

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Rogers v Chief of Navy [2002] ADFDAT 1

CRIMINAL LAW - jurisdiction practice and procedure - filing of information, presentment, or indictment – sufficiency of charge - no requirement to plead all elements of offence charged

CRIMINAL LAW - jurisdiction practice and procedure – filing of information, presentment, or indictment - averments - uncertainty, duplicity and ambiguity - course of conduct constituted by a series of closely related events not duplicitous

DEFENCE AND WAR - offences by members of the forces and persons liable to serve – behaving in a manner likely to prejudice the discipline of the defence force - whether conduct prejudicial - sexual relationship with female subordinate

Defence Force Discipline Act 1982 (Cth) s 60

Defence Force Discipline Rules 1985, (Cth) Rule 9

R v Tearse [1945] KB 1 referred to

Director of Public Prosecutions v Merriman [1973] AC 584 at 607 referred to

S v The Queen (1989) 168 CLR 266 applied

Walsh v Tattersall (1996) 188 CLR 77 referred to

R v F (1996) 90 A Crim R 356 applied

Chief of General Staff v Stuart (1995) 133 ALR 513 at 535 applied

LIEUTENANT ADRIAN ROGERS v CHIEF OF NAVY
DFDAT No 6 of 2001

HEEREY J (President), UNDERWOOD J (Deputy President) and
DUGGAN J (Member)
SYDNEY

25 JULY 2002

DEFENCE FORCE DISCIPLINE

APPEAL TRIBUNAL

DFDAT No 6 OF 2001

**IN THE MATTER OF THE *DEFENCE FORCE DISCIPLINE APPEALS ACT 1955*
*AND DEFENCE FORCE DISCIPLINE ACT 1982***

**BETWEEN: LIEUTENANT ADRIAN ROGERS
 APPELLANT**

**AND: CHIEF OF NAVY
 RESPONDENT**

**TRIBUNAL: HEEREY J (President), UNDERWOOD J (Deputy President) and
 DUGGAN J (Member)**

DATE OF ORDER: 25 JULY 2002

WHERE MADE: SYDNEY

THE TRIBUNAL ORDERS THAT:

1. The appeal is dismissed.

DEFENCE FORCE DISCIPLINE

APPEAL TRIBUNAL

DFDAT No 6 OF 2001

**IN THE MATTER OF THE *DEFENCE FORCE DISCIPLINE APPEALS ACT 1955*
*AND DEFENCE FORCE DISCIPLINE ACT 1982***

**BETWEEN: LIEUTENANT ADRIAN ROGERS
 APPELLANT**

**AND: CHIEF OF NAVY
 RESPONDENT**

**TRIBUNAL: HEEREY J (President), UNDERWOOD J (Deputy President) and
 DUGGAN J (Member)**

DATE: 25 JULY 2002

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 The appellant was charged before a Restricted Court Martial upon the following charge sheet:

“DFD Act section 60

Prejudicial behaviour

Between the dates of the tenth day of October 2000 and the fourth day of December 2000, at Sydney and Adelaide, being a defence member, did behave in a manner likely to prejudice the discipline of the Defence Force, by being involved in a sexual relationship with his subordinate, namely ABBM Alana Yvette Johnson W164535.”

2 The appellant pleaded guilty, was convicted and punished by an order reducing his rank from Lieutenant Commander to Lieutenant with rank and pay seniority to date from 10 June 1993.

3 Notwithstanding his plea of guilty, the appellant has appealed against the conviction and consequential order of penalty. The notice of appeal contains ten grounds, but Mr Street SC, who

appeared as counsel for the appellant, agreed that all grounds could be encapsulated as follows.

- (a) The charge to which the appellant pleaded guilty, and which is set out on the charge sheet, does not allege an offence known to law because it does not plead an essential element of the offence created by s 60 of the *Defence Force Discipline Act* 1982 (Cth) (“the Act”), namely, an act or acts by which the appellant behaved in a manner likely to prejudice the discipline of the Defence Force; or
- (b) the acts pleaded by way of particulars resulted in the charge being duplicitous; and/or
- (c) no act pleaded in the particulars was capable of constituting a breach of s 60 of the Act.

4 At the relevant times, s 60 of the Act provided:

“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.”

5 Initially, the charge sheet charged the appellant with five breaches of the Act. All of them related to an alleged sexual relationship with a female subordinate. After the five charges had been laid, the appellant’s defending officer sought particulars of each of them. The prosecuting officer responded, but the defending officer complained that the particulars supplied were inadequate. There followed a directions hearing before the Chief Judge Advocate. At that hearing, amendments were made to each of the five charges and particulars were ordered.

6 After the directions hearing, but before the Restricted Court Martial convened, the prosecuting officer supplied the following particulars of (inter alia) count 2:

“1. It is the prosecution case that there were three separate consensual sexual encounters between the accused and AB Alana Yvette JOHNSON:

- a. On a Wednesday afternoon in October 2000, being a date after 10 October 2000, AB Johnson visited the accused at his home at Hunters Hill. An act of sexual intercourse between the accused and AB Johnson occurred in the accused’s bedroom. See Question and answers 139 to 168, inclusive, of the Record*

of Interview of AB Johnson of Friday 01 December 2000.

