

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Quinn v Chief of Army [2001] ADFDAT 4

DEFENCE AND WAR – appeal from conviction by Defence Force Magistrate – ill-treatment of Defence Force member of inferior rank – infantry training exercise – capture of platoon commander – held at direction of company commander for fifteen hours with head covered – exposed for two hours in hot sun – interrogated – meaning of ill-treatment in military training context – whether ill-treatment – whether mental element of offence established

WORDS AND PHRASES – “ill-treatment”, “ill-treats”

Defence Force Discipline Act 1982 (Cth) ss 10, 34

Re CB [No 2] [1982] VR 681 applied

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

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

Susan Newington (1990) 91 Cr App R 247 applied

**TROY BROOK QUINN v CHIEF OF ARMY
NO DFDAT 4 OF 2001**

**HEEREY J (President), UNDERWOOD J (Deputy President) & MILDREN J (Member)
MELBOURNE (HEARD IN SYDNEY)
22 AUGUST 2001**

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 4 OF 2001

**BETWEEN: TROY BROOK QUINN
APPLICANT**

**AND: CHIEF OF ARMY
RESPONDENT**

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

DATE OF ORDER: 22 AUGUST 2001

WHERE MADE: MELBOURNE (HEARD IN SYDNEY)

THE TRIBUNAL ORDERS THAT:

1. The appeal is allowed.
2. The conviction is quashed and the penalty set aside.

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**AND: CHIEF OF ARMY
RESPONDENT**

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

DATE: 22 AUGUST 2001

PLACE: MELBOURNE (HEARD IN SYDNEY)

REASONS FOR JUDGMENT

THE TRIBUNAL:

1 The appellant was convicted by a Defence Force Magistrate (DFM) of one count of ill-treatment of an inferior, contrary to s 34 of the *Defence Force Discipline Act 1982* (Cth) (the DFD Act) which provides:

“34. A defence member who assaults, or ill-treats, a member of the Defence Force who is of inferior rank to the defence member is guilty of an offence for which the maximum punishment is imprisonment for 2 years.”

The Charge

2 The particulars of the charge were that at Kulim, Malaysia, on or about 4 March 1998, the appellant ill-treated Lieutenant David Steven Good, a member of the Defence Force who was inferior in rank to him in that he:

- (a) permitted the placement of a pillowcase over the head of Lt Good at about 0730 hours;
- (b) permitted the placement of adhesive tape over the pillowcase and around the head and over the eyes of Lt Good at about 0730 hours;
- (c) permitted the pillowcase to remain in place over the head of Lt Good for a period of or about 15 hours, namely from about 0730 hours to about 2230 hours;
- (d) permitted the said adhesive tape to remain in place for a period of or about 15 hours,

- namely from about 0730 hours to about 2230 hours;
- (e) permitted the wrists of Lt Good to be bound at or about 0730 hours;
 - (f) required Lt Good to be kept in a standing position with his wrists bound, a pillowcase over his head and adhesive tape wrapped over the pillowcase and around his head so as to cover his eyes, for a period of about three hours;
 - (g) threatened Lt Good that he (the appellant) would lay him on an ant hill;
 - (h) placed a substance underneath the shirt of Lt Good that he (the appellant) indicated to Lt Good were ants by using words to the effect of “are they biting you”;
 - (i) permitted the placement of Lt Good in an area of direct sunlight for a period of about two hours;
 - (j) failed to ensure that Lt Good did not become dehydrated during the period from about 0730 hours and about;
 - (k) poured a liquid substance down the throat of Lt Good;
 - (l) required Lt Good to be deprived of food for a period of or about 15 hours, namely from about 0730 hours and about 2230 hours.

The Facts

3 The appellant was OC A Company 3rd Battalion Royal Australian Regiment (3 RAR). Lt Good was the platoon commander of 2 Platoon, there being three platoons in the company. Several months before March 1998 A Company had deployed to Malaysia where it was based at Butterworth for the purpose of training in combat tactics in a jungle environment.

