DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Stuart v Chief of Army [2003] ADFDAT 3

CRIMINAL PROCEDURE – whether charge duplicitous – whether substantial miscarriage of justice

CRIMINAL PROCEDURE – failure to provide adequate particulars – whether substantial miscarriage of justice

DEFENCE AND WAR – Defence Force – service offence – breach of general order – whether provision intended to be obeyed – whether provision applied to circumstances

DEFENCE AND WAR – Defence Force – service offence – insubordinate conduct – whether offence of strict liability – whether facts alleged amounted to insubordinate language

DEFENCE AND WAR – Defence Force – service offences – Defence Force magistrate – refusal to permit calling of convening authority as witness – whether proceedings infected by apparent or systemic bias

Criminal Code (Cth) s 6.1 (1)

Defence Force Discipline Appeals Act 1955 (Cth) s 23(1)(c)

Defence Force Discipline Act (Cth) ss 26, 29, 103, 127, 152, 154, 180

Defence Force Discipline Rules rr 8(3), 11(5)

Findlay v The United Kingdom (1997) 24 EHHR 221 – not followed

Fingleton v Ivanoff Pty Ltd (1976) 14 SASR 530 – referred to

Johnson v Miller (1937) 59 CLR 467 – applied

Lyle v Christian Ivanoff Pty Ltd (1977) 16 SASR 477 – followed

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273 – applied

Minogue of Human Rights and Equal Opportunity Commission (1999) 166 ALR 129 – applied

Parker v Sutherland (1917) 116 LT 820 – applied

Quelch v Story (1924) NTJ 46 – referred to

R v Bedington [1970] Qd. R. 353 – applied

R v Grant and Ors (1957) 2 All ER 694 – distinguished

R v Tyler; ex parte Foley (1993-1994) 181 CLR 18 – applied

R v Phillips and Lawrence [1967] Qd. R 237 – applied

S v The Queen (1989) 168 CLR 266 – applied

DIANA BETTINA STUART V CHIEF OF ARMY
DFDAT 4 OF 2002

HEEREY J (President), UNDERWOOD J (Deputy President)
and MILDREN J (Member)
21 AUGUST 2003
MELBOURNE (HEARD IN SYDNEY)

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL **DFDAT 4 OF 2002**

BETWEEN: **DIANA BETTINA STUART**
APPELLANT

AND: **CHIEF OF ARMY**
RESPONDENT

JUDGES: **HEEREY J (President), UNDERWOOD J (Deputy President) and MILDREN J (Member)**
DATE OF ORDER: **21 AUGUST 2003**
WHERE MADE: **MELBOURNE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1 The appeal in relation to count 7 be allowed and a verdict of not guilty be entered.

2 The appeal be otherwise dismissed.

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL **DFDAT 4 OF 2002**

BETWEEN: **DIANA BETTINA STUART**
APPELLANT

AND: **CHIEF OF ARMY**
RESPONDENT

JUDGES: **HEEREY J (President), UNDERWOOD J (Deputy President) and MILDREN J (Member)**
DATE: **21 AUGUST 2003**
PLACE: **MELBOURNE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 On 7 October 2002, Brigadier M. A. Kelly AM, a convening authority appointed under section 102 of the Defence Force Discipline Act 1982 (the Act) referred a total of seven charges against the appellant for trial by a Defence Force magistrate (DFM) pursuant to ss 103(1)(c) of the Act. The trial as conducted before the DFM resulted in convictions on counts six and seven only. Count 1 was withdrawn and the DFM found the appellant not guilty of the remaining counts. Very minor penalties were imposed in relation to the two counts upon which there were findings of guilt. The appellant appeals to this Tribunal on a number of grounds in relation to her conviction on counts six and seven.

Count 7

2 It is convenient to begin with this count first. The charge against the appellant was one of failing to comply with a general order, contrary to section 29 of the Act, "by failing to have her uniform correctly pressed and free of stains contrary to Army Standing Orders for Dress, Volume 1, Chapter 2 paragraph 2.3 and Chapter 3 paragraph 3.48 dated 2 August 2000."

