Defence Force Discipline Appeal Tribunal

Kearns v Chief of Army [2022] ADFDAT 3

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| Appeal from: | Defence Force Magistrate |
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| File number: | DFDAT 1 of 2022 |
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| Judgment of: | **LOGAN J (President), BRERETON jA (deputy president) AND SLATTERY J (MEMBER)** |
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| Date of judgment: | 12 August 2022 |
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| Catchwords: | **DEFENCE AND WAR** – appeal from a Defence Force Magistrate (DFM) – where the appellant was found guilty of assaulting a subordinate – *Defence Force Discipline Act 1982* (Cth) (*DFDA*), s 34 – and of conduct prejudicial to the discipline of the Defence Force under *DFDA*, s 60 – *Defence Force Discipline Appeals Act 1955* (Cth), ss 20, 23 (*Appeals Act*) – whether time should be extended under *Appeals Act,* s 21 for lodging the appeal – the appellant, a Lieutenant Colonel had attended a function at the Australian Defence Force Academy Cadets Mess the appellant was convicted of conduct under *DFDA*, s 60 by placing his hand at the function upon the thigh of a female Officer Cadet whilst intoxicated and convicted of assaulting the same female Officer Cadet , a subordinate, under *DFDA*, s 34 by twirling her hair and massaging her shoulder – whether the DFM impermissibly took into account the absence of evidence of a motive to lie contrary to *Palmer v The Queen*, constituting a material irregularity and resulting in a miscarriage of justice warranting the conviction being quashed under *Appeals Act* s 23(1)(c) – whether the convictions were unreasonable, or cannot be supported having regard to the evidence or in all the circumstances of the case are unsafe or unsatisfactory warranting the conviction being quashed under *Appeals Act,* s 23(1)(a) and (d) – appeal dismissed – observations about the authority of superior service tribunals under the *DFDA* |
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| Legislation: | *Defence Force Discipline Act 1982* (Cth) ss 34, 60, 61, 68, 152, 154, 162, Pt IV  *Defence Force Discipline Appeals Act 1955* (Cth) ss 20, 21, 23, 37  *Evidence (Miscellaneous Provisions) Act 1991* (ACT)s 74  *Defence Regulation 2016* (Cth) |
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| Cases cited: | *Fulton v Chief of Army*[2005]ADFDAT 1  *Howieson v Chief of Army* [2021] ADFAT 1  *Lane v Morrison* (2009) 239 CLR 230  *Mills v Martin* (1821) 19 Johns 7  *Palmer v R* (1998) 193 CLR 1  *Pell v The Queen* (2020) 94 ALJR 394  *Private R Army v Chief of Army* [2022] ADFDAT 1  *R v Murray* (1987) 11 NSWLR 12  *R v Rodriguez* (1997) 93 A Crim R 535  *Randall v Chief of Army* [2018] ADFDAT 3  *Tomlinson v R* [2022] NSWCCA 16  *Yewsang v Chief of Army* [2013] ADFDAT 1 |
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| Number of paragraphs: | 133 |
|  |  |
| Date of hearing: | 3 June 2022 |
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| Counsel for the Appellant: | Mr RA Pearce |
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| Solicitor for the Appellant: | Salerno Law |
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| Counsel for the Respondent: | Mr S Whybrow  Mr M Fielden |
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| Solicitor for the Respondent: | Office of the Director of Military Prosecutions |

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| **Table of Corrections:** |  |
| 30 August 2022 | In paragraph 7, the references to “Solerno” have been replaced with “Salerno”. |
| 30 August 2022 | In paragraph 57, the reference to “*Parker*” has been replaced with “*Palmer*”. |
| 30 August 2022 | In paragraph 119 the following amendments have been made:   * “taken” has been replaced with “initiated”. * “leading ultimately to his administrative discharge” has been replaced with “proposing to terminate his appointment”. * “his appointment had been terminated on another basis and” has been inserted after the words “heard by the Tribunal”. |
| 30 August 2022 | In paragraph 121 the following amendments have been made:   * the words “initiate action to” have been inserted in the first line after “decision to”. * the words “could have” have been inserted in the first line after “his service”. * the word “decision” in the third sentence has been replaced with “action initiated against him”. * The word “two” has been deleted before “convictions”. |

ORDERS

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|  | | DFDAT 1 of 2022 |
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| BETWEEN: | SEAN PATRICK KEARNS  Appellant | |
| AND: | CHIEF OF ARMY  Respondent | |

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| order made by: | LOGAN J (President), BRERETON JA (Deputy president) AND SLATTERY J (member) |
| DATE OF ORDER: | 12 AUGUST 2022 |

THE TRIBUNAL ORDERS THAT:

1. Time be extended to the appellant to bring this appeal out of time.
2. The appellant have leave to amend the grounds of appeal so as to include a further ground in the following terms:

“(c) The learned Defence Force Magistrate fell into error by impermissibly taking into account the absence of evidence of a motive to lie, constituting a material irregularity, and resulting in a miscarriage of justice.”

1. Leave to appeal be granted.
2. The appeal be dismissed.

REASONS FOR DECISION

THE TRIBUNAL:

### Introduction

1. On 6 May 2021 the appellant, Lieutenant Colonel (LTCOL) Sean Patrick Kearns was convicted by a Defence Force Magistrate (DFM) of two service offences under the *Defence Force Discipline Act 1982* (Cth) (*DFDA*). He was convicted under *DFDA,* s 60 on a charge that as a defence member at the Australian Defence Force Academy (ADFA) he engaged in conduct likely to prejudice the discipline of the Defence Force by touching a female Officer Cadet (OCDT) on the thigh while in the ADFA Cadets Mess (ACM). He was also convicted under *DFDA,* s 34 of assaulting a subordinate in rank, namely the same OCDT on the same occasion, by twirling her hair and/or massaging her shoulder. After a further hearing on 7 May 2021 punishments were imposed in respect of both convictions, requiring him to forfeit seniority in the rank of LTCOL with his new seniority in rank to date from that day.
2. The appellant seeks an extension of time to appeal and leave to appeal to this Tribunal, under *Defence Force Discipline Appeals Act* 1955 (Cth) (*Appeals Act*), s 20 and s 21, contending that both convictions should be quashed on two grounds. First, he contends under *Appeals Act,* s 23(1)(c) that there was a material irregularity in the course of the proceedings and a substantial miscarriage of justice has occurred, namely that the DFM impermissibly took into account in support of the complainant’s account that she had an absence of a motive to lie, contrary to statements in *Palmer v R* (1998) 193 CLR 1; [1998] HCA 2 *(Palmer).*
3. Next, the appellant contends under *Appeals Act,* s 23(1)(a) and (d) that both convictions are unreasonable or cannot be supported having regard to the evidence and in all the circumstances of the case are unsafe or unsatisfactory. On this ground he contends that the DFM engaged in a process of circular reasoning: the DFM rejected the appellant’s evidence, because of the appellant’s state of gross intoxication; but the DFM should have applied the same considerations when assessing the prosecution’s admittedly intoxicated witnesses, in concluding that the appellant was grossly intoxicated, based on their evidence that the appellant was more intoxicated than they were.