4 On 3 March 1998 2 Platoon had been bussed out to a training area called Kulin where it was to participate in a 4 or 5 day assessment exercise in such activities as ambush and attack. A training instruction had been prepared by Lt Smith, a training and administrative officer, and had been issued by the appellant. Although there was no mention of this in the instruction, the appellant decided to build into the exercise the removal of each of the platoon commanders to enable the person next in rank to take over the responsibility of leadership. The appellant intended that the platoon commanders would be captured by an “enemy party” and the platoon sergeants would then take over to prepare the necessary orders and command the operation of recovering the commanders from the “enemy”.

5 At the time of the alleged offence, Lt Good, who was aged 24, had been commander

of 2 Platoon for only a short time. He was aware that this exercise was intended to assess his and his platoon's performances in respect of the training they had so far received in Malaysia.

6 On 3/4 March 1998 Lt Good's platoon sat in an ambush for all of the night. Just before first light the "enemy" walked through and the ambush was sprung. The appellant then ordered that the platoon set up another ambush at another location and that Lt Good should go to the company headquarters for further orders. Lt Good took a protection party of two scouts with him and set off for headquarters. On the way he encountered the appellant coming down the road with two "enemy". After an exchange of "fire" the appellant designated the two scouts as "killed". Lt Good was captured.

7 Lt Good was taken to the ground, a pillowcase was placed over his head and tape was placed over the pillowcase across his eyes to further minimise his ability to see. His hands were bound before him. He was then taken to company headquarters. The capture took place at between 0730 and 0930 hours. At some time shortly after his arrival, Lt Good was checked over by Cpl Gorman, a medic. The toggle rope used to bind his hands was removed. It appears that his hands were then rebound with tape. He complained that the binding was too tight, and the appellant, either personally or by direction to Cpl Gorman, removed the binding and replaced it with bandages binding his hands in front of him.

8 The DFM accepted the account given by Lt Good as to what happened to him next. First he was tied to a tree and required to stand for a number of hours against the tree during which time he was interrogated by the appellant. During breaks in the interrogation Lt Good sought to sit down, but he was lifted back by a person unknown and was not allowed to sit. This lasted for about three hours. The interrogation was loud and aggressive. The appellant adopted a foreign accent. Lt Good refused to provide any information about his unit movements or any other information demanded by the appellant other than his regimental details. During this period he was moved and told by the appellant that there was an ants nest in the location to where he was being moved and he was going to be put on it. Something was then placed down his shirt and the appellant asked, "Are they biting?". After this, there was a lengthy gap in the interrogation. Lt Good was taken out into the sun in the hottest part of the day. The weather was hot and humid. He was allowed to lay on the ground. A radio was placed next to him, tuned to a local station which broadcast music. The volume was turned up loud. This lasted for a period of two hours.

9 Next, Lt Good was doused with water and placed on a stretcher in the shade. He was then given regular drinks of water although he had had none before this time. There was no finding that Lt Good became dehydrated. It is not clear if the interrogation continued after that time, but there was a finding that the interrogation over all lasted for a substantial number of hours, although there were gaps in the interrogation lasting for 5 to 10 minutes as well as the lengthy gap previously mentioned. Lt Good was recaptured by his own platoon at between 2200 and 2300 hours that night. It was not until then that the pillowcase, tape and binding was removed. There was no finding that the appellant had caused Lt Good to be deprived of food although that had been alleged by the prosecution.

The DFM's Reasons for Decision

10 As to the elements of the offence, the DFM relied upon a passage from a report under s 154 of the DFD Act by Group Captain Kirkham in 1994:

“In order to sustain a charge of ill-treatment under section 34 of the Defence Force Discipline Act I considered the prosecution must establish deliberate conduct on the part of the accused, whether by act or omission, that could reasonably be categorised as ill-treatment. Secondly, that at the time of such conduct the accused had knowledge or awareness that he was ill-treating the victim or was reckless as to whether he was doing so.”