3 Chapter 2 of the Army Standing Orders for Dress 2000 Volume 1 is headed "Dress Policy." Paragraph 2.1 provides (relevantly):

> *"This Chapter gives the general policy for Army dress and detailed information on responsibilities for dress, clothing and equipment specifications."*

4 Paragraph 2.3 provides:

> *"It is the responsibility of all personnel to maintain their uniform in good order and repair and present the highest possible standards of appearance."*

5 Chapter 3 paragraph 3.48 relevantly provides:

> *"DPCU when worn as Barracks Dress is to be lightly pressed to remove wrinkles."*

6 Paragraph 3.9 c. defines DPCU to mean "Disruptive Pattern Combat Uniform."

7 The evidence led at trial which the DFM accepted was that the appellant was not wearing DPCU but was wearing "Protective Dress." The difference between the two kinds of dress was explained by the DFM:

> *"The DPCU uniform is incredibly distinctive. It is variously known as the can't see me suit, or cams or disruptive pattern. No-one who has been in the service for longer than one minute could confuse it with protective dress. Protective dress is a light coloured khaki uniform."*

8 The DFM found that there was a reasonable doubt about whether or not the appellant's uniform had been not been pressed on the occasion in question.

9 As to the stain, the finding of the DFM was that on the morning of 20 June 2002, as was Unit practice, there was a parade held by the Squadron Sergeant Major for the purpose of dress inspection. On this day, the dress to be inspected was protective dress which was the normal wear of the appellant and other members of the Unit around the Unit. That morning, the appellant was having a cup of coffee before going down to the Unit parade. She spilt some of the coffee onto her shirt either in one or two places, staining the shirt. She attended the parade in that stained uniform, there being no time available to change her uniform. The DFM found in effect that the spillage was her own fault and therefore she was not excused by any defence of accident; however the DFM did say that if someone else had spilled coffee over her, an event over which she had had no control, he would have found that she would not have been in breach of the requirement of the standing order to have presented the "highest *possible* standard." No evidence was led to show how the coffee came to be spilled.

10 A number of grounds of appeal were raised in relation to this conviction. It is not necessary to

refer to all of them. First it was submitted that the charge was duplicitous. The charge was framed in such a way that proof of one or other of two facts – the appellant had worn a uniform that was not pressed, or the appellant had worn a uniform that was stained – could support a conviction. However, it was clear that only the latter fact was proved. Thus, this was not a case where evidence of two offences had been led and there is uncertainty as to which the conviction relates, because it is capable of equal application to two sets of facts: *Parker v Sutherland* (1917) 116 LT 820 cited in *Johnson v Miller* (1937) 59 CLR 467 at 488 per Dixon J. Nevertheless, as the DFM did not put the prosecution to its election (see *Johnson v Miller*, *supra* at 489), and assuming the charge to be duplicitous, the question then arises as to whether "there has been a blemish on the trial amounting to a substantial miscarriage of justice": see *S v The Queen* (1989) 168 CLR 266 at 287 per Gaudron and McHugh JJ, and s 23(1)(c) of the *Defence Force Discipline Appeals Act 1955.* In the circumstances of this case, the suggested miscarriage of justice relates to the fact that the appellant was led to believe, by the way that the charge was framed in relation to the lack to the uniform being pressed, that the prosecution was alleging that she was wearing DCPU uniform. Therefore, so the submission went, once it was found that she was wearing protective dress, the charge should have been dismissed. We are unable to accept this argument. The question of which uniform the appellant was wearing was not relevant to the question of whether or not the appellant had been guilty of a breach of the general orders by wearing a coffee-stained uniform at a dress parade.

