DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Van Damme v Chief of Army [2002] ADFDAT 2

CRIMINAL LAW – appeal from Defence Force Magistrate – convictions on three charges of assault – consent not raised at trail – no finding by Magistrate as to lack of consent – whether evidence gave rise to an inference of consent – whether substantial miscarriage of justice

CRIMINAL LAW – differing accounts given by witnesses – Magistrate impressed by complainant but not by appellant – whether verdict unsafe and unsatisfactory

CRIMINAL LAW – whether obligation on prosecution to call appellant's witnesses – whether obligation on prosecution to search for witnesses

CRIMINAL LAW – three charges of assault – whether improperly joined and heard together

CRIMINAL LAW – assault – charged as occurring within a period of several weeks – whether prejudice

CRIMINAL LAW – charge of assault alleging placing of finger in complainant's ear and licking his face – whether bad for duplicity

CRIMINAL LAW – assault – whether touching must be violent or hostile

CRIMINAL LAW – assault by threats – whether evidence of intent to cause appellant to entertain a fear of immediate violence

Defence Force Discipline Act 1982 (Cth) s 33(a)
Defence Force Discipline Appeals Act 1955 (Cth) s 23(1)(b) and (d)

R v Coney (1882) 8 QBD 534 at 549 referred to
Boughey v The Queen (1986) 161 CLR 10 at 24, 25-7 applied
Pallante v Stadiums Pty Ltd (No. 1) (1976) VR 331 at 339
Kunjo S/O Ramalan v Public Prosecutor [1979] AC 135 at 143 cited
M v The Queen (1994) 181 CLR 487 at 492-495 applied
Edwards v The Queen (1993) 178 CLR 193 referred to
Khaled Hamzy (1994) 74 A Crim R 341 at 345-6 and 349 cited
Eades v R (1991) 57 A Crim R 151 at 156 referred to
John Adrian Knight (1988) 35 A Crim R 314 at 317 cited
Zanker v Vartzokas (1988) 34 A Crim R 11 distinguished

Waller and Williams *Criminal Law Text and Cases* (9th Ed) at p 49
Smith and Hogan *Criminal Law* (7th Ed) at p 406

TODD RAYMOND VAN DAMME v CHIEF OF ARMY
DFDAT No 1 of 2002

HEEREY J (President), UNDERWOOD J (Deputy President) and MILDREN J (Member)
ADELAIDE (HEARD IN MELBOURNE)
26 JULY 2002

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE

APPEAL TRIBUNAL **DFDAT No 1 OF 2002**

BETWEEN: **TODD RAYMOND VAN DAMME**
APPLICANT

AND: **CHIEF OF ARMY**
RESPONDENT

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

DATE OF ORDER: **26 JULY 2002**

WHERE MADE: **ADELAIDE (HEARD IN MELBOURNE)**

THE TRIBUNAL ORDERS THAT:

1. The conviction in relation to charge 3 of assault on service land between 1 December and 30 December 2000 is quashed.
2. The appeal is otherwise dismissed.

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE
APPEAL TRIBUNAL **DFDAT No 1 OF 2002**

BETWEEN: **TODD RAYMOND VAN DAMME**
APPELLANT

AND: **CHIEF OF ARMY**
RESPONDENT

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

DATE: **26 JULY 2002**

PLACE: **ADELAIDE (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

1 The appellant was charged with two counts of assault on service land and one count of assault in a public place contrary to s 33(a) of the *Defence Force Discipline Act 1982* (Cth) ("the Discipline Act"). He was tried by a Defence Force Magistrate and found guilty on each count. He has appealed against his conviction on a number of grounds not all of which were addressed by his counsel in either his written or oral submissions. To the extent that such grounds were not addressed we take them as having been abandoned.

2 The first ground argued related to count 1. It was submitted that the learned Magistrate failed to consider whether or not the prosecutor had proved that the acts constituting the alleged assault were without the consent of the complainant. This does not appear to have been agitated as an issue at the trial. The appellant's case at trial was that he did not touch the complainant at all. The learned Magistrate found that the appellant struck the complainant in the chest with his right hand. The complainant's evidence was that he did not consent to being so struck. There was a finding by the learned Magistrate that he accepted the evidence of the complainant that he was struck, and inferentially that he did not consent. However, there is no express finding on this point.