The DFM said:

“The commentary in the Defence Force Discipline Act in respect of section 34 has the following comment in respect of ill-treatment. It states that this is not a defined term and should be regarded as having its ordinary meaning in a military context. And both counsel for the prosecution and the defence have adopted in their submissions that that is the appropriate approach to the term. The commentary goes on:

It is taken to include forms of ill-treatment not constituted in assault, for example, the unlawful imposition of a punishment or the deliberate and improper withholding of benefits. The imposition of necessary or proper duties and the exaction of their performance will not constitute this offence even though the duties are arduous or hazardous or both.”

11 Specifically the DFM found proved the facts alleged in particulars (a) to (i) and (k) and (l) (that is, all except particular (j) which alleged failure to ensure Lt Good did not become dehydrated). The DFM further found the facts alleged in particulars (a) to (i) constituted behaviour “which is capable of reasonably being categorised as ill-treatment”.

12 The DFM did not accept the submission of the appellant’s counsel that the conduct was appropriate conduct for the purpose of additional training and appropriate to increase Lieutenant Good’s officer qualities and to toughen him up for the completing of his duties to the best abilities of a platoon commander. He was unable to attribute an appropriate reason for this conduct, and held that it did not fall within the category of the imposition of necessary or proper duties and the exaction of their performance, although those duties might be arduous or hazardous. The DFM concluded that the conduct amounted to ill-treatment, and that the necessary mental element had been proved.

13 The DFM recorded a conviction and imposed a fine of \$2000 payable by ten equal fortnightly emoluments of \$200.

The meaning of “ill-treats”

14 The term “ill-treats” is not defined in the DFD Act. It is an ordinary English word and not a technical term. Its dictionary meaning is “to treat badly or cruelly” (Macquarie). According to the same dictionary “Cruelly” means “indifferent to, or taking pleasure in, the pain or discomfort of another”. In *Re CB [No 2]* [1982] VR 681 at 693, O’Byrne J said that “ill-treated means knowingly and without moral justification causing physical pain or mental suffering to someone”. Mere causation of physical pain or mental suffering could not necessarily constitute ill-treatment. Physical pain is often inflicted for the benefit of the person upon whom it is inflicted. Dental treatment and surgical operations are examples.

15 For present purposes, the word takes flavour from its context in a statute concerning military discipline. Of necessity, life in the armed forces can involve hardships and hazards not encountered in civilian life. Service personnel have to be trained to cope mentally and physically with the demands of warfare. Conduct which would be regarded as ill-treatment in civilian employment might be necessary and reasonable, indeed essential, as part of military training. Long route marches, unarmed combat training and survival courses are some examples. But obviously enough there are limits. The armed forces, like all other sections of Australian society, are subject to the rule of law.

16 Whether conduct is ill-treatment within the meaning of s 34 of the DFD Act will depend on a careful assessment of all the circumstances, always bearing in mind the military environment in which the question arises. The conduct must be considered objectively. At

least the following considerations would be relevant:

- (i) Was the conduct likely to result in the person holding inferior rank suffering physical or mental ill-effects of more than a transient nature?
- (ii) Did the conduct have a purpose related to the proper functioning of the armed forces?
- (iii) Was the conduct cruel, vindictive, discriminatory or humiliating?

The DFM's conclusion as to ill-treatment in the present case

17 It follows from the foregoing that the fact that Lt Good underwent an experience that was exhausting and accompanied by some measure of pain and discomfort in itself did not necessarily establish that he was ill-treated by the appellant within the meaning of s 34. The evidence disclosed a number of uncontested facts and circumstances, some of which were the subject of express findings but others of which were not adverted to by the DFM in his reasons for decision:

- (i) The appellant did not bear Lt Good any ill feeling;
- (ii) No injury of any significant nature was suffered by Lt Good;
- (iii) A Medical Corps NCO (Cpl Gorman) was present. The appellant told him to ensure that Lt Good was in no distress or had any problems;
- (iv) Cpl Gorman saw Lt Good throughout the day and was satisfied he was not suffering ill effects;
- (v) Lt Good was provided with water throughout the day;
- (vi) There was a military purpose for the appellant's conduct.