11 The appellant's second argument was that there was no proven breach of any lawful general order relating to the wearing of the uniform on this occasion. The prosecution alleged a breach of Army Standing Orders for Dress, Volume 1, Chapter 2 paragraph 2.3 to which we have already referred. It was submitted that this paragraph was not a general order, but merely a matter of statement of general policy. The orders relating to dress which were relevant to this case were, it was submitted, contained in Chapter 3 of the Standing Orders. Chapter Three is headed "Wearing of Uniform". Paragraph 3.1 provides:

> *"This chapter explains:*
>
> *a. the authority to wear uniform;*
> *b. the occasions when uniform is to be worn, and*
> *c. appearance aspects."*

12 Paragraphs 3.30 to 3.59 follow a heading "APPEARANCE" and deal with a number of

matters relevant to the standards of personal dress, appearance and grooming. Para 3.30 provides:

> *"The standard of personal dress, appearance and grooming is to be such as to reflect credit on the individual and on the Australian Army. The intent of ASOD is to ensure that a high standard of grooming consistent with that expected of a professional military force is maintained without being unnecessarily restrictive. While recognising the standards of society, the traditional military standards have proved their value in fostering group identity and morale."*

13 A number of paragraphs in this section of the standing orders are expressed in language which is plainly in the form of an order: eg. "male personnel are to be clean shaven daily..." (para 3.33); "Shirts and jackets are to be worn with the button line positioned centrally in front of the body…" (para 3.32); "Jewellery is not to be worn by personnel in uniform with the exception of wrist watches…" (para 3.49); "Radical [hair] styles are prohibited…" (para 3.44). It is common ground that there is no provision in Chapter 3 providing that Protective Dress is to be clean and unstained when worn on a dress parade. It was submitted that Protective Dress is designed to be worn when doing dirty tasks which might cause damage to other forms of dress, that this kind of dress will become stained in the normal course of duties and therefore it is not possible to infer that there was a breach of the standing orders.

14 The question then is whether the prosecution proved that para 2.3 is an order which must be complied with in the case of Protective Dress when worn at a dress parade. The relevant General Order which was tendered as Exhibit P3 before the DFM was tendered in an incomplete form. In particular, Chapter 1 was not tendered, yet according to the contents page Chapter 1 contained the following:

> *"INTRODUCTION*
>
> *Application of the order*
> *Variations to Army Standing Orders for Dress*
> *Layout of Army Standing Orders for Dress*
> *Interpretation of Army Standing Orders for Dress"*

15 In all the circumstances, we do not think that the prosecution proved beyond reasonable doubt that paragraph 2.3 was an order the breach of which resulted in the commission of an offence against s 29 of the Act, or that if that was such an order, it was intended to deal with the circumstances of this case. It is not clear to us that para 2.3 is intended to be an order at

all. In para 4.48 of the *Discipline Law Manual*, it provides:

> *"…the mere inclusion of matter in standing orders (for example) may not in itself result in non-compliance being an offence under this section. If the matter is so drafted that the relevant members are in fact given an option whether or not to comply (for example by the use of the word 'should', which is merely an exhortation) then a duty to comply will not have been imposed."*

16 In this case, para 2.3 appears in a section of the general orders which appear to be dealing with policy matters and explanatory matters, with the relevant detail to be found in Chapter 3. We do not think it is has been proved that clause 2.3 was intended to be an order, particularly in the absence of the provisions of Chapter 1 to which reference has already been made. Furthermore, we do not consider that it has been proved that para 2.3, even if it is an order, applied to the circumstances of this case. The *Manual of Military Law 1929* (UK) provides at p436:

> *"…a misapprehension reasonably arising from want of clearness in the order is a ground of exculpation."*

17 Likewise, if there is a reasonable doubt as to whether the provision relied upon was intended to be obeyed and to apply to the circumstances, the accused is entitled to an acquittal. Here the very nature and purpose of Protective Dress suggests that it is not intended that such uniform be kept spotless at all times. For example, if a soldier was engaged in vehicle maintenance, it is likely that the uniform will get dirty. It is not difficult to see how it could be suggested that with more care, the soldier could have avoided getting his uniform dirty and that therefore the soldier had not presented "the highest *possible* standards of appearance." We doubt if that was intended, and that doubt is reinforced by the absence of Chapter 1 in the exhibit tendered before the DFM. We would therefore allow the appeal in relation to count 7 and quash the conviction and sentence in respect thereof.

Count 6

18 This charge was one of insubordinate conduct contrary to s 26(1) of the Act, in that the appellant, at Macrossan Training Centre on 31 May 2002, engaged in conduct that was insubordinate to Corporal M. Green, her superior officer, by replying to him “There’s two fucking ends to the fucking rope, why did he have to fucking start at my end”, or words to that effect, when addressed by him.

19 No point was taken by the appellant that the charges on the charge sheet were improperly

joined, contrary to r 8(3) of the Defence Force Discipline Rules, although if it had been taken it is difficult to see how the joinder of all of these counts in the one charge sheet could have been justified. However, this is a mere irregularity, and if there is no miscarriage of justice the convictions will not be quashed on this ground: see *R v Phillips and Lawrence* [1967] Qd R 237 at 278-9; *R v Bedington* [1970] Qd R 353; Defence Force Discipline Appeals Act 1955, s 23(1)(c). No submission was made that any miscarriage of justice flowed due to improper joinder.

20 It was submitted, relying on *R v Grant & Ors* (1957) 2 All ER 694, that insubordination means "a refusal to subordinate oneself to authority" and, therefore, the prosecution must prove an intention on the part of the appellant to be insubordinate. It was further submitted that, on the unchallenged evidence of the appellant, she had no such intention. In any event, the DFM did not find any such intention proved because he considered that the charge was one of strict liability.

21 Section 26(3) of the Act provided, at the relevant time, that an offence against s 26 is an offence of strict liability. Counsel for the appellant, Mr Levet, nevertheless sought to argue that, because the notion of insubordination inherently involved deliberate conduct, there could be no conviction without proof of the relevant mental element. We are unable to accept this submission. It is open to the legislature to provide that an offence is one of strict liability and, if it does, no mental element need be proved: see s 6.1(1) of the Criminal Code (Cth). As counsel for the respondent, Mr Beech-Jones, submitted what the provision now requires is proof that, viewed objectively, her conduct was insubordinate.

22 Next it was submitted that the appellant was not charged with insubordinate language but insubordinate conduct, but the conduct particularised in the charge sheet consisted of language only. However, whatever may be the state of the particulars in the charge sheet, the DFM founded his decision not merely on the words used, but took into account the surrounding circumstances, namely that the words were said in the hearing of, or presence of, subordinates, peers and at least one superior, and that the conduct (which consisted of yelling the words alleged in a disrespectful tone into the face of Corporal Green some 60 cm away) called into question Corporal Green's leadership and rank. In those circumstances, there is no basis to the argument that the wrong charge had been preferred.

23 Counsel for the appellant complained that this was unfair and gave rise to a miscarriage of justice. Rule 11(5) of the Defence Force Discipline Rules provides:

> *"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."*

24 Clearly, if the prosecution had intended to rely upon conduct other than the words used, these should have been particularised. However, this is also a mere irregularity and the appellant must also satisfy us that a miscarriage of justice occurred: See s 23(1)(c) of the Act.

25 The appellant complained that no evidence was led by the prosecution of any facts in support of the charge other than the words used. In cross-examination, counsel for the appellant at trial had succeeded in obtaining a concession from the complainant, Corporal Green, that the words used were not insubordinate per se, because throughout the course, language such as that employed by the appellant had been commonplace throughout, irrespective of rank, and no-one had taken offence. It was not until examination-in-chief, cross-examination and re-examination of Corporal Green concluded that the following evidence was given as a result of questioning by the DFM:

> *"DFM:Q. Corporal, I have got a couple of matters which I would like you to clear up for me. Have you ever heard a digger swear before?*
>
> *A. Diggers swear?*
>
> *Q. Once or twice in your career?*
>
> *A. I might have heard something like this, Sir.*
>
> *Q. Ever heard angry diggers use the word 'fuck' occasionally?*
>
> *A. All the time, Sir. That's one thing that I don't distinguish, Sir, if someone swears, I don't really react to it, Sir. If I swear, they swear, I call it evens. I don't go off at that, Sir.*
>
> *Q. Did you prefer this charge against her?*
>
> *A. Yes, Sir. It was not for the swearing at me or anything like that. It was for screaming in my face that I did it, Sir, not any personal actions or anything along those lines, and it was also in front of most of my subordinates and I had some of my peers standing off to my rear and the Sergeant also overheard it as well.*
>
> *DFM: Gentlemen, questions arising from that?*

FLTLT LYNHAM: No, Sir.

DFM: Major Levet? I would invite you to –

MAJ LEVET: No, Sir.

DFM: I specifically invite you on the basis of those last answers which I have opened up which were not opened up by the Prosecution."

26 Counsel for the appellant at trial did not object to the evidence given by Corporal Green on the basis that it was a non-responsive answer to the DFM's question (or any other basis). He did not seek an adjournment. He apparently had no need to seek instructions because he immediately cross-examined Corporal Green about the matters which the DFM had opened up. This cross-examination occupies some 9 pages of the transcript. It is difficult to see how there could be any miscarriage of justice. No complaint of any kind was made at the time. The notice of appeal raised no complaint about this amounting to a miscarriage of justice. The original outline of submissions filed in this Tribunal on 16 July 2003 made no reference to this. It was first raised in the appellant's submissions filed on 21 July 2003. The unfairness alleged is that the appellant lost the opportunity of a planned cross-examination relating to these additional matters. We are not satisfied that this ground of appeal has been made out. We were not told how a "planned" cross-examination might have altered the outcome. We consider that the defending officer was, in fact, able to deal with the problem adequately.

Other grounds affecting both counts 5 and 6

27 Ground of appeal 2(c) is as follows:

"In respect of both the Fifth and Sixth Charges, the learned DFM erred (at transcript page 112) in that he:

(i) Refused to permit the accused to call the convening authority as a witness;
(ii) Refused to permanently stay the proceedings against the accused."

28 Before dealing with these grounds in detail, it is necessary to briefly outline the matters to which these grounds – which are interrelated – refer. The appellant has a lengthy history of being the subject of disciplinary proceedings. The evidence led at trial was that the appellant joined the Army as a reservist in April 1987. In 1988 she graduated with a bachelor's degree in rural science. In October 1990 she transferred to the Australian Regular Army. Prior to

her trial for these matters, the appellant had received a total of 59 PD105s, or "Summary Proceeding Reports", which are the forms used to initiate charges to be brought before a subordinate summary authority. She had been convicted on only 7 occasions. There were 8 administrative attempts to have her discharged and on 15 occasions she had been referred to a psychologist with a view, it was suggested, to having her discharged on psychological grounds. Some witnesses who were NCOs gave evidence that they had been asked to report her for any infractions. The DFM observed:

> *"The Defence have shown to me that this Accused has been, on many occasions, vindicated in relation to those matters which she had previously been charged with and on some occasions convicted, and on some of those occasions having served a sentence...*
>
> *The Defence have also tendered to me numerous examples of redress of grievances, of Show Cause Notices and of administrative dealings in general which indicate that this Accused has not enjoyed the normal career path of members of the Army. In fact, I venture to suggest that this Accused would be almost singular in the attention that she has received, both in an administrative and in a disciplinary sense during her years in the Army.*
>
> *I am not in a position to comment upon that because I do not know what circumstances surrounded each of those allegations or administrative actions. Clearly others who have reviewed the disciplinary matters at least have found on nearly every occasion that they have reviewed them that the Accused was entitled to have returned to her a clear record after each such review. Clearly others who have examined administrative processes have also come to a like conclusion that the initial actions taken against the Accused in an administrative sense on various occasions could not be upheld for reasons which are not known to me...*
>
> *The Defence have urged upon me at every conceivable occasion that this Accused has a rightful perception of being victimised or unfairly treated within the Australian Regular Army and that such unfair treatment continues to this date. To that end I take it into account but that is as far as I think I can take it into account."*

29 At the trial, counsel for the appellant sought to persuade the DFM that the system under which the appellant was charged was infected with "systemic bias", and an application was therefore made to the DFM to stay the proceedings. In support of this application the appellant sought to have called Brigadier Kelly, the convening authority, as a witness. It was proposed to ask Brigadier Kelly if he had received any "pre-trial advice" before he decided to refer the hearing to a DFM and, if so, who gave that advice and what regard was taken of it.

30 The DFM refused to permit the calling of Brigadier Kelly because, even if he assumed that

the prosecuting officers had advised Brigadier Kelly from the very inception and that Brigadier Kelly acted on that advice, it would not have affected the ability of the appellant to receive a fair trial from an independent tribunal.

31 The "system" which is the subject of criticism in this case may be briefly described. Proceedings in this case were initiated by charges being laid on a Form PD105 before a subordinate summary authority, Lieutenant Colonel Faithful, the accuser's commanding officer. There was evidence that Lieutenant Colonel Faithful was of the view that the appellant was of the opinion that the appellant's retention was not in the best interests of the Army. Although the charges were capable of being dealt with by a subordinate summary authority, Lieutenant Colonel Faithful decided that he believed it would be in the interests of justice if he referred the matter to Brigadier Kelly.

32 As the DFM pointed out, if Lieutenant Colonel Faithful had dealt with the matter personally the appellant may well have had cause to complain about his lack of apparent impartiality given his opinion of her. But there can be no complaint made on this ground if he did not deal with the matter, other than to refer it to a convening authority.

33 The appellant argued at first instance that because Lieutenant Colonel Faithful referred the matter to a particular convening authority, because he had the power of choice, the subsequent proceedings were tainted. This submission was not developed in that form before us. Rather, the submission was made that the military justice system, as constituted by the Defence Force Discipline Act, the Defence Force Discipline Regulations and associated subordinate legislation, is inherently flawed in that it fails to accord procedural fairness to accused persons because of "inherent systemic bias and command influence".

34 Counsel for the appellant acknowledged that various challenges which have been made to the validity of service tribunals have been rejected by the High Court. In particular, *Re Tyler; Ex parte Foley* (1993-1994) 181 CLR 18 established that military tribunals are not subject to Chapter III of the Constitution, and are not required to be independent in the sense that a court is required to be independent of executive influence. Moreover, a majority of the Court held that the provisions of the Defence Force Discipline Act "established an independence on the part of courts martial commensurate with the system of service tribunals for the discipline of the Defence Force." (supra at 27, 34).

35 In our opinion, the same conclusion should be reached in relation to trial by a DFM. Whilst, technically, the convening authority appoints the DFM chosen to hear the case under s 103 of the Defence Force Discipline Act, the allocation of the person to be appointed as the DFM is not made by the convening authority but by the Chief Judge Advocate. A DFM is required to be a member of the judge advocate's panel and is appointed by the Judge Advocate General (s 127). DFMs, although holding rank within the armed services, are not within the command structure of the convening authority. The Judge Advocate General must be a former or serving Federal or Supreme Court Judge (s 180). Apart from the power to terminate the appointment of the DFM chosen for the case, and having administrative responsibility for arranging the presence of witnesses at the hearing, the convening authority has no other functions in relation thereto. Confirmation of any conviction or sentence is not the function of the convening authority but is entrusted to a separate reviewing authority (s 152), who is required to receive legal advice pursuant to s 154 of the Act before reviewing the matter. In addition to the automatic review provided for by the Act, a convicted person has a right to petition the reviewing authority *vide* s 153, as well as appeal to this Tribunal. A right of appeal from this Tribunal lies to the Federal Court of Australia. These provisions establish a system of independence commensurate with a service tribunal established for the purpose of the discipline of the Defence Force.