- b. A second act of sexual intercourse between the accused and AB Johnson occurred on a Monday early in November 2000. It is the prosecution case that this act occurred at the home of AB Johnson in Richmond Grove, NSW. See paragraphs 6 and 7 of AB Johnson's statement dated 17 July 2001.*
- c. The third act of sexual intercourse between the accused and AB Johnson occurred on Sunday 26 November 2000 in Adelaide whilst the accused and AB Johnson were attending a FIMA National Conference. See question and answers 233 to 269, inclusive, of the Record of Interview of AB Johnson of Friday 01 December 2000.*

2. The prosecution also relies upon the fact that the accused sent an SMS message to AB Johnson's mobile with the text 'Do you want to have an affair with me?' See question and answer 106 of the Record of Interview of AB Johnson of Friday 01 December 2000.

3. During the period referred to in the charges the accused called AB Johnson into his office in FIMA Sydney, closed the door, whereupon he kissed her. See question and answers 113, 122 to 138 inclusive, of the Record of Interview of AB Johnson of Friday 01 December 2000.

4. The prosecution also relies upon the exchange of intimate and sexually explicit e-mails between the accused and AB Johnson. Copies of all relevant e-mails have been provided to the Defence."

7 When the Restricted Court Martial convened, the prosecuting officer was given leave to withdraw all but one of the remaining charges (one had been withdrawn at the directions hearing) leaving only count 2 on the charge sheet which we have set out at the beginning of these reasons.

8 The Restricted Court Martial was handed an agreed statement of facts signed by the prosecuting officer and the defending officer. It is unnecessary to set out this document here. It restates the particulars together with some further details. Those details included:

- the subordinate female member was the appellant's secretary;
- she was married to a member of the Royal Australian Navy who was then posted to HMAS Manoora;

- the relationship developed over a period of time;
- it included sexual intercourse upon the occasions particularised; and
- on more than one occasion, the appellant lied to senior officers about the existence of the affair.

9 Mr Street's primary submission was that an essential element in the charge was an act which resulted in the proscribed behaviour. He contended that the behaviour pleaded in the charge sheet was different from an act or omission. He submitted that in effect the appellant had been convicted of an association offence.

10 Mr Street's consequential submission was that the appellant pleaded guilty to an offence not known to law because the charge sheet did not plead an essential element in the offence, viz, (relevant to this case) an act or acts.

11 At common law a presentment must contain a statement of the specific offence charged, together with reasonable information by way of particulars to show the nature of the charge: *R v Tearse* [1945] KB 1. The common law is reflected in the *Defence Force Discipline Rules 1985* (Cth) ("the Rules") made under the Act. Rules 9(2) and (3) provide:

"9. ...

- (2) *A charge shall consist of 2 parts, namely –*
 - (a) *a statement of the offence which the accused person is alleged to have committed; and*
 - (b) *particulars of the act or omission constituting the offence.*
- (3) *A statement of an offence shall contain –*
 - (a) *in the case of an offence other than an offence against the common law – a reference to the provision of the law creating the offence; and*
 - (b) *in any case – a sufficient statement of the offence."*

12 The statement of offence in the charge sheet in this case clearly alleged a breach of s 60 of the Act by way of the first limb, viz, behaviour likely to prejudice the discipline of the Defence Force. Mr

Street cited no authority to support the proposition that to constitute a valid presentment, all the legal ingredients that go to make up the charge must be pleaded. We know of no such authority. Indeed, most commonly, presentments do not plead all the legal elements that go to make up the crime or offence charged. In the ordinary run of cases the offence charged is identified by a name and a reference to a statute eg. assault or murder, and is followed by sufficient particularity to identify the facts and circumstances upon which the Crown proposes to rely to establish all the legal ingredients that go to make up the charge.

13 Finally, Rule 9 (4) provides:

Without prejudice to any other sufficient manner of setting out the statement of offence, the statement of offence shall be sufficient if it is set out in the appropriate form in the Schedule.

14 The Schedule provides that in the case of s 60 of the Act "Prejudicial Behaviour" shall be a sufficient statement of offence.

15 With respect to the obligation to supply particulars, Rule 9(5) also reflects the common law by providing:

"Particulars of an offence shall contain a sufficient statement of the circumstances of the offence to enable the accused person to know what it is intended to prove against that person as constituting the offence."

16 In the present case, the particulars delivered after the directions hearing, which Mr Street conceded should be read as forming part of the charge sheet, gave the appellant ample information as to the facts that it was intended to prove against him to establish the offence charged.

17 Behaviour can only occur by way of acts or omissions. That much is obvious. The acts relied upon by the prosecution were particularised. Mr Street conceded that if the words "by the acts particularised" had been inserted into the charge before the words "did behave in a manner likely to prejudice the discipline of the Defence Force", this aspect of his submissions would fail.

18 We are of the opinion that there is no legal requirement that those words be inserted in order to prefer a valid charge, nor is there any requirement to plead all the elements that go to make up a

charge.