3 The Discipline Act does not provide a statutory definition of "assault" which must therefore be given its meaning at common law: see s 10. The question is whether lack of

consent is an element of the common law offence of assault. Waller and Williams, *Criminal Law Text and Cases* (9th Ed), at p 49 cite the following passage from 1 East *Pleas of the Crown* 406:

> *"An assault is any attempt to offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it. Where the injury is actually inflicted it amounts to a battery, (which includes an assault;) and this, however small it may be; as by spitting in a man's face, or any touching of him in anger without any lawful occasion. But if the occasion were merely accidental and undesigned, or if it were lawful….; it is no assault or battery in the law…"*

4 The learned authors observe, at p 50:

> *"Clearly not every putting of another in fear of bodily hurt or touching of another is an assault….There must be an element of unlawfulness in the transaction, but it does not seem possible to provide a single definition of that element which would cover all possible cases.*
>
> *Some have suggested that as regards battery the absence of the victim's consent to the touching supplies that element. But that would require the positing of an implied consent in a variety of situations so wide as to make the concept virtually devoid of meaning. It is almost certainly not an assault to kiss an acquaintance at a Christmas party, but to say that the recipient impliedly consented to be kissed by one and all present is forced and inaccurate.*
>
> *The solution of the problem seems to lie in considering whether, having regard to all the circumstances of the given case, the touching was within the limits of what is socially accepted or at least tolerated.…Section 182 (3) of the Tasmanian Code excludes from an 'assault' any 'act which is reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion.' This provision would appear to state the position at common law: see* Boughey v R *(1986) 60 ALJR 422."*

5 If this be so, lack of consent is not an element of the offence which needs to be proved by the prosecution unless consent is raised by the defence. In *R v Coney* (1882) 8 QBD 534 at 549, Stephen J said:

> *"In cases where life and limb are exposed to no serious danger to the common course of things, I think that consent is a defence to a charge of assault even where considerable force is used…."*

6 Smith and Hogan, *Criminal Law* (7th Ed) treat consent as a defence to a charge of either assault or battery. At p 406, the learned authors observe that "(c)onsent therefore negatives either crime and the onus of proving the absence of consent is on the Crown." This is consistent with the theory that, what needs to be proved is that the force used in a battery was unlawful, and, if the force is not necessary for the common intercourse of life, prima facie the element of unlawfulness is made out. Consent is not always a defence in any event. It is well established that consent cannot lawfully be given to bodily harm or grievous bodily harm. In *Boughey v The Queen* (1986) 161 CLR 10 at 24, Mason, Wilson and Deane JJ referred to s 182(4) of the Tasmanian *Criminal Code* as dealing with "another of the more common excuses or justifications for what would otherwise be an unlawful battery at common law or 'an unlawful assault' for the purposes of the Code. It provides that, subject to some qualifications and exceptions, 'an assault is not unlawful if committed with the consent of the person assaulted'." It is clear that their Honours thought that the Code in this respect reflected the common law. Counsel for the appellant relied upon *Pallante v Stadiums Pty Ltd (No. 1)* (1976) VR 331 at 339 where McInerney J said that "to be an assault the infliction of force to the person of another must be done: (1) in a hostile and angry manner; and (2) without the consent of the other person". That statement was made in the context of a boxing match where consent was clearly raised. It does not alter the view that we take that the absence of consent is not relevant unless it is raised by the defence.

7 Notwithstanding that this issue was not raised by the appellant's counsel at trial, if there was evidence that the complainant consented to the assault, we consider that the appellant is entitled to rely on this on appeal if a substantial miscarriage of justice has occurred: see *Defence Force Discipline Appeals Act 1955* (Cth) ("the Appeals Act") s 23(1)(b); although leave is required as the question is not one of law (see s 20(1)): see also *Kunjo S/O Ramalan v Public Prosecutor* [1979] AC 135 at 143. Counsel for the appellant submitted that the evidence showed that the complainant overheard the appellant say to others in the Mess that he would rather have a drink with another soldier, whom he named, than the complainant. The complainant approached the appellant and asked what was the problem that he had with him. The appellant motioned to the complainant to follow him outside. The complainant did so, but conceded that because he realized that there was a

possibility of a physical confrontation he did not take his drink with him. There are differences in the evidence as to who went outside first, and whether the invitation to go outside came from the appellant or the complainant. But whichever be the case, these circumstances do not in our view give rise to an inference that the complainant may have consented to the assault, so as to raise a reasonable doubt about the truth of the complainant's evidence that he had not consented. We would dismiss this ground of appeal.