### Extension of time to Appeal

1. This appeal is brought out of time. *Appeals Act,* s 21(1) requires appeals to the Tribunal to be lodged with the Registrar “within the appropriate period, or within such further period as the Tribunal, either before or after the expiration of the appropriate period, allows”. The “appropriate period” for the purposes of *Appeals Act*, s 21(1) is the period of 30 days commencing immediately after the earlier of, the notification of the results a review of the proceedings under *DFDA,* s 152, or the last day of a period of 30 days after the conviction: *Appeals Act,* s 21(2)(a) and (b).
2. At the hearing of the application to extend time to appeal and the appeal on 3 June 2022 the Tribunal extended the time to bring this appeal. The appellant conducted himself reasonably warranting the grant of extension in the following circumstances. Following the appellant’s conviction on Thursday, 6 May 2021 the Commander Forces Command (COMD FORCOMD) undertook the automatic review of conviction required under *DFDA,* s 152. The outcome of this automatic review was notified to the appellant on 10 June 2021. The earlier of the two periods provided for under *Appeals Act,* s 21(2)(a) and (b) here was the period 30 days after conviction which expired on Monday, 7 June 2021 (30 days counts to Saturday, 5 June 2021 a day when the Tribunal’s Registry is closed).
3. Thus, the *Appeals Act,* s 21 appeal period expired before the appellant received the outcome of his automatic review on 10 June. The appellant considered his position and further available avenues of review available to him and decided to submit a petition against his convictions to COMD FORCOMD on 2 July 2021. Pending the outcome of his petition on 8 August 2021 he returned to duties providing direct support to non-combatant evacuations from Kabul, Afghanistan. On 9 August 2021 he was issued with a notice to show cause as to why his service should not be terminated on the grounds that his retention was not in the interests of the Defence Force under *Defence Regulation* *2016* (Cth), s 24(1)(c). He began preparing a response. On 13 August 2021 he received advice as to the outcome of his petition from COMD Division 2 supporting both convictions and punishments and on 19 August 2021 he was supplied with the *DFDA,* s 154 report in relation to his petition. On 9 September 2021 he submitted his response to the termination notice.
4. Between 9 September 2021 and 14 September 2021, he requested legal assistance from Defence Counsel Services in respect of his possible rights of appeal and independently sought consultations with an Army reserve legal officer. The Tribunal is satisfied that he made reasonable attempts in a timely way to engage legal advice through these two means. When he was ultimately unsuccessful, he contacted his present solicitors, Salerno Law, on 4 December 2021. Consultations with Salerno Law and his present counsel, Mr R. Pearce, followed resulting in the appellant giving instructions for the filing of the present appeal on 4 December 2021.
5. It was reasonable for the appellant to wait for the outcome of the automatic review and then his petition before deciding what further course to take in respect of his convictions. The Tribunal does not regard any of the steps that appellant took in pursuing his rights of petition under *DFDA,* s 154 or seeking to secure legal advice before lodging his appeal as unnecessary or involving excessive delay. It was important in his own interests and for the better administration of justice for him to secure legal advice before commencing an appeal. In the circumstances an extension of time to institute his appeal was warranted and was granted during the hearing.
6. *Appeals Act,* s 21(2) appears to be structured on the assumption that a *DFDA,* s 152 automatic review will be available to a convicted defence member within 30 days of conviction. In practice that does not occur. The *Appeals Act,* s 21 warrants amendment to provide a longer time for appeal, running from the notification of the outcome of *DFDA,* s 152 mandatory automatic review, or if applicable the outcome of any *DFDA,* s 154 petition. Earlier this year, in expressing a like view in *Private R Army v Chief of Army* [2022] ADFDAT 1 (*Private R*), at [11], the Tribunal suggested that, “a more suitable ‘appropriate period’ might be achieved by omitting ‘whichever is the earlier’ from s 21(2) of the Appeals Act and replacing it with ‘whichever is the later’”.

### The Charges and the Trial

1. On 3 May 2021, the appellant pleaded not guilty to three principal charges and two alternative charges involving two OCDTs before the DFM, Brigadier M Cowen QC at the Court Martial Facility in the Australian Capital Territory (ACT). All charges arose out of events alleged to have occurred on the evening of 26 September 2020. Two of the charges qualified as “sexual offences” under the ACT evidence legislation which applied to the trial, the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (*EMP Act*). In conformity with *EMP Act,* s 74 during the trial the DFM ordered that the names of the complainants not be published.
2. This Tribunal takes the same course in these reasons. Even though the appellant was found not guilty of the two charges involving sexual offences the charge sheet still contained charges involving sexual offences and the Tribunal made nonpublication orders consistent with *EMP Act,* s 74. The first charge and its alternative charge related to an event alleged to have occurred in relation to a female complainant, who will be referred to in these reasons as OCDT X. The second charge and its alternative, and the third charge related to the other female complainant, who will be referred to in these reasons as SCDT Y.
3. The following were the charges preferred against the appellant:

**First Charge – s 61(3), DFDA and s 60(1), *Crimes Act 1900* (ACT) – Act of indecency without consent**

Being a defence member at the Australian Defence Force Academy, Canberra, in the Australian Capital Territory, on or about 26 September 2020, did commit an act of indecency upon [OCDT X] by touching her buttock without her consent, and being reckless as to whether she consented.

**In the Alternative to the First Charge – s 60(1), DFDA – Prejudicial conduct**

Being a defence member at the Australian Defence Force Academy, Canberra, in the Australian Capital Territory, on or about 26 September 2020, did engage in conduct likely to prejudice the discipline of the Defence Force by touching [OCDT X] on her buttock while in the ADFA Cadets Mess.

**Second charge – s 60(1), DFDA – Prejudicial conduct**

Being a defence member at the Australian Defence Force Academy, Canberra, in the Australian Capital Territory, on or about 26 September 2020, did commit an act of indecency upon [SCDT Y] by touching her thigh without her consent, and being reckless as to whether she consented.

**In the Alternative to the Second Charge – s 60(1), DFDA – Prejudicial conduct**

Being a defence member at the Australian Defence Force Academy, Canberra, in the Australian Capital Territory, on or about 26 September 2020, did engage in conduct likely to prejudice the discipline of the Defence Force by touching [SCDT Y] on her thigh while in the ADFA Cadets Mess.

**Third Charge – s 34, DFDA – Assaulting a subordinate**

Being a defence member at the Australian Defence Force Academy, Canberra, in the Australian Capital Territory, on or about 26 September 2020 assaulted [SCDT Y] a member of the ADF who was subordinate to him in rank by twirling her hair and/or massaging her shoulder.

1. On 6 May 2021, the fourth day of the trial, the DFM found the appellant not guilty of Charge 1 and its alternative in relation to OCDT X. But in relation to SCDT Y he found the appellant not guilty of Charge 2 but guilty of its alternative, and guilty of Charge 3.
2. Following the convictions, in imposing the punishments of forfeiture of seniority on the appellant, the DFM described the offences found proven as, “too serious to be met by a severe reprimand or a reprimand, even in conjunction with a fine” but he balanced this with a judgment about the appellant’s prospects for rehabilitation in future service, saying that the appellant “still [has] a lot to offer the Army as a lieutenant colonel.” Under the *Appeals Act*, no appeal lies to this Tribunal against the punishments imposed; the punishments are a matter for review by command under *DFDA,* s 162.