19 With respect to the second submission, the classic approach to the issue of duplicity was stated by Lord Diplock in *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607:

“The rule against duplicity ... has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment.”

20 In *S v The Queen* (1989) 168 CLR 266, after referring to the history of the rule against duplicitous counts in an indictment Gaudron and McHugh JJ said at 284:

*“However, the rule against duplicitous counts has, for a very long time, rested on other considerations. One important consideration is the orderly administration of criminal justice. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of *autrefois acquit* or *autrefois convict*. See, generally, *R. v. Sadler* (1787) 2 Chit. 519; *R. v. Holland* (1794) 5 TR 607, at p 623 [101 E.R. 340, at p. 348], per Lord Kenyon C.J.. See, as to the need for distinct consideration in relation to penalty, *R. v. Stocker*; *R v Sadler*; *R v Morley* (1827) 1 Y. & J. 221 [148 E.R. 653]; *Cotterill v. Lempriere* (1890) 24 Q.B.D. 634, at p. 637, per Lord Coleridge C.J.. See, as to the availability of a plea in bar, *R v Robe* (1735) 2 Str 999 [93 E.R. 993]; *Davy v. Baker* (1769) 4 Burr. 2471 [98 E.R. 295]; *R. v. Wells*; *Ex parte Clifford* (1904) 91 L.T. 98; *R. v. Surrey Justices*; *Ex parte Witherick* [1932] 1 K.B. 450.*

The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet. See, e.g., R. v. Robe (1735) 2 Str., at p 999 [93 E.R., at p. 994] where it was said ‘this is so general a charge, that it is impossible any man can prepare to defend himself on this prosecution ...’ See also *R. v. Hollond* (1794) 5 T.R., at p 623 [101 E.R., at p 348], per Lord Kenyon C.J.; *R. v. North* (1825) 6 Dowl. & Ry. 143 at p 146 [28 R.R. 538, at p. 541]; *R. v*

Morley (1827) 1 Y. & J., at pp. 224-225 [148 E.R., at p. 654]; and Cotterill v Lempriere (1980) 24 Q.B.D., at p. 639, per Lord Esher M.R. Of course, the degree of unfairness or prejudice involved will vary from case to case, and it may be, as suggested by Professor Glanville Williams in 'The Count System and the Duplicity Rule' [1966] Criminal Law Review 255, at p. 264, that on occasions the uncertainty is not 'such as to disable the defendant from meeting the charge'."

21 The use of the words "by an act or omission *behaves ...*" in s 60 of the Act, clearly indicates that Parliament contemplated that the offence could be committed by more than one act and/or omission in the same way as fraud or stealing can, and often is, committed by a series of closely related acts. To rely upon a number of particularised acts as constituting one charge may not be, and was not in this case, duplicitous; cf *Walsh v Tattersall* (1996) 188 CLR 77. Although the Court was divided in that case, it was common ground that in the case of a continuing offence or in a case where the facts are so closely related that they amount to one activity, the pleading of all those facts in one count does not amount to duplicity. This case is such a case. Further, for the reasons expounded by Hunt J at CL in *R v F* (1996) 90 A Crim R 356, no miscarriage of justice will generally arise from joining a number of related acts in a single charge where there has been a plea of guilty because all the facts upon which the conviction rests will not be contentious.

22 Depending on the circumstances, it may be that a single act of sexual intercourse with a subordinate does not amount to a breach of s 60 of the Act. In the present case, the breach was created by a continuing state of affairs arising from the particularised acts. The plea of guilty and the agreed statements of facts removes any possibility of unfairness or uncertainty arising with respect to the facts upon which the conviction was based.

23 In our opinion there is no substance in the appellant's last contention that as a matter of law the particularised acts were not capable of constituting the behaviour proscribed by s 60. In argument, Mr Street rightly conceded that these acts could, in certain circumstances, amount to behaviour likely to prejudice the discipline of the Defence Force. In *Chief of General Staff v Stuart* (1995) 133 ALR 513 Lockhart J at 535 said that conduct likely to prejudice the good order and discipline of the Defence Force may take many forms and counselled against any attempt to provide an exhaustive definition. It is obvious that the relationship between the appellant and the subordinate

female member and the conduct of the appellant in the course of that relationship were likely to prejudice the discipline of the Defence Force. There was a real risk that the appellant would treat the subordinate differently from others under his command and that the subordinate would treat the appellant differently from the way those others treated him. It was also likely that these differences and their cause would become apparent to those over whom the appellant exercised authority and thereby imperil that authority generally.

24 Indeed, in the course of the plea in mitigation the appellant's defending officer expressly conceded that the appellant's conduct had the necessary quality referred to in s 60 of the Act. He said:

“His admission of the relationship and his plea of guilty ... demonstrates an acceptance on his part of the fact that his relationship with his subordinate was likely to prejudice the discipline of the RAN.”

25 The appeal is dismissed.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate:

Dated: 25 July 2002

Counsel for the Appellant: A W Street SC and A Abadee

Solicitor for the Appellant: Garland Hawthorn Brahe

Counsel for the Respondent: P Roberts SC and P Keane

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 23 July 2002

Date of Judgment: 25 July 2002