36 This being so, there was nothing to be gained by the appellant calling the convening authority to give evidence in this case. Any evidence Brigadier Kelly might have given was irrelevant. In our opinion the learned DFM was correct to refuse the appellant's application.

37 The appellant sought to argue, based on certain decisions of the European Court of Human Rights, that the system was infected by inherent bias and therefore breached, inter alia, article 14 of the International Covenant on Civil and Political Rights to which Australia is a party. This Tribunal is not bound by decisions of the European Court of Human Rights. The International Covenant on Civil and Political Rights is not part of Australian domestic law and, therefore, has only a limited role to play in this country: see *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 286 ff. Counsel for the appellant acknowledged that a general challenge to the validity of the Defence Force Discipline Act could not be successfully mounted based on these decisions.

38 Counsel for the appellant pointed out that the Covenant has been incorporated into a schedule

contained in the Human Rights and Equal Opportunities Commission Act. However, as he also acknowledged, the Full Court of the Federal Court has ruled that this does not mean that the Covenant has been incorporated into domestic legislation in such a manner as to give rise to enforceable rights: *Minogue v Human Rights and Equal Opportunity Commission* (1999) 166 ALR 129 at paras [35] to [36].

39 Notwithstanding these authorities, counsel for the appellant mounted an argument that there was a requirement implied by s 61 of the Constitution to afford natural justice to the appellant. It would serve no useful purpose to set out the elaborate reasoning upon which this argument was based. In this case, there is no doubt that the appellant received natural justice from the learned DFM. She was allowed to present her case; she was allowed to have free legal assistance. It is not clear to us in what respect it is suggested that the rules of natural justice were breached, other than apprehended bias by the DFM. In our opinion, there is no substance to this submission which must be rejected. The argument depends, inter alia, upon the conclusions reached by the European Court of Human Rights in *Findlay v The United Kingdom* (1997) 24 EHRR 221, a case concerning systemic bias. Those conclusions in relation to the legislation, then existing in the United Kingdom, are not open in respect of the Defence Force Discipline Act because of the reasoning of the High Court in *Re Tyler; Ex parte Foley*, supra. Systemic bias has been upheld in Australia in circumstances where decision-makers (magistrates) lacked judicial independence because they were subordinates to the prosecutor and the prosecuting authority, and this is so whether the cause of the problem is institutional or not: see for example, *Quelch v Story* (1924) NTJ 46; *Fingleton v Ivanoff Pty Ltd* (1976) 14 SASR 530; cf *Lyle v Christian Ivanoff Pty Ltd* (1977) 16 SASR 477, where the Full Court held that magistrates were not precluded from hearing charges brought by prosecuting authorities merely because they were all public servants, when the circumstances were that the magistrates, prosecuting counsel and complainants were all in different departments with different departmental heads. It is clear that the DFM, although a member of the Defence Force, is not subject to the chain of command of the prosecuting authorities or the convening authority, and exercises an independent function. His position is analogous to the position of the magistrates considered by the Full Court in *Lyle v Christian Ivanoff Pty Ltd*, supra, in that whilst he holds rank within the Army, he is not subject to the same command structure as the prosecuting officer or the convening authority.

40 We would therefore dismiss the appeal in so far as it relies on these grounds.

Conclusion

41 In conclusion, the appeal in relation to count 7 is allowed and we enter a verdict of not guilty. Otherwise, the appeal is dismissed.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey (President), Justice Underwood (Deputy President) and Justice Mildren (Member)

Associate:

Dated: 21 August 2003

Counsel for the Appellant:	Mr B Levet, Ms B Boss
Solicitor for the Appellant:	Wyatt Attorneys
Counsel for the Respondent:	Mr R Beech – Jones, Mr P Keane
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	24 July 2003
Date of Judgment:	21 August 2003