that a person charged has committed a service offence is on the prosecution and the standard of proof is proof beyond reasonable doubt.

(2) In proceedings before a service tribunal, the onus of proving a defence is on the person charged and the standard of proof is proof on the balance of probabilities.

(3) In this section, " defence means -

...

(d) where the service offence charged is an offence against this Act (other than sub-section 61(1)) or the regulations - a defence set out in the provision creating the offence; ...

Part III follows. It is headed "Offences". It contains ss.15-65. Twenty four of these sections contain a sub-section which provides for a defence to the offence created by the section. These defences fall into two main categories. The first main category provides a defence where the person charged with an offence under the section had a reasonable excuse for engaging in the behaviour to which the charge relates - see ss.15, 16, 17, 23, 28, 32, 40, 43, 48, 50 and 54A. The second main category provides a defence where the accused lacked knowledge in respect of some aspect of the conduct charged in the offence - see ss.25, 26, 27, 29, 31, 41, 49 and 58. Section 45 provides for a defence in each category. Sections 24, 44, 46 and 47 provide for defences which do not fall into either of the main categories.

In our view this legislative pattern in relation to the onus and standard of proof makes it clear that:

(a) in all service offences the onus of proving that an accused has committed the offence is on the prosecution and the standard of proof is beyond reasonable doubt and

(b) in many service offences the section which creates the offence also creates a defence; and the onus of proving that defence is on the accused; and the standard of proof is on the balance of probabilities.

Whatever may have been the ingredients of a service offence before the Defence Force Discipline Act 1982 commenced, we think it clear that, in those cases where the defence is now set out in the section which creates the offence, it can no longer be said that the subject-matter of the defence is an ingredient of the offence.

It was suggested faintly by counsel for the appellant that, because the defence was set out in a sub-section of the section creating the offence, it was not "set out in the provision creating the offence" within the meaning of those words in s.12(2)(c). We do not consider there is any substance in this submission.

We think, therefore, that s.12(2)(c) applies to each defence set out in a sub-section of the section which creates the offence. Consequently s.12(2)(c) is applicable, inter alia, to s.25(2). It is therefore appropriate to give s.12(2)(c) and s.25(2) a combined effect. By combining the effect of both provisions, the result reached is that it is a defence if a person charged with an offence under s.25(1) neither knew, nor could reasonably have been expected to have known, that the person against whom the offence is alleged to have been committed was a superior officer, that the onus of proving the defence is on the person charged and that the standard of proof is proof on the balance of probabilities. We think it abundantly clear, in the light of these provisions, that the words of the statute creating the offence and the defence have displaced the presumption that knowledge of the person charged that the person against whom the offence is alleged to have been committed was a superior officer is an essential ingredient of the offence.

For these reasons we do not think there was any error on the part of the Judge Advocate in his summing up. We therefore dismiss the appeal.

President

Member

Member