### Overview of Uncontested Matters

1. In the afternoon and the evening of 26 September 2020, the ADFA Rugby Club held an after-match function at a venue known the “Sportsman Bar”, which is located on the top level of the ACM. Several of the Rugby Club’s teams had participated in semi-finals matches that day. Two teams had won and would be progressing to the grand final in their respective division.
2. At that time the appellant was the Chief of Staff of the Royal Military College of Australia. He was also the Head Coach of the ADFA Rugby Club and a sponsor under the ADFA Family Sponsorship Program (a program which pairs Canberra-based ADF Officers with ADFA cadets).
3. The function commenced at approximately 1700 and many of the defence members present commenced drinking alcohol at around this time. The cadets in the Rugby Club who gave evidence were all either OCDTs continuing to undertake studies at ADFA or were at the time of giving evidence staff cadets (SCDT) at the Royal Military College – Duntroon. SCDT Y was of that rank when she gave evidence but had been an OCDT on 26 September 2020. Witnesses are referred to in these reasons in the rank they held when giving evidence.
4. Some attendees commenced drinking before they arrived at the function, and some, including the appellant, only began to drink after joining the function. The appellant arrived at the function between 1900 and 1930 hours. As Head Coach of the Rugby Club, he participated in presenting match awards and continued socialising and drinking alcohol at the Sportsman Bar with other members of the club, including the complainants.
5. The function continued until the Sportsman Bar closed sometime between 2130 and 2200 hours. All those still attending the ADFA Rugby Club function then moved down one level within the ACM to its first level, where the Beersheba Bar and an associated lounge seating area are located. The same night the ADFA AFL Club was hosting a function in the Beersheba Bar lounge area. The appellant continued socialising with the members of the Rugby Club in that area, although there was some intermingling with members of the AFL Club.
6. It is not in contest that the appellant left the ACM at approximately 2330 and was home by midnight. The events that led to the two charges in respect of OCDT X occurred first, followed by the events that led to the three charges in respect of SCDT Y. All relevant events occurred between 2130 and 2330 and several cadets associated with the Rugby Club were witnesses to them.
7. The events in relation to Charge 1 relating to OCDT X, commenced when the appellant, SCDT Barclay Roach and OCDT X were standing close to the bell of the President of the Mess Committee (the PMC Bell), which is affixed to the wall adjacent to the Beersheba Bar. Around this time, OCDT X kissed SCDT Roach. OCDT X’s evidence in support of Charge 1 is based on an alleged interaction between the appellant and herself shortly after OCDT X had initiated this kiss. Whilst she was walking to the ladies’ restroom, SCDT Y said she observed the interaction between the appellant and OCDT X. Another witness observed aspects of it.
8. As the night progressed further, the appellant and other Rugby Club members moved to a seating area in the general vicinity of the Beersheba Bar and adjacent to a concourse and stairs, leading down to the ground floor of the ACM. The seating area contained several clusters of four two-seater leather couches, each arranged around a wooden coffee table. The four couches within each cluster were placed at 90° to one another forming a square facing into the coffee table, allowing small groups to sit close to one another, to socialise and to place drinks on the coffee table in the centre of each cluster.
9. The appellant moved from the PMC Bell area and occupied a couch in a cluster of couches on one side of the Beersheba Bar lounge area, immediately adjacent to the concourse and stairs leading down to the ground floor. The back of his lounge abutted the balustrade above the stairway to the ground floor. From where he sat the appellant had a view throughout the lounge area. Several of the witnesses whose evidence featured in the appeal sat or stood nearby.
10. LT Jack Carroll sat on the couch directly opposite the appellant in the same lounge cluster. At that time SCDT Nicholas Elks occupied the couch to the left of and at right angles to the couch occupied by the appellant. There was another couch at right angles and to the right of the appellant, behind which a small group of cadets was standing. By this time SCDT Roach had also moved away from the vicinity of the PMC Bell and was standing as a member of this group. At some point SCDT Y joined the group near the cluster of lounges where the appellant was sitting and then she sat on the same couch as the appellant sitting on his left. He agrees that she was sitting on his left although SCDT Roach has the appellant sitting on SCDT Y’s left.
11. The appellant states, and it is not in contest, that that before SCDT Y sat next to him, he was engaged in conversation with LT Carroll, centred on the theme of rugby and service life. After a while the appellant broke his conversation with LT Carroll to have a conversation with SCDT Y. The conversation was also centred on rugby. The appellant congratulated SCDT Y on her performance as an officeholder of the Rugby Club. The conduct comprising Charge 2 and Charge 3 is said to have occurred after the appellant and SCDT Y had been sitting on this couch talking for a period.
12. Shortly after the Charge 2 and Charge 3 events, the Beersheba Bar was closed, and everyone departed the ACM. SCDT Roach took SCDT Y to her lines at ADFA. The appellant returned to his residence at Duntroon.
13. The following morning, SCDT Y and OCDT X exchanged text messages regarding the previous night. Later that evening, SCDT Y indicated to OCDT X that she intended to speak with CAPT Hardy, the Rugby Club’s supervising officer, regarding the events from the previous night. SCDT Y called CAPT Hardy on 28 Sep 20 and she complained to CAPT Hardy about what had occurred at the ACM. CAPT Hardy then held separate records of conversation with OCDT X and SCDT Y. The military police became involved and spoke with each of the complainants and took statements. OCDT X then indicated she wanted to make a formal complaint. A further statement was taken, and a record of interview was conducted with the accused concerning OCDT X only.
14. The evidence of the witnesses’ and the appellant’s state of intoxication was varied and controversial. The quality of that evidence is discussed later during analysis of the grounds of appeal.
15. The appellant initially sought to rely in submissions upon the evidence of FLTLT James Champness who, as the unit Adjutant, had examined and searched closed circuit television footage of the Sportsman’s Bar area on the evening of 26 September 2020. The video footage itself was not put into evidence but it was ultimately not in contest that the footage related only to the area of the Sportsman’s Bar, which the appellant and the other witnesses had left before the conduct complained of occurred. Counsel for the appellant indicated that he placed no reliance upon the evidence of this witness, nor was any challenge made to the way that the DFM dealt with his evidence.

### Overview of The Prosecution Case, the Contest at Trial and the DFM’s Findings

#### Charge 1

1. The appellant was acquitted of Charge 1 – act of indecency concerning OCDT X and its alternative prejudicial conduct charge. But the contest in relation to Charge 1 is relevant to the DFM’s evaluation of the evidence in relation to Charges 2 and 3 concerning SCDT Y.
2. The prosecution alleged in relation to Charge 1 that after OCDT X spontaneously kissed SCDT Roach in the group by the PMC Bell that the appellant, who had been standing near to OCDT X, placed his arm around OCDT X and intentionally indecently touched her buttock whilst he was grossly intoxicated by alcohol. OCDT X said he touched her in this way. In this she had some support from SCDT Roach, who remembered receiving the kiss and being “quite shocked” and then seeing the appellant’s arm reach around behind OCDT X after the kiss. SCDT Y said that as she was walking to the bathroom, she noticed the appellant’s hand on OCDT X’s backside and later that evening that prompted her to ask OCDT X whether she was “okay”. SCDT Y observed that the appellant was continuing to drink, and she described him as “quite heavily intoxicated at that point”. Other witnesses gave evidence about this first incident, the detail of which is not presently material.
3. The appellant denied at trial that he had touched OCDT X’s buttock, but he agreed in evidence that he had touched her back before her kiss of SCDT Roach, as a gesture of apology for something he had said to her that might have caused her offence. In a service police interview he did not mention any kiss between OCDT X and SCDT Roach nor any touching of OCDT X. At trial he gave evidence that when he observed the public display of affection involved in a kiss between OCDT X and SCDT Roach and her wrapping her arms around SCDT Roach, it “made me feel awkward and subsequently leave the area” of the PMC Bell.
4. In acquitting the appellant of Charge 1 and its alternative, the DFM noted the amount of alcohol which OCDT X had consumed (up to 15 standard drinks) and concluded that she was grossly impaired as a result. He further noted that OCDT X’s contemporaneous text messages showed she had impaired memory of the event, and doubted the reliability of her evidence. He said he was comfortably able to rely upon the evidence of SCDT Y as an “honest reliable and credible” witness who is “an accurate historian of events”, and was comfortably satisfied that at least “momentarily, the appellant’s hand contacted with the buttock of SCDT X”. But he concluded that the touching of her buttock could have an innocent explanation, a clumsy drunken manoeuvre being a possibility, and that any sexual element was “equivocal”, so he was not satisfied beyond reasonable doubt that the conduct was indecent, intentional, or likely to prejudice the discipline of the Defence Force. But although not being satisfied that this charge was proved beyond reasonable doubt, the DFM rejected the appellant’s account that he was uncomfortable after OCDT X spontaneously kissed and embraced SCDT Roach.

