IN THE DEFENCE FORCE DISCIPLINE )
APPEAL TRIBUNAL ) DFDAT No.3 of 1989
SYDNEY REGISTRY )

IN THE MATTER of the Defence Force Discipline Act 1982 AND the Defence Force Discipline Appeals Act 1955

WO1 GRAHAM JOHN NEWBOULT

Appellant

CHIEF OF THE GENERAL STAFF

Respondent

REASONS FOR JUDGMENT

Members: The Hon. Mr Justice Woodward (President)
His Honour Judge Broad (Member)
The Hon. Mr Justice Gallop (Member)

Date: 11 May 1990.
Melbourne

In this matter the appellant has applied for leave to appeal and has also filed Notice of Appeal against his conviction and sentence for an offence against s.60 of the Defence Force Discipline Act 1982 in that he, a defence member, at 21 Supply Battalion, Moorebank, in the State of New South Wales, during February 1988 and March 1988 did behave in a manner likely to prejudice the discipline of the Defence Force, and in particular 21 Supply Battalion, by importuning F234164 Pte S.L. Johansson to have sexual intercourse with him. The appellant seeks leave to appeal on the following grounds:

(a) that the conviction is unreasonable and cannot be supported having regard to the evidence;

(b) that the conviction constitutes a substantial miscarriage of justice; and

(c) that the conviction is unsafe and unsatisfactory having regard to all the evidence.

The grounds of appeal set out in the Notice of Appeal are:

(1) that the finding of the Defence Force Magistrate was unreasonable having regard to the evidence; and

(2) further and in addition the penalty imposed further to conviction was overly severe in all the circumstances.

This Tribunal has no power to entertain appeals against sentence and the second ground of appeal was not argued.

The appellant needs leave to appeal pursuant to s.20 of the Defence Force Discipline Appeals Act 1955 because he seeks to have his conviction quashed on a ground that is not a question of law. We heard the application for leave and the appeal together.

The trial of the appellant was held at Victoria Barracks, Paddington, New South Wales, on 14 and 15 August 1989. The evidence called by the prosecution in support of the charge was that of the complainant Sharon Lee Johansson, another witness Vanessa June Moylen, and Sergeant James Edward Bell. There was also tendered in evidence a record of interview between the appellant and SSGT Longson dated 26 July 1988 and an edited version of that record of interview.

At the end of the evidence for the prosecution, the Defence Force Magistrate rejected a submission that a prima facie case had not been established. The accused then gave evidence on his own behalf, denying the substance and the particulars of the allegations made against him. After hearing addresses by the prosecutor and defence counsel, the Defence Force Magistrate found the appellant guilty. He then considered evidence relevant to the question of penalty and sentenced the appellant to reduction in rank to the rank of Warrant Officer Class 2. He fixed the date of the appellant's appointment for promotion to the rank of Warrant Officer Class 2 as 14 August 1986.

The primary grounds for leave to appeal on the hearing of the application to this Tribunal were that the complainant and the witness Vanessa June Moylen should not have been believed and that, accordingly, the conviction of the appellant was unreasonable and unsafe in all the circumstances.

The circumstances in which this Tribunal will allow an appeal and quash a conviction are set out in s.23

of the Defence Force Discipline Appeals Act 1955. The relevant provision is:

> "23.(1) Subject to subsection (5), where in an appeal it appears to the Tribunal:
>
> (a) that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;
>
> (b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;
>
> (c) that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred; or
>
> (d) that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory;
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> it shall allow the appeal and quash the conviction or the prescribed acquittal."

The words of s.23(1) are similar to the common form statute in Australia in relation to the powers of Courts of Criminal Appeal in the various States and Territories. Section 6 of the Criminal Appeal Act 1912 (NSW) empowers the Court of Criminal Appeal of that State to allow an appeal "if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice ...". See also Crimes Act (Vic), s.567; Criminal Law Consolidation Act 1935 (S.A.), s.353.

These provisions are adopted from the English Criminal Appeal Act 1907. They were referred to by Dawson J. in Whitehorn v. R. (1983) 152 CLR 657 at 685 as being "the common Australian form". It follows, in our opinion, that s.23(1) should be applied by the adoption of the well established principles for considering whether a conviction is unreasonable or unsafe in all the circumstances. The principles have been expressed in various ways. In Whitehorn v. R., supra, Gibbs CJ and Brennan J. said, at 660, that a Court of Criminal Appeal, acting under a statute in the common form in Australia:

> "should allow an appeal if, having regard to all the evidence, it concludes that it would be unsafe, unjust or dangerous to allow a verdict of guilty to stand. If the court reaches such a conclusion in a particular case, that means that it thinks that it was not open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused in that case.

After reviewing the various expressions of principle, Dawson J., at p.471, said:

> "A Court of Criminal Appeal should conclude that a verdict is unreasonable or cannot be supported having regard to the evidence if, on the evidence, it considers it to be unsafe or unsatisfactory. The verdict will be unsafe or unsatisfactory if the Court of Appeal concludes that the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal."

See also Raspor v. R. (1958) 99 CLR 346; Plomp v. R. (1963) 110 CLR 234 at 244 and Hayes v. R. (1973) 47 ALJR 603 per Barwick CJ at 604-5.

The statements of principle are expressed as applying to the review by a Court of Appeal of the verdict of a jury, but in our view, those statements of principle are equally applicable to the review of proceedings before a

Court Martial or a Defence Force Magistrate. The only difference in the latter case is that the Tribunal has the advantage of a reasoned explanation for the conviction, which will usually make it easier to decide whether justice has miscarried.

Likewise, the traditional test should be applied in the application of s.23(1)(d) where the ground of appeal seeks a review of the convictions as being unsafe or unsatisfactory. In Chamberlain v. R. (1984) 153 CLR 521, Gibbs CJ and Mason J said at 534:

> "It seems to us that the proper test to be applied in Australia is ... to ask whether the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal, i.e. must have entertained a reasonable doubt as to the guilt of the accused. To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt."

Brennan J. expressed the test in the following way (at 607):

> "In every case where a verdict is set aside because of some defect or weakness in the evidence to support the verdict given at the trial, whether upon the ground that the verdict is unreasonable or not supportable having regard to the evidence or upon the ground that there was some other miscarriage of justice, the Court of Criminal Appeal must come to the conclusion that it was not open to the jury to be satisfied of the appellant's guilt beyond a reasonable doubt."

He went on to refer to what he and Gibbs CJ had said in Whitehorn v. R., supra, at 660 as set out above.

Brennan J. went on to say:

> "The question for the Court of Criminal Appeal is whether it was open to the jury to be satisfied of the appellant's guilt, not whether the court is satisfied. The distinction between the two propositions must be constantly borne in mind lest the function of the court under the common form statute, wide though it be, is

unduly extended and that court usurps the functions of the jury."

On the hearing before this Tribunal the submissions put on behalf of the applicant were:

(1) that the evidence before the Defence Force Magistrate was not capable of supporting a conviction on the offence charged;

(2) that the complainant had made no complaint at all until some 3-4 months after the last alleged incident between her and the appellant and that the Defence Force Magistrate had failed to give sufficient weight to that fact in measuring the complainant's general credibility as a witness;

(3) that the complainant had had ample opportunity to complain to others at the relevant time and that if she had complained her consistency as a witness may thereby have been established and greater credibility given to her evidence;

(4) although corroboration is not required as a matter of law the Defence Force Magistrate should have examined the evidence to see whether there was corroboration in this case because in the absence of corroboration he could not have been satisfied beyond reasonable doubt of the appellant's guilt; and

(5) on one occasion relied upon by the prosecution another person, namely Pte Aldridge, was present yet was not called as a witness and no explanation was proffered by the prosecution for the failure to call Pte Aldridge.

It is necessary to have regard to the evidence at the trial of the appellant. The complainant gave evidence that she had enlisted in the Regular Army in October 1985 and was discharged in September 1988. During her service she was posted to 21 Supply Battalion on 26 February 1986. At the time of the incidents complained of she was 20 years of age, having been born on 16 November 1967. She was working as a storeman in 21 Supply Battalion in Storehouse No. 3 and the appellant was at all material times her supervisor.

The first incident giving rise to the charge occurred, according to the complainant's evidence, at the end of November or the beginning of December 1987. She said that the appellant approached her while she was working at her consignment bench in Storehouse No. 3 and asked her to come and speak to him in his office, which she did. Initially there was some conversation about her work and the appellant then said, "I think we've become good friends and we can trust each other", to which the complainant replied, "Yes". There was no other conversation and there was no one else present.

The next incident was during Exercise Night Voucher. The complainant was working when the appellant approached her and said, "Have you been getting any lately", to which the complainant answered, "No.". The appellant said words to the effect that, if she ever felt like a bit, he would be there for her and what are friends for. She said that she was scared and shocked. The conversation continued by the appellant saying, "I am good, you know".