8 Next it was submitted that because there were differing accounts given by the witnesses as to whether or not there was an assault at all, the verdict was unsafe and unsatisfactory: see s 23(1)(d) of the Appeals Act. This ground is not a question of law, and therefore requires leave. The approach to this question is explained in well known passages in *M v The Queen* (1994) 181 CLR 487 at 492-495 which it is not necessary to recite. Suffice it to say, that there is nothing in the evidence of the complainant by way of discrepancies, or inaccuracies. The evidence was not tainted; it did not lack probative force. The learned Magistrate had the opportunity of seeing and hearing the witnesses. He was clearly impressed with the complainant, and not impressed with the appellant. Two witnesses called by the appellant were dealt with by the learned Magistrate who concluded that the assault happened very quickly and therefore they must not have been looking at that time. We are unable to find that the learned Magistrate should have entertained a reasonable doubt. This ground of appeal is also dismissed.

9 A number of complaints were raised not only in relation to count 1, but in relation to the other counts as well. It is convenient to deal with them together. First, there was a complaint that the prosecution did not call the witnesses Trooper Gebhardt and Trooper Edwards who were called by the defence. It was put that this resulted in a miscarriage of justice because the appellant's counsel was denied the right to cross-examine these witnesses. In relation to count 2, it was submitted that the prosecution had failed in its duty to call all the material witnesses, as the incident in question happened in a crowded public bar and no other witnesses other than the complainant were called to give evidence. The difficulty with both of these submissions is that the prosecution is under no obligation to call witnesses it knows not of. It was conceded in relation to count 1 that the prosecution was never asked to call the witnesses called by the defence. There is nothing to show that the prosecution knew what was in their statements, or even knew of their existence. In relation to count 2, there was no evidence that the incident which occurred was in fact seen by anyone else who could have

been called to give evidence. There is no substance to these submissions which must be dismissed.

10 Next there was a complaint that the learned Magistrate, who rejected the appellant's evidence largely because it differed considerably from what he had said to the Military Police in a formal Record of Interview, had erred by failing to give himself a direction in accordance with *Edwards v The Queen* (1993) 178 CLR 193. In our opinion, no such direction was required. It is clear that the learned Magistrate made no finding that the appellant's lies were such as to give rise to an inference of guilt. This ground must be dismissed.

11 The next ground of appeal related to alleged prejudice suffered by the appellant in having three charges brought against him dealt with at the same time. It was not suggested that the charges were improperly joined: see reg 8 (3) of the *Defence Force Discipline Rules.* No application was made to the learned Magistrate to sever any of the charges from the charge sheet and to order separate trials. There is nothing in the learned Magistrate's reasons which suggests that he did not deal with each charge separately. No other actual prejudice to the appellant is shown. This ground of appeal must be dismissed.

12 The appellant also complains about the fact that no complaint was made to the authorities for some months after the incidents. None of the assaults were sexual assaults. Sometimes the fact that a complaint is not made to the authorities promptly can give rise to special considerations which need to be identified and considered, for example where the complainant is unable to identify the occasion with sufficient precision as to time or place. There is a complaint in this appeal also that the charge sheet referred in each case to a period of time expressed as being not on a particular date, but between certain dates weeks apart. However in this case no special considerations arose. It is clear that the appellant well knew the occasion referred to in each case. He did not deny his presence. He did not assert that he had lost the chance of alibi, or that for any other reason he faced any unusual difficulty in defending the charges against him by reason of the fact that there was some delay in bringing the charges, and that the date of each offence was not able to be given more precisely than it was. There is no substance to this submission.

13 Next it was submitted that the conviction on the second count was bad for duplicity. The charge was that the appellant assaulted the complainant in a public place "by placing his

wet finger in Trooper Schaeffer-Steele's ear and licking Trooper Schaeffer-Steele's face with his tongue." The learned Magistrate found that the appellant did both of these things. No objection was taken to the form of this charge at trial. In our opinion neither the charge nor the conviction was duplicitous. It is legitimate to charge in a single count one activity even though that activity may involve more than one act and notwithstanding that each act would constitute a separate offence. The court has the power to direct the prosecution either to elect or to separate out the offences where the charge would otherwise cause unfairness to the accused, where, for instance, a different defence is asserted to different acts. Although different defences were run in relation to the two acts in this case, the absence of any complaint by the accused's counsel at trial inevitably leads to the conclusion that there was no unfairness: see *Khaled Hamzy* (1994) 74 A Crim R 341 at 345-6 and 349. In any event it is plain that the learned Magistrate found that it was the licking of the face, not the placing of the finger in the ear which constituted the assault: cf *Eades v R* (1991) 57 A Crim R 151 at 156. This ground of appeal fails.

14 Next it was submitted in relation to count 2 that in order to sustain a conviction for the assault, the touching must be violent or hostile. That contention must be rejected: see *Boughey v The Queen* (1986) 161 CLR 10 at 25-27; although proof of positive hostility or hostile intent towards the victim may convert what might otherwise be unobjectionable as reasonably necessary for the common intercourse of life into a battery. This submission must be rejected.

15 As to count 3, the allegation in the charge sheet was that the appellant assaulted the complainant by "moving close to him and saying, 'I could snap kick your head and break you in half' or words to that effect." The account given by the complainant, which the learned Magistrate accepted, was that he was talking with two friends, Troopers Nash and Sergeant, on the balcony of a barracks block, when the appellant joined them, and at one point walked over to the complainant, put his face about 6 inches from the complainant's face, and said the words complained of. The complainant said that the words were said in an aggressive tone, whilst the appellant pointed his finger to the middle of the complainant's chest, that he was glaring at him, that he felt intimidated, scared and uncomfortable and thought that the appellant was about to head butt him.

16 In this case there was no allegation of, or finding of, a physical touching, so that the

assault was not also a battery. The first submission made was that, in order to constitute an assault, there must by something more than mere threatening words. It is not necessary to decide whether an assault must be accompanied by some physical act, as in this case, there were the physical acts described above which accompanied the words which together caused the complainant to apprehend that he might be headbutted. In those circumstances, there can be an assault if the appellant's intention was to cause the complainant to believe that unlawful force was about to be inflicted upon him: see *John Adrian Knight* (1988) 35 A Crim R 314 at 317.

17 The difficulty with this count is that there is no finding by the learned Magistrate as to what the appellant's intention might have been. No doubt he intended to intimidate the complainant, but did he intend to cause him to believe that unlawful force was about to be inflicted upon him? It was at least open on the evidence to find that no such intention was proved beyond reasonable doubt, given that the words used referred to what the appellant could do if he wished to, not what he was about to do to him. The circumstances of this case are different from those in *Zanker v Vartzokas* (1988) 34 A Crim R 11 which was relied upon by senior counsel for the respondent. In that case, although there was no threat to immediately inflict force, the threat was to inflict force sometime within the parameters of the incident which gave rise to the threat being made. The conclusion we have reached is that the learned Magistrate did not turn his mind to the mental element of the offence. He stated the elements of the offence, but made no reference to the mental element at all. This was not a case where proof of an element of the charge followed as night follows day from proof of the other elements of the charge, and the failure to specifically advert to the element in his reasons might be excused on that basis. There was at least the possibility that the appellant did not advert in his own mind to the possibility that the complainant might, as a consequence of his actions, entertain a fear of immediate violence. That possibility is the more compelling when one considers that part of the reason why the complainant felt fearful of the appellant rested upon a belief based on hearsay that the appellant had a propensity for violence.

18 The conviction is relation to count 3 must be quashed. The appeal is otherwise dismissed.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate:

Dated: 25 July 2002

Counsel for the Appellant:	R Clark
Solicitor for the Appellant:	Cahills
Counsel for the Respondent:	RRS Tracey QC and M Duncan
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	22 July 2002
Date of Judgment:	26 July 2002