18 To expand on the last point, it needs to be kept in mind that the events occurred in a jungle warfare training exercise involving infantrymen of the Regular Army. Subject to obvious limitations, such an exercise needs to be, as far as possible, a realistic approximation of conditions soldiers would encounter in warfare.

19 The DFM dealt with the issue of the appellant's purpose in the following way. After discussing some earlier incidents involving the two men, the DFM expressed his satisfaction that there was no evidence that the appellant bore Lt Good any ill feeling. He continued:

"However, that is not to say that Major Quinn respected Lieutenant Good or considered that he did not require additional training.

It is quite clear on the evidence before me that Major Quinn intended to

toughen up his platoon commanders and that he had that purpose in mind in the training in which he engaged for the platoons commencing 3 March 1998. That takes me then to the question of what training could have been envisaged by the conduct engaged in by Major Quinn in interrogating Lieutenant Good. Certainly, this training was not as to how Lieutenant Good should conduct an interrogation. Major Quinn was already on notice from Captain Sheldon that the interrogation which he intended to partake in during the exercise was illegal but Major Quinn made the decision to press on.

However, there is no reasonable conclusion that I can draw that Major Quinn intended from the training to instruct Lieutenant Good as to how the interrogation should be conducted. The interrogation on any consideration of the facts was an interrogation beyond that which was acceptable under the pre-existing general orders relating to the conflict. The question then arises as to whether the training was intended to provide Lieutenant Good with the appropriate resistance to interrogation. I have considerable difficulty with such a prognosis. Members know that they must not give more details to an interrogator other than their regimental details. But how to resist an improper interrogation was, in my mind, not a matter appropriate for the exercise which commenced on 3 August [sic – obviously March] 1998.”

After discussing the evidence and the elements of the charge the DFM continued:

“It was put to me by the prosecution that the conduct of placing the pillowcase over the head of Lieutenant Good, of binding or placing over the pillowcase across the eye area and of binding Lieutenant Good’s hands was sufficient in itself, if not undone or redressed immediately, to constitute ill-treatment. I do not accept that submission. The evidence before me, evidence which I must accept in regard to the weight of the evidence, is that in respect of the capture of a member of the enemy it is appropriate to place a pillowcase over his head and bind his wrists.

The question arises as to whether that conduct, if not per se ill treatment, then becomes ill treatment after a certain period of time.”

20

The DFM then proceeded to discuss the evidence as to the length of time for which Lt Good had the pillowcase over his head. Later he said:

“There is no question that this treatment occurred in a non-military environment. The conduct may well be capable of being ill treatment, it is therefore essential for me to consider the conduct in the military context in which it occurred. In that regard it is urged upon me to find that the conduct was appropriate conduct for the purpose of additional training for Lieutenant Good, which training was appropriate to increase his officer qualities and to toughen him up for the purposes of completing his duties to the best of his abilities as a platoon commander.

As I have already stated the training was clearly not training as to how to conduct an interrogation. The interrogation that was conducted by Major

Quinn went on for a substantial number of hours and the deprivation of Lieutenant Good's freedom consequently also existed for a large number of hours. The purpose of the training is a matter upon which I am unable to attribute an appropriate reason. In my opinion the training offered did not fall within the category of the imposition of necessary or proper duties and the exaction of their performance, even though those duties might be arduous or hazardous."

21 After concluding that the facts he found constituted ill treatment the DFM paused to consider the question whether the appellant had "the necessary intent". We will later discuss this aspect more fully. However, relevantly for present purposes, the DFM then said:

"The evidence is clear that Major Quinn intended on a course of conduct for the purpose of toughening up Lieutenant Good. In my opinion that intention is indicative of the intention to ill treat Lieutenant Good in respect of the conduct that he imposed upon him. The fact that he thought or may have thought that it was good for Lieutenant Good to experience those conditions does not nullify the intention to commit the acts with the intention of ill treatment."

22 We would make the following observations. First, there seems to be an element of confusion between, on the one hand, training in the proper way to treat enemy prisoners and, on the other hand, training in how to resist interrogation by an enemy who may not be acting properly. If the training was of the latter kind, it is difficult to see the point of the DFM's finding that placing a pillowcase over the head of a captive is "appropriate", provided it is not kept there too long.

23 This aspect has been affected by the evidence of Captain Sheldon, the appellant's 2IC, which was much relied on by Senior Counsel for the respondent before us.

24 Captain Sheldon testified that before the exercise he told the appellant that he (Sheldon) had been to an officer's presentation at the School of Infantry some 13 or 14 months previously "in reference to the new directive about the interrogation techniques" and that he told the appellant that "what his intent was, is in fact, was illegal according to the new direction, or the new directive". The appellant just "noted my point" and indicated that he was going to press on with it anyway. The prosecutor sought to tender the "new directive". Tender was opposed on the grounds that there was no proof the appellant had knowledge of it and that it was irrelevant since the appellant was not charged with breaching any order. The objection was upheld. In any case, it seems that Captain Sheldon was talking about directives

on interrogation techniques, not resistance to interrogation.

25 Secondly, there appears to be no evidentiary basis at all for the finding that how to resist an improper interrogation was “not a matter appropriate for the exercise”. Nor is there any logical basis for regarding training of this type as not appropriate. In wartime soldiers do get captured and do get improperly interrogated. This is a wartime eventuality for which soldiers need to be trained and prepared.

26 Thirdly, the purpose of toughening up is self-evidently a military purpose and the more so in the present case in that it related to all the appellant’s platoon commanders and not just Lt Good. There is no suggestion in this case of the kind of malicious brutality commonly referred to as bastardisation. Toughening up, either for individuals or units, is an essential part of military training, as in route marches, physical training and the like. We do not understand how characterising the appellant’s purpose as the toughening up of Lt Good could lead to the conclusion that it was an improper purpose and one that made the appellant’s conduct amount to ill-treatment.

27 In our opinion, and quite apart from this question of intent to which we are about to turn, it was not open on the evidence for the DFM to find that the conduct of the appellant amounted to ill-treatment of Lt Good within the meaning of s 34.

Intent

28 The words of s 34 prescribe no mental element, but s 10 of the DFD Act provides that “the principles of the common law with respect to criminal liability apply in relation to services offences other than old system offences”. By virtue of the definitions in s 3, the offence created by s 34(1) is a service offence not being an old system offence. It follows that the principle enunciated by the High Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523 applies to the interpretation of s 34(1), viz, that unless the words of the statute indicate a contrary intention, Parliament is presumed to have intended that some form of *mens rea* (guilty intent) is an element in that offence. In *Chief of General Staff v Stuart* (1995) 133 ALR 513 it was held that this general proposition of statutory interpretation applied to an offence created by the DFD Act.

29 Counsel for the appellant referred the Tribunal to *Susan Newington* (1990) 91 Cr App

R 247. This case concerned the offence of ill-treating a patient contrary to the *Mental Health Act 1983* (UK), s 127(2). Watkins LJ, who delivered the judgment of the Court, said at 254 with respect to the issue of *mens rea*:

“In our judgment the judge should have told the jury that for there to be a conviction of ill-treatment contrary to the Act of 1983 the Crown would have to prove (1) deliberate conduct by the appellant which could properly be described as ill-treatment whether irrespective of this ill-treatment damaged or threatened to damage the health of the victim [sic] and (2) a guilty mind involving either an appreciation by the appellant at the time that she was inexcusably ill-treating a patient or that she was reckless as to whether she was inexcusably acting in that way.”

30 It is clear from the reasons for judgment of the English Court of Appeal that the offence created by statute involved the concept of treatment which, viewed objectively, was ill-treatment and an intention on the part of the appellant to apply such treatment or a reckless indifference whether her acts and omissions amounted to such treatment. Watkins LJ said (at 253) that “if the appellant genuinely believed that in using such conduct she was acting in the best interests of the patient and the jury accepted that, she would not be guilty of the offence alleged...”. For the purposes of this appeal, there is no material distinction to be drawn between the words of the section considered in *Newington* and s 34 of the DFD Act.

31 Further, the nature of ill-treatment is such that it is unlikely that the Parliament intended to create an offence of strict liability, for one would have to ask, as did Lockhart J in *Stuart* (supra) at 531, what is the subject matter of an honest and reasonable belief as to the existence of facts, which if true, would make an act and/or omission innocent and not constitute ill-treatment?

32 The Tribunal accepts the submission of Senior Counsel for the respondent that the elements that go to make up the offence created by s 34(1) are:

- (i) that the person charged;
- (ii) by an intentional act(s) and/or omission(s);
- (iii) caused ill-treatment, as judged by the ordinary standards of reasonable persons in the circumstances of the case; and
- (iv) that at the time of doing that act(s) and/or omission(s) the persons charged intended to cause such ill-treatment or foresaw that such ill-treatment was the likely outcome of that act(s) and/or omission(s).

33 The DFM found that “Major Quinn may well have had the belief that it was appropriate for him to perform the conduct which he did and impose the conditions on Lieutenant Good for the purpose of developing Lieutenant Good. That ulterior motive does not negative the intent to ill-treat Lieutenant Good”. In so concluding the DFM fell into error. The belief that he found the appellant may well have had does not negate the second element, namely that his acts and omissions were intentional. However, a positive belief that the impugned acts and omissions were for the welfare or good of the alleged victim negates the fourth element, for such a belief will negate an intention to cause ill-treatment and will also negate the proposition that such acts and omissions were done or omitted recklessly indifferent to whether they constituted ill-treatment. Thus in the case of chastising a child or caring for a sick patient the relevant conduct viewed alone may well amount to ill-treatment but will not be a breach of the criminal law unless it is established that the alleged offender did the acts and/or made the omissions with the requisite intention. To adopt the words of Watkins LJ in *Newington* cited above, “if the appellant genuinely believed that in using such conduct [he] was acting in the best interests of [Lieutenant Good] and the [DFM] accepted that, [he] would not be guilty of the offence alleged”.

34 The DFM did not accept that the appellant did believe that he was acting in the best interests of Lieutenant Good, but he did find that the appellant “may well have” so believed. It follows that DFM could not have been satisfied beyond reasonable doubt that the appellant intended to cause ill-treatment or acted recklessly indifferent to whether he was causing ill-treatment.

35 That this error affected the order from which this appeal is brought is apparent from the following passages in the reasons for decision of the DFM:

“I am satisfied that the evidence establishes that Major Quinn at the time of his conduct towards Lieutenant Good had the knowledge that he was ill treating Lieutenant Good and that he excused his behaviour in his own mind in the belief that the conduct engaged by him was for the overall benefit of Lieutenant Good.

Alternatively, it would be just as open to find that, having regard to the conversation between Captain [then Lieutenant] Sheldon and Major Quinn in this regard [the conversation already referred to above, that tying up and interrogating the platoon commanders would be illegal] that Major Quinn would be aware, or was aware, that his behaviour was – he foresaw that his behaviour was capable of amounting to ill-treatment of Lieutenant Good and

that he recklessly persisted with that behaviour regardless of having foreseen that fact.”

36 The second proposition is inconsistent with the first. Whether or not the appellant should have paid more heed to the counsel offered by his second in command (although, for the reasons already mentioned, Captain Sheldon’s advice did not relate to the critical issue) once it is said that the appellant excused his behaviour with the belief that the relevant conduct was for the good of the platoon commander, it cannot also be said that he acted with reckless indifference to whether the conduct was ill-treatment.

37 This error also vitiates the conviction.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Tribunal.

Associate:

Dated: 22 August 2001

Counsel for the Applicant: B Baker

Solicitor for the Appellant: Cahills

Counsel for the Respondent: P S Hastings QC

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 15 August 2001

Date of Judgment: 22 August 2001