The next incident of which the complainant gave evidence occurred during the same week of Exercise Night Voucher. Again the complainant was working when the appellant approached her and asked her to come and talk to him "in the top office". Once in the top office he said to her, "Do you remember what you told me on Monday night?". She said, "No, Sir". He said, "You told me that you were as good in bed as I was". She said, "No I didn't". There was no other person present during the conversation.

The complainant's evidence was that she went on leave straight after Exercise Night Voucher, which finished on 26 February 1989, and returned from leave about 14 March 1989. On some day after her return the appellant approached her and asked her whether she had been getting any lately and said, "I am good you know. If you ever feel like a bit, call me".

About a week later outside Storehouse No. 3 he said to her, "Johnno, I have always had a thing for you. I want to get into your pants". She said that she was shocked. There was no other conversation. A couple of days later he said to her, "Have you thought about our last conversation", to which she replied, "Sir, I thought you had something for Private Moylen". He said, "She is not my type".

The next conversation was one afternoon which the complainant thought was a Wednesday, and he said to her, "I know how many times you do it a night". She said, "How many", to which the appellant did not reply. The

complainant said that Pte Moylen was present during that conversation.

Asked about whether she had ever reported these incidents, the complainant said that at one stage she did tell Corporal Bruce Westneat, but otherwise she did nothing. She did not report any of the incidents to her Platoon Commander because she did not trust him, nor to the Company Sergeant Major because she believed him to be a good friend of the appellant, nor to the Regimental Sergeant Major because she was frightened of him. She said that she had told Pte Moylen and Fiona McTavish about the conversations.

She said in cross-examination that in June 1989 she had related the events to the Company Sergeant Major, Staff Sergeant Ettels, because she trusted him and the matter had already been brought up before him. Later in cross-examination she said that the reason she had not made any complaint to anybody was that she was only a Private and the appellant was a Warrant Officer and she doubted whether anybody would believe her.

Pte Moylen gave evidence on behalf of the prosecution about one of the occasions given in evidence by the complainant. She said that at Storehouse No. 3 the appellant had come into the office and said to her, "You should hear what I know about Johnno", referring to the complainant, "I know how many times she does it a night". The complainant said, "Well how many times". He said "Well never mind, I know". Moylen said that Pte Aldridge was

present at the time. Aldridge was not called to give evidence.

Moylen conceded in cross-examination that she could not be positive about the exact words used in the conversation but she was quite adamant that the conversation had taken place in words to the same effect as given by her in evidence.

In his record of interview the appellant categorically denied each one of the conversations alleged to have taken place and adhered to those denials in his evidence before the Defence Force Magistrate.

There was a conflict in testimony between the complainant and Moylen on the one hand and the applicant on the other. The Defence Force Magistrate dealt with that conflict of testimony by observing that such cases are always difficult, where there are allegations made by one person that something happened when no other witnesses were present, and those allegations are flatly denied by the person against whom the allegations are made. He said that the Court had to look carefully at the evidence, the manner in which the evidence was given, and the manner in which that evidence could be attacked or proved to be unreliable or wrong, or false.

He concluded that the complainant was a witness of truth and that her evidence should be accepted. He considered the criticisms of her, including the absence of complaint and corroboration, but nevertheless accepted her evidence. So far as Moylen is concerned, he concluded that she too should be accepted notwithstanding her concession in

cross-examination that she could not give the one conversation word for word. He went on to say that, even without Moylen's evidence and the criticisms that could be made on the basis of Moylen's close association with the complainant, he preferred the complainant's evidence and rejected the evidence of the appellant.

There was no contention that if the various conversations of which the prosecution witnesses gave evidence were established to the requisite degree of satisfaction, such conduct did not amount to behaviour likely to prejudice the discipline of the Defence force. That the behaviour was prejudicial was established by the circumstances, including that the appellant was the complainant's superior officer, that the conversations were part of a pattern which might be regarded as the sexual harassment of the complainant, that some of the conversations took place in the privacy of an office when no one else was present and that it might well have been difficult for the complainant to make complaint to anybody else.

We have carefully considered the evidence and the Defence Force Magistrate's reasons for judgment. We are not persuaded that the Defence Force Magistrate should have entertained a sufficient doubt to entitle the appellant to an acquittal. In our view the conviction was not unreasonable having regard to the evidence, nor was it unsafe or unsatisfactory.

Nevertheless, because of the long delay before a complaint was made, there was a sufficiently arguable case

to warrant the grant of leave to appeal. The most appropriate course is to grant leave to appeal and dismiss the appeal. We order accordingly.

I certify that this and the
11 preceding pages are a true
and accurate copy of the Reasons
for Judgment herein of
the Tribunal.

Elizabeth Causer

Associate

Dated: 11 May 1990