#### Charges 2 and 3

1. The conduct alleged in these two charges involved the appellant placing his hand on the skin of the thigh of SCDT Y (Charge 2 and its alternative) and twirling her hair and massaging her shoulder (Charge 3) whilst he was seated on her right on the couch. The two charges do not reflect the chronological order of events, the twirling of the hair allegedly occurring before the touching of the thigh.
2. Primarily relying upon the evidence of SCDT Y, the prosecution’s case was that during their conversation, from his position on her right the appellant began twirling SCDT Y’s hair, around the area of her right ear with his left hand. SCDT Y said that after approximately two minutes she jerked her head away from his hand. At that point, according to SCDT Y, the appellant moved his left hand to SCDT Y’s left shoulder and began lightly massaging her shoulder. This lasted for about ten or so seconds before SCDT Y again jerked away, this time moving her body away from the appellant.
3. At this point SCDT Y says that the appellant moved his hand to SCDT Y’s right thigh and began touching her bare skin above the knee and just below the hemline of her skirt, rubbing his hand back and forth on this part of her thigh for about five to ten seconds. SCDT Y says she again jerked her body away from the appellant, and the touching ceased. SCDT Y says SCDT Roach then sat next to the appellant, positioning himself in the centre of the couch and pushed next to SCDT Y.
4. In the course of the appeal, the Tribunal was taken to the evidence supporting SCDT Y’s account, and some evidence said to be inconsistent with or unsupportive of it, and this will be dealt with below.
5. The appellant said that after SCDT Y sat down next to him, he engaged in conversation with her and congratulated her on the grand final and the work that she had done as an officeholder of the Rugby Club. He recalled tapping her on the arm and upper shoulder as a gesture of camaraderie whilst complimenting her for what she and the players had achieved in a demanding year. He did not recall coming into contact with her hair or recall her attempting to move away from him. He accepted they were sitting “relatively close” on the two-seater couch. The appellant denied that OCDT Y moved away from him during their interaction and said that “she retained facial and eye contact with me. And – not the entire time, of course, but there was what you would expect – the nodding of the head as we were communicating and talking about different pieces.” He otherwise denied the conduct alleged to constitute Charges 2 and 3.
6. In cross examination, the appellant denied touching her on the leg as she alleged. But he also explained that he could not recall putting his hand on her leg but that “he may have” done so. He said that “a hand on the leg is a [gesture] that “isn’t uncommon for me, with a closed hand – wrong – with the back of the hand. I can’t recall whether I used that gesture with OCDT Y or not.”
7. The DFM accepted SCDT Y’s account of what happened between her and the appellant on the couch and rejected the appellant’s account. He accepted SCDT Y’s account beyond reasonable doubt and said that he had “no doubt about any aspect of her evidence”. He rejected the appellant’s account on the basis of his findings that the accused was grossly intoxicated, a finding based both on the evidence of prosecution witnesses and the appellant’s own account of events. He was unimpressed with the appellant’s directness in answering questions. And the DFM was troubled by some of the appellant’s descriptions of conduct that he would regard as socially acceptable, including the appellant’s concession that he would “not uncommonly” interact socially with females by touching them on the leg. He ultimately thought that the appellant did “not have a great deal of memory and has to that extent, reconstructed it with the benefit of hindsight”.
8. The DFM was comfortably satisfied that the touching on the thigh was without consent, because the appellant “was so intoxicated he did not even think about it”, and that it was intentional. But he was not comfortably satisfied that the touching of the thigh was indecent, as there was no evidence that he had moved his hand under her skirt or to the inside of her thigh, nor was there other evidence to similar effect. Nonetheless the circumstances permitted him to conclude that such conduct between a LTCOL and an OCDT, as SCDT Y was at that time, would be likely to prejudice the discipline of the Defence Force. This was because the touching occurred in a place where the cadets expect such conduct not to occur, and because the conduct would cause serious distrust in senior officers. So, the DFM convicted the appellant of the alternative to Charge 2 under *DFDA,* s 60.
9. The DFM convicted the appellant of Charge 3. He again accepted the evidence of SCDT Y and rejected the evidence of the appellant. The DFM found that the appellant massaged SCDT Y’s shoulder and twirled her hair, and that it must have been apparent to him that she did not consent and that it was thereby an unlawful application of force establishing the assault alleged.

#### The Appeal

1. As pleaded, the appeal grounds are as follows:

(a) The learned Defence Force Magistrate erred in rejecting the Appellant’s sworn testimony;

(b) In all the circumstances of the case, the convictions are unsafe and unsatisfactory; and

(c) The learned Defence Force Magistrate fell into error by impermissibly taking into account the absence of evidence of a motive to lie, constituting a material irregularity, and resulting in a miscarriage of justice.

1. Grounds of appeal (a) and (b) were argued together and are considered together in these reasons. The applicant was given leave to amend his application to include ground of appeal (c) during the hearing. Ground (c) was argued first in the appeal and is dealt with first in these reasons.
2. There is no challenge in the appeal except in one respect as to the way the DFM directed himself on issues of law. The DFM directed himself as to the burden of proof, as to the requirement for the prosecution to disprove mistaken belief as to consent, as to the meaning of indecency, as to taking into account self-induced intoxication as relevant to whether the element of recklessness as to consent was proved, whether the accused’s state of intoxication was relevant to whether he held a mistaken belief as to consent as distinct from the reasonableness of the belief and as to the meaning of prejudicial conduct. And the DFM correctly directed himself that it was not a question of him making a choice between the evidence of the accused and the prosecution witnesses, but it was for the prosecution to prove the elements of the offence beyond reasonable doubt. Consistently with *R v Murray* (1987) 11 NSWLR 12 he scrutinised the complainants’ evidence with great care.

#### Ground (c) – A Contravention of the Principles of Palmer v The Queen?

1. The appellant argued orally on this appeal that part of the DFM’s reasoning contravened statements of the High Court in *Palmer.* The appellant’s contentions on this issue could not readily be accommodated within grounds of appeal (a) and (b), which being based on *Appeals Act,* s 23(1)(a) and (d) did not require the appellant to establish a miscarriage of justice. The respondent was ready to engage with the appellant’s argument in relation to *Palmer*. The Tribunal invited Mr R. Pearce, Counsel for the appellant to formulate an additional ground of appeal orally which he extemporised, and which was then confirmed in writing. It was to the effect that:

(c) The learned Defence Force Magistrate fell into error by impermissibly taking into account the absence of evidence of a motive to lie, constituting a material irregularity, and resulting in a miscarriage of justice.

1. The appellant’s argument on this ground arises out of several passages in the DFM’s reasoning where he made observations about the credibility of OCDT Y. The DFM’s observations relied upon by the appellant are the following:

I pause to note that in relation to her state of sobriety her evidence is uncontested. That does not mean to say that I should accept it, but when she says that she was chatty, she, essentially, was not so adversely affected by the consumption of alcohol. I accept her evidence on that point. I also accept her evidence on that point, finding her an honest and reliable witness *with no axe to grind, with no moment of malice* or exaggeration, that her assessment, even approaching cautiously the fact that she had been consuming alcohol, in her position as president of the Rugby club, was that the defendant, contrary to his current recollection was grossly intoxicated on the evening in question.

[emphasis added]

1. The DFM returned to similar themes when discussing OCDT Y’s credibility later in his reasoning as follows:

I comfortably come to the conclusion that I am able to accept the word of SCDT Y. I have no doubt about any aspect of her evidence. There was *no moment of malice. No intentional falsity.* No exaggeration. Proper concessions – for example, making the observations from 10 to 15 m, as was read out to her – her original statement said 10 m. She was a reluctant complainant, in that there was no moment of over enthusiasm to get somebody into trouble. But that does not go to her discredit. All that means is I had no moment of malice or unreliability – of lack of credibility, in relation to her evidence.

[emphasis added]

1. The appellant argues that these passages, particularly the parts emphasised in italics involve the DFM reasoning that the SCDT Y had no motive to lie. Mr Pearce contends that that is the only fair description one can apply to those words. He further submits that the absence of a motive to lie was not raised by either party; it did not arise either in the prosecution case in cross examination or in addresses. Mr Pearce submits that a proper application of *Palmer* makes clear that there is no onus upon an accused to prove that the complainant in an allegation of a sexual offence has a motive to lie and that the failure or inability to identify motive to lie is entirely neutral in relation to the credibility of the complainant, whose account gains no legitimate credibility from the absence of evidence of a motive to lie.
2. Mr Pearce argues that if the DFM’s observations were limited to the phrase “no moment of malice” a different construction of his reasons might perhaps be open, but the position is made even clearer when the DFM reasons “she had no axe to grind”. Mr Pearce further submits that whether an accused has in fact no knowledge of any fact from which it could be inferred that the complainant has a motive to lie is an entirely irrelevant consideration and that the DFM should have directed himself in accordance with *Palmer* to ignore considerations of whether or not OCDT Y had a motive to lie.
3. The principles in *Palmer* may be shortly stated. In the trial of the accused in *Palmer* for sexual assault and various acts of indecency the prosecution cross-examined the accused to show that he could not prove any ground for imputing a motive to lie to the complainant. The High Court concluded that the complainant’s account gained no legitimate credibility from evidence that the accused could not suggest a motive for her to lie and that in the circumstances of the case the asking of the question had such a prejudicial effect that there may have been a miscarriage of justice. The High Court explained the principle in the following way:

[7] It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. And evidence may be given by other witnesses of events from which such a motive may be inferred. But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.

[8] If it were permissible generally to cross-examine an accused to show that he has no knowledge of any fact from which to infer that the complainant has a motive to lie, the cross-examination would focus the jury’s attention on irrelevancies, especially when the case is “oath against oath”. In such a case, to ask an accused the question: “Why would the complainant lie?” is to invite the jury to accept the complainant's evidence unless some positive answer to that question is given by the accused. As Gleeson CJ, speaking for the Court of Criminal Appeal of New South Wales, said in F:

“the ‘central theme’ of the case, according to the trial judge, could be found in the question, ‘Why would the complainant lie’? That is a question, often left unspoken, which usually hovers over cases of this nature. ... Whilst that question, sometimes spoken, sometimes unspoken, is often of great practical importance, it is never 'the central theme' of a criminal trial. At a criminal trial the critical question is whether the Crown has proved the guilt of the accused person beyond reasonable doubt. Just as the law does not require the Crown to prove a motive for the criminal conduct of the accused, the law does not require the accused to prove a motive for the making of false accusations by a complainant."

1. The absence of proof of a motive to lie is entirely neutral as the High Court explained in *Palmer* when rejecting certain observations of Callaway JA in *R v Rodriguez* (1997) 93 A Crim R 535, at 553:

With respect, a complainant's account gains no legitimate credibility from the absence of evidence of motive. If credibility which the jury would otherwise attribute to the complainant's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished. That is the converse of the proposition stated by Cresswell J in the case cited by Wills where his Lordship acknowledged that proof of a motive to lie weakened a complainant's credibility. The correct view is that absence of proof of motive is entirely neutral.

[Footnote references omitted]

1. The appellant’s argument on this ground is not persuasive for several reasons. First, upon a proper reading of the passages of the DFM’s reasons that the appellant relies upon in context, they are only observations about the demeanour of the witness in the witness box. They are not findings that the complainant did not have a motive to lie. This is evident from looking at all the words used by the DFM in both cited passages. His use of the phrase “moment of malice” in each passage is not a reference to motive to lie at all. It is a finding that OCDT Y did not share the tendency of some witnesses to exaggerate the detail of facts in her account of events, deliberately to embellish testimony to give it more effect, or otherwise to manifest through their demeanour antagonism towards an opposing party.
2. This was even more evident from the second passage where the DFM links “no moment of malice” with “no intentional falsity” and again with “no exaggeration” in the same context, observing that she made proper concessions - just as a well-balanced witness would in relation to fallible memory. Then in the same vein he goes on to describe her as “a reluctant complainant” and as having no “moment of over enthusiasm”. The DFM uses the word “moment” in these passages in one of its secondary meanings its sense of a cause or motive for action; a decisive or determining influence; a determining argument or consideration: *Oxford English Dictionary*. All these observations are consistent with a demeanour-based finding that the witness was reliable because she was measured, did not indulge in exaggeration, and was not inclined to do so.
3. Mr Pearce’s emphasis on the words “no axe to grind” does not elevate the argument any further. Like all oft-used metaphors “no axe to grind” should be interpreted carefully. Having “no axe to grind” is applicable to wide variety of situations in public and personal life which have nothing to do with having a motive to lie. A person can have an “axe to grind”, who is enthusiastic in pursuing a particular issue or idea. All that the observation “having no axe to grind” means in context here is that OCDT Y’s credibility was not impaired by obvious over enthusiasm for a cause, something which the DFM also said expressly when he used the words “no moment of over enthusiasm”, a vanilla observation about the complainant’s credibility.
4. Second, these passages do not look at all like the reasons that might be expected had the DFM been relying upon a failure to demonstrate that OCDT Y had a motive to lie. Had that been the exercise that the DFM had taken upon himself, more detailed examination of her actual motives might be expected to appear in what is clearly a set of detailed and careful reasons. But nothing like that is present. Counsel for the appellant correctly observed in argument that no contention that the appellant had no motive to lie was advanced in submissions or cross examination by the prosecution contrary to *Palmer*. This Tribunal would not readily infer from the language that the DFM used that he had spontaneously launched into consideration of the issue without some foundation in the contest before him.
5. Third, the passages of the DFM’s reasons do not demonstrate the DFM engaging in reasoning that the absence of proof of the complainant having a motive to lie added legitimate credibility to the complainant’s account. He did not pose the question to himself, “why would the complainant lie” or anything like it. In any event, *Palmer* does not hold that the absence of a motive for a complainant to lie is an irrelevant consideration for a tribunal of fact; what it holds is that it is impermissible to cross-examine an accused to elicit an inability to suggest any such motive.
6. Ground (c) is not made out. It is not necessary to consider the question of a miscarriage of justice, as no material irregularity is established.

#### Grounds (a) and (b) – An Unreasonable or an Unsafe and Unsatisfactory Verdict?

1. Based on *Appeals Act,* s 23(1)(a) and (d), the appellant argued grounds of appeal (a) and (b) together, ground (a) being presented as an aspect of ground (b). The two grounds are:

(a) The learned Defence Force Magistrate erred in rejecting the Appellant’s sworn testimony;

(b) In all the circumstances of the case, the convictions are unsafe and unsatisfactory.

1. These grounds not being confined to a question of law, leave to appeal is required: *Appeals Act,* s 20(1). In *Angre v Chief of Navy (No 3)*[2017] ADFDAT 2 the Tribunal (Tracey, Logan and Brereton JJ) considered the test for leave to appeal in the context of the Tribunal and said:

42 The purpose of a requirement for leave to appeal is generally to serve as a filter on unmeritorious or trifling appeals, so as to restrict the appeal procedure to appropriate matters and thereby promote the efficiency of the Tribunal’s appeal procedures: *Coulter v The Queen* (1988) 164 CLR 350 at 359. Most principles concerning leave to appeal have been developed in the context of interlocutory appeals in civil matters, and considerable caution is required in their application in the present context of appeals from final convictions in quasi-criminal matters, where, as Deane and Gaudron JJ observed in *Coulter* (at 359):

In a case such as the present where the application for leave to appeal was from a criminal conviction or information to a first court of appeal exercising general supervisory appellate jurisdiction, the requirement of leave effectively represents no more than a means of efficiently disposing of prospective appeals which would obviously fail since it is difficult to envisage circumstances where a competent application for leave to appeal to such a court could properly be refused in a case where the conviction should be set aside if leave were to be granted and the appeal were to proceed to a full hearing.

43 In other words, leave would not be refused in a criminal appeal if it appeared to the tribunal that there had been a miscarriage of justice warranting the quashing of a conviction. An equivalent approach should apply in this Tribunal.

1. This appeal has been fully argued. It is a rare case in which it can be said, prospectively, that an appeal on the “unsafe and unsatisfactory” ground, which requires the Tribunal itself to review the evidence to ascertain whether the DFM ought to have had a reasonable doubt, must obviously fail. In any event, this is not such as case. Leave to appeal should be granted.
2. The parties argued these grounds of appeal on the basis that no distinction was to be drawn between *Appeals Act,* s 23(1)(a) ands 23(1)(d). These two provisions are expressed in the same language as analogous acts in the civilian criminal justice system which have long received close judicial scrutiny. Both parties accepted in their submissions that the applicable legal principles are accurately stated in this Tribunal’s decision in *Private R* , at [34] to [38] where this Tribunal stated:

34 Although this ground alleges two bases separately specified in s 23 of the Appeals Act upon which an appeal might be allowed, each party was agreed that, at least in the circumstances of any application in the present case, no relevant distinction was to be drawn between the grounds specified in s 23(1)(a) and s 23(1)(d) of the Appeals Act. The Tribunal has in the past and by reference to authority in the High Court concerning analogous provisions in the civilian criminal justice system, remarked on the overlap between these paragraphs of s 23(1): *Fulton v Chief of Army* [2005] ADFDAT 1 (*Fulton*), at [55], and *Randall v Chief of Army* [2018] ADFDAT 3 (*Randall*), at [26]. A comprehensive collation and discussion of authorities pertinent to an unreasonable verdict ground was recently offered by Brereton JA (N Adams J and Cavanagh J agreeing) in *Tomlinson v R* [2022] NSWCCA 16, at [72] et seq. It is not necessary to repeat what is there stated. The pertinent principles, as derived by the Tribunal in *Yewsang v Chief of Army* [2013] ADFDAT 1 (*Yewsang*), at [56] – [59], from such analogous authority are:

(a) The Tribunal must address the question whether, upon the whole of the evidence, it was open to the DFM to be satisfied beyond a reasonable doubt that the applicant was guilty?

(b) To address that question, the Tribunal must make an independent assessment of the sufficiency and quality of the evidence.

(c) The conviction must be set aside if the Tribunal decides that the DFM *must*, not might, have had a reasonable doubt about the appellant’s guilt, even if there is sufficient evidence in law to support it.

(d) A doubt experienced by the Tribunal will be a doubt which a DFM ought also to have experienced, except where the DFM’s advantage of seeing and hearing the evidence is capable of resolving a doubt experienced by the Tribunal.

35 Since *Fulton*, *Yewsang* and *Randall* were decided, the High Court has emphasised, by the following explanation in *Pell v The Queen* (2020) 268 CLR 123 (*Pell*), at 144 – 145, [37] – [38], that a court exercising appellate criminal jurisdiction undertakes a different function from the primary tribunal of fact (a jury in that case) in an assessment of the evidence and must not usurp the function of that tribunal of fact:

[T]he assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community. Just as the performance by a court of criminal appeal of its functions does not involve the substitution of trial by an appeal court for trial by a jury, so, generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box. The jury performs its function on the basis that its decisions are made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function.

... The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury.

36 A like position prevails in relation to the respective functions of this Tribunal and the tribunal of fact functions of a service tribunal exercising jurisdiction under the DFDA, be that a court martial panel or, as in the present case, a DFM. Further and as with a civilian judge or magistrate trying a case alone and unlike a civilian jury or a court martial panel, a DFM is obliged to expose his or her reasons for convicting the person charged.

37 Another passage from the joint judgment in *Pell*, at 145, [39], is also in our view applicable, *mutatis mutandis*, to the function of the Tribunal on an appeal where, as here, reliance is placed on 23(1)(a) of the Appeals Act to challenge a conviction by a service tribunal:

The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, *proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable*. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.

38 As with a judge or magistrate trying alone a charge in the civilian criminal justice system, the acceptance by a DFM of the credibility and reliability of a complainant is not just a matter of assumption but must be, and was in this case, exposed in the reasons given by that DFM. At times, some of the submissions made on behalf of Private R in relation to Ground 1 seemed to us to solicit, contrary to the emphasised observation by the High Court in *Pell*, our making our own assessment of whether the evidence of the complainant was credible and reliable.”

[Footnote reference omitted – emphasis added]

1. In considering these grounds, therefore, the Tribunal’s first task is to consider the evidence for itself, and then, if it has a reasonable doubt as to the appellant’s guilt, to consider whether any such doubt can be resolved by reason of the DFM’s position of advantage in hearing and seeing the witnesses. However, in adopting that approach, the Tribunal is informed by the appellant’s submissions as to why it is said that the DFM erred in expressing himself to be satisfied beyond reasonable doubt of the appellant’s guilt. In circumstances where the appellant gave evidence in his defence, the DFM could be so satisfied only if he disbelieved the appellant, and setting his evidence aside was satisfied that the prosecution had proved its case beyond reasonable doubt. The appellant’s argument in support of Grounds (a) and (b) was concisely set out in the written submissions of counsel for the appellant:

3. The learned Defence Force magistrate (DFM) was confronted with two irreconcilable cases: on the one hand it was asserted the Appellant had wilfully assaulted two female officer cadets in circumstances that, if accepted, warranted denunciation. The Appellant’s contrary position (as he explained in his interview with Service Police, and during his sworn testimony) encompassed bare denials or an explanation of innocent or inadvertent touching.

4. To establish a pathway to conviction, the learned DFM had to reject the Appellant’s explanations. To the extent the Appellant’s explanation remained plausible, the prosecution had not established proof to the requisite standard.

5. In short, it is contended that the learned DFM was wrong to reject the Appellant’s evidence, which he did on the basis “[t]here is more reliable evidence to my mind that he was grossly intoxicated”.

6. In rejecting the Appellant’s evidence on the basis he was grossly intoxicated, the learned DFM both failed to adequately consider evidence on the Prosecution case that the Appellant was not so intoxicated, and acted unreasonably in accepting the evidence of some prosecution witnesses over others - this being a case where those same witnesses accepted as reliable were themselves affected adversely by consumption of alcohol.

7. If the learned DFM was correct in relying on the Appellant’s purported state of intoxication to reject his evidence, he ought to have applied the same consideration when assessing the various prosecution witnesses (on whom the DFM relied to conclude that the Appellant was grossly intoxicated). The Appellant contends that no proper or reasonable basis existed for the DFM to have rejected the Appellant’s account, and that accordingly, he erred in so doing. It follows that the resulting convictions in respect of the alternative charge to Charge 2 (Prejudicial conduct) and Charge 3 (Assaulting a subordinate) are unsafe or unsatisfactory.

8. The learned DFM engaged in a process of circular reasoning by which, having accepted evidence from intoxicated witnesses that the Appellant was likely more intoxicated than they, that the conduct alleged of the Appellant by those witnesses was consistent with the conduct of an intoxicated person, and therefore more likely to have occurred as they alleged.

9. This appeal therefore involves a criticism of the learned DFM’s purported rejection of the Appellant's evidence, the consequence of which was to render the resulting convictions unsafe or unsatisfactory.

1. The appellant’s argument puts the following main propositions. The first proposition is that in rejecting the appellant’s evidence the DFM failed adequately to consider evidence in the prosecution case that the Appellant was not grossly intoxicated and that the DFM acted unreasonably in accepting the evidence of some prosecution witnesses adversely affected by alcohol over others.
2. The second proposition is that if the DFM was correct in relying upon the appellant’s purported state of intoxication to reject his evidence, the DFM should have applied the same consideration when assessing the prosecution witnesses, who were themselves affected adversely by the consumption of alcohol. And had the DFM done so there was no proper basis for him rejecting the appellant’s evidence.
3. The third proposition was that the DFM engaged in “a process of circular reasoning” by accepting the evidence of intoxicated witnesses that the appellant was more intoxicated than they were and that because the appellant was intoxicated his conduct was more likely to have occurred.
4. These propositions all convey the same core ideas but in different words: the evidence of admittedly intoxicated witnesses provided an unreasonable or unsafe foundation for finding that the appellant was grossly intoxicated and rejecting his evidence, and then being satisfied on that evidence beyond reasonable doubt that the appellant was guilty. Put in terms consistent with the task of this Tribunal defined in *Private R*, at [34], the appellant was asking the Tribunal to assess the sufficiency and quality of the evidence, particularly that of intoxicated prosecution witnesses, to see if the DFM must have had a reasonable doubt about the appellant’s guilt.

#### Rejecting the Appellant’s Evidence.

1. As to the first aspect of the appellant’s argument, the DFM’s rejection of the appellant’s evidence, the rejection was in fact based on much more than the judgments of other witnesses about the appellant’s state of intoxication.
2. By a process of careful reasoning the DFM grounded inferences about the unreliability of the appellant’s evidence and his high levels of intoxication from aspects of the evidence that were open as a proper basis for such inferences, and which did not depend upon direct evidence of intoxicated witnesses opining about his level of intoxication. Once this is appreciated, the appellant’s argument about the DFM’s falling into the trap of circular reasoning, or accepting the evidence of intoxicated witnesses about the appellant’s level of intoxication, falls away. The DFM’s analysis ranged over both the circumstances of Charge 1 and Charges 2 and 3.
3. First, the DFM accepted some of the appellant’s own evidence and drew inferences directly from that evidence and what he said in his police interview, about the appellant’s level of intoxication. The appellant said in evidence at the trial that he placed his arm around OCDT X before the kissing incident, although the appellant did not mention this at all at the police interview. Accepting the appellant’s evidence at trial that he remembered placing his arm around the back of OCDT X, the DFM found on the strength of other evidence that it was after the kiss. The DFM drew a reasonably available inference from this evidence:

This, for a lieutenant colonel and an officer in a cadets’ mess, is an indication of gross intoxication. That he thought it appropriate to institute physical contact, at that stage, with somebody who’d just planted a kiss on somebody else, is an indication of such an impairment of judgment, it supports my view that he was grossly intoxicated.

1. The DFM suspected that the appellant’s failure to mention this touching of OCDT X in the police interview was either because he chose not to mention it, because it would have put him in close contact with the complainant, or he did not remember it because he was intoxicated. But the evidence of other witnesses of the appellants arm being around OCDT X forced him to give evidence of the act at the trial.
2. Moreover, the appellant himself accepted under cross-examination that he had consumed somewhere in the range of 6 to 8 beers in 2 to 3 hours, a not insignificant quantity of alcohol. He also accepted that the time of his interactions with OCDT X that “to some extent [his] judgment had been impaired” by alcohol. The DFM’s findings were consistent with these admissions.
3. Second, the DFM found aspects of the appellant’s evidence inherently improbable or internally inconsistent. For example, the DFM noted that the appellant did not mention OCDT X’s kiss of SCDT Roach at all in his record of interview but then gave evidence about it at the trial, after the evidence of other witnesses on the subject. The DFM did not accept as “having the ring of truth” the appellant’s explanation for not mentioning the kiss to the service police: that explanation being that he was not sure of the identity of OCDT X as the person involved in the kiss. The appellant said:

I was not certain at the point of interview that it was who we were talking about. And short of badmouthing and adding to an inaccurate rumour – that I know haunts a lot of women – I chose not to, because I was not sure.

1. And the DFM was entitled to dismiss the appellant’s excuse for omitting the kiss as implausible. This was a judgment well open to the DFM on the evidence. Looked at objectively at the time of interview the identity of the person making the kiss really did not matter, so much as the act itself, which the appellant did not mention to the service police.
2. The DFM highlighted other related inconsistencies in his assessment of the appellant’s evidence. The DFM mentioned the aspect of the appellant’s evidence that gave an account of the appellant’s claimed reasonable belief that SCDT Y consented to his touching of her shoulder. The appellant said that that “she [SCDT Y] retained facial and eye contact with me” and that she was “nodding [her] head as we were communicating” and “her verbal and non-verbal responses indicated” she was “okay” with being touched on the shoulder. The DFM could not accept on the one hand the appellant’s evidence that he felt so uncomfortable with seeing OCDT X kissing SCDT Roach that he had to move away “straight away” from an area in which he felt safe but that he nevertheless felt comfortable, on his own admission, about putting his arm around the back of an intoxicated OCDT X to comfort her and later touching the shoulder and even the thigh of SCDT Y, as he spoke to her. The DFM was justified in finding the tension between these two attitudes as “incredible”.
3. Nor could the DFM accept that the appellant had a good recollection of his claimed eye contact with and encouragement from SCDT Y, yet had such poor recollection of perhaps putting the back of his hand (as he said) momentarily or accidentally on the skin of SCDT Y’s thigh, or (as she said) rubbing his hand up and down. The DFM said:

For a man who says he remembers the verbal and non-verbal cues, I find, as a fact that he did touch her thigh, and it is remarkable, in the circumstances, when he says he has no memory of such touching. To remember one thing that is fairly innocuous – looking her in her eyes after patting her on the back and touching her shoulder, remembering specifically that he formed the view she was consenting to that act, but then are not remembering skin on skin touching, to my mind, raise significant eyebrows about the accuracy of his recollection.

1. These were all elements in the appellant’s evidence that contributed to the DFM’s rejection of it.
2. Third, the DFM also took into account in rejecting the appellant’s evidence that the way he gave it did not instil confidence. Mindful that the appellant was a LTCOL being cross-examined in the witness box in a less than commanding position and that allowance should be made for that, the DFM nevertheless observed, “but a lot of times in his answers he did not answer the question but sought to give a speech”. And there are other examples of the appellant giving inconsistent answers on important issues: at different times he denied and could not recall placing his hand upon SCDT Y’s thigh.
3. Fourth, the DFM grounded his reasoning about the appellant’s state of gross intoxication from uncontroversial facts, based upon the DFM’s general service knowledge, which resonated with the evidence of other witnesses. The DFM inferred that the appellant’s judgment was impaired from the time, the nature of the conduct, the location, and the disparity of rank in the circumstances. The DFM inferred that for an officer of LTCOL rank holding a senior posting within ADFA to be engaging after 2130 in the various admitted acts of touching of cadets in the ACM was itself evidence of impaired judgment. The DFM justifiably said of the Charge 2 conduct, rejecting a finding of indecency but inferring inappropriateness, that:

… it is incredible, that it speaks of gross intoxication, that it is extremely questionable conduct, drunk or sober, that is fairly shocking behaviour of a LTCOL at any time, to think it would be appropriate to lay his bare hands and rub the naked leg, or the unclothed part of the thigh of a female cadet.

1. Fifth, acceptance of only one part of the evidence of SCDT Y which is corroborated by SCDT Elks and SCDT Roach, not directly involving any judgment about the appellant’s state of intoxication, gives objective support to the DFM’s reasoning. All three say that the appellant reached around her shoulder and appeared to “twirl” SCDT Y’s hair. Such behaviour is so inherently incongruous between persons of such rank disparity in a social situation that it bespeaks severely impaired judgment. Even the appellant himself conceded that this inference was well open when he agreed as a general proposition that conduct including hair twirling by a person of his rank in that situation would “not be appropriate”.
2. In conclusion, the DFM regarded the explanation for the appellant’s conduct on the evening as his gross intoxication. The DFM concluded:

Having concluded, from the other evidence that I do find reliable, I find that his asserted recollections of the level of his intoxication are not accurate and reliable. I find he was severely intoxicated and has downplayed his memory of its effect. Because he does not have a great deal of memory, and has, to that extent, reconstructed it with the benefit of hindsight.

1. It was quite open to the DFM as the tribunal of fact to reject the appellant’s evidence on these grounds, which did not depend exclusively or even substantially upon the evidence of intoxicated prosecution witnesses. In other words, the DFM was entitled to disbelieve the appellant. This part of the appellant’s argument fails.
2. *Accepting Prosecution Witnesses.* The appellant next argues that the DFM must have had doubts about SCDT Y’s testimony and that of other prosecution witnesses supporting her account, because of their intoxication. The appellant’s argument canvasses the evidence of several witnesses, OCDT Samuel Hicks, Midshipman (MIDN) Joshua Bloor, LT Carroll, SCDT Nicholas Elks, SCDT Roach, and SCDT Y.
3. Before examining the appellant’s submissions, the DFM’s other observations about the appellant’s state of intoxication in addition to those covered earlier in these reasons are set out. He said:

There is other support for that conclusion which I will come to from other witnesses and other support for that conclusion by the overall circumstances of the case that the defendant found himself in the arms at one stage of a female cadet half his age, in her first year, putting his arm around her is other support for conduct which, in my view, is questionable at any time, unless you are consoling somebody genuinely. But in circumstances, while everybody is intoxicated is demonstrable, to my mind, of impaired judgement, and that impaired judgement arose from all of the circumstances and the consumption of alcohol. It is also supported by the observations of SCDT Roach. It is not contradicted by MIDN Bloor, and I will come to his evidence in a moment.

So, I can comfortably conclude that LTCOL Kearns was significantly intoxicated at the relevant parts of the proceedings that the passage of time has made it in his mind that he was less intoxicated than he actually was.

…

He was cross-examined. He admitted that drinking in a cadets’ mess, whilst not specifically against any regulation, is a fraught situation which one needs to exercise care and judgement with. He said that is true. He said drinking until closing time as cadets get more and more intoxicated is even more problematic. He made that concession. There was toing and froing between the defendant and the prosecutor about the amount of alcohol that he had. Like other witnesses, I accept his memory was imprecise. The upshot of the totality appears, to my mind, to be somewhere around the 10 standard drinks in the course of the evening, so over a bottle of wine. He said that, whilst it would have been irresponsible, that he could have driven. He did admit that when he was cross-examined that to some extent his judgement in decision-making to some extent that we cannot determine would have been affected.

…

In relation to the evidence and testimony of LTCOL Kearns, looked at in conjunction with his interview with the service police, I do not accept his explanation that he was not so intoxicated. There is other more reliable evidence to my mind that he was grossly intoxicated.

1. The appellant’s submissions approach the argument by examining the evidence of prosecution witnesses that supports an inference that he was less intoxicated than the DFM found. The appellant then criticises the reasoning of the DFM in respect of these witnesses. The appellant’s arguments to this effect are set out and analysed here.

### OCDT Hicks

1. The appellant first pointed to aspects of the evidence of OCDT Hicks that supported the appellant's account that he had arrived at the venue much later than the others on the night, which the appellant submitted constrained the opportunity for him to become grossly intoxicated but which was inconsistent with the evidence of the witnesses whose evidence was accepted by the DFM. But the appellant submits that the DFM in his findings only referred to certain other evidence of OCDT Hicks that the appellant placed his arms around OCDT X’s shoulder, and she put her arm around his waist, describing that as, “the extent of his evidence”. The appellant was critical of this, submitting that the DFM had therefore ignored OCDT Hicks' evidence supporting the appellant as to his arrival at the venue later than others.
2. But the evidence of OCDT Hicks is relatively peripheral to the main issues. Whatever time the appellant arrived, even on his own evidence the appellant had consumed 6 to 8 beers in 2 to 3 hours and admitted being affected by alcohol. Evidence from OCDT Hicks about the time the appellant’s arrival was unlikely to weigh heavily against the evidence that he was intoxicated. It is unsurprising that the evidence of OCDT Hicks did not feature greatly in the DFM’s final reasoning.

### MIDN Bloor

1. Next the appellant submitted that the uncontradicted evidence of MIDN Bloor, who claimed to have had only between one and three standard drinks, was that the appellant was “standing upright and was not swaying around, falling, wasn't carrying on, vomiting or slurring words, or any other affect that would make me believe that he was intoxicated at that time.”
2. The appellant submitted that even though the appellant’s intoxication was the basis for the DFM's findings, and that MIDN Bloor was clearly more sober than many of the other witnesses, the DFM was somewhat dismissive of MIDN Bloor’s evidence, saying of his account, “I make this observation. That does not exclude the likelihood with the preponderance of other evidence that LTCOL Kearns was grossly affected by alcohol”. And then concluding about MIDN Bloor, “he is, to my mind, fairly neutral”. The appellant submits that MIDN Bloor was anything but “neutral”, and supportive of the defence case.
3. This submission is not persuasive. First, MIDN Bloor described an uncommonly demanding standard of what might indicate gross intoxication, a standard that the DFM was entitled to downplay. But also, the DFM was quite entitled to conclude MIDN Bloor was “neutral”, because of MIDN Bloor’s limited interaction with the appellant. When asked whether the appellant was affected by alcohol, MIDN Bloor said:

I would be unable to say, sir, if LTCOL Kearns was intoxicated or not. I did not engage in a discussion with him: I only observed him standing next to a few other people.

1. The light of this concession, the DFM’s assessment of MIDN Bloor as “neutral” was entirely appropriate in the circumstances.

### SCDT Elks

1. The appellant submitted that the only evidence apart from that of SCDT Y that supported part of the conduct constituting Charge 3, namely the twirling of the respondent’s hair, was that of SCDT Elks. But the appellant submitted that SCDT Elks was intoxicated. SCDT Elks’ evidence was that he had consumed “around 10 drinks that evening”, which he described as “Carlton Dry tins, and then Bundaberg Rum tins”. SCDT Elks' evidence included this exchange (in evidence-in-chief):

Q: At the time this occurred, how would you describe your state of sobriety? --- Probably fairly intoxicated, sir, but not to the level where I was incoherent, I don't think so, sir.

Q: And were you able to make any assessment of any of the other people in the area? --­ Yes, sir. I'd say that OCDT Ruben Linden, OCDT X and LTCOL Kearns were probably more so intoxicated than the rest of the members there.

1. The appellant submits that despite SCDT Elks' acknowledgement that he was “fairly intoxicated”, the DFM concluded:

The upshot of all of his evidence is I can comfortably take from it that this was not a one or two second flick of the hair in an attempt to pat her shoulder in a complimentary fashion. Even if it was I'm struggling to see how that would cause her hair to be moved, and visibly so, as seen by other people.

So the upshot of his evidence as I conclude as a fact is he saw unintentional playing of the hair of SCDT Y which was not for a couple of seconds but might be less than 30 seconds. But whatever it was it was not a momentary flick consistent with an action touching in a congratulatory way a shoulder.

1. SCDT Elks was not central to the DFM’s reasoning. The DFM accepted SCDT Y’s evidence about the hair twirling conduct as he was entitled to do, and he saw the evidence of SCDT Elks as “supportive” not “conclusive” as he explained:

The fact that other people saw the touching of the hair is supportive of her account but not conclusive of it. But having already said that I accept everything she said might not have gone on exactly for two minutes, but it was not momentary.

1. The defence at trial raised issues about why no one else apart from SCDT Elks had seen the hair twirling, but as the DFM explained, it could have been brief and “other people [had] limited views of that part of the event”. Moreover, the proposition that SCDT Elks was the only one to see it was incorrect; SCDT Roach gave evidence to similar effect.
2. SCDT Elks’ admitted intoxication does not mean that his evidence is without evidentiary value, especially where it is consistent with that of SCDT Roach and, in particular, that of SCDT Y, for which it provides significant corroboration.

### LT Carroll

1. Next the appellant was critical of the DFM’s treatment of the evidence of LT Carroll. The evidence of SCDT Y had been that at material times LT Carroll had been seated on a couch in front of her, and that after the appellant touched her, LT Carroll asked her “if I was okay.” But the appellant submitted that neither of those assertions were supported by LT Carroll, whose evidence was dealt with by the learned DFM in the following limited terms

LT Jack Carroll. He said he had had a few drinks before he arrived. He was aware of his surroundings.

1. The appellant submitted that the inconsistencies between LT Carroll’s evidence and that of SCDT Y were not addressed adequately or at all by the learned DFM.
2. The appellant’s submission does not do justice to LT Carroll’s evidence, which was not a basis to doubt the quality or reliability of anything that SCDT Y said in her evidence. LT Carroll did not contradict SCDT Y. He simply said about the possibility of conversations between them, “I believe I might have had a conversation with her at the time within Beersheba, however, I do not remember specifically what we spoke about”, and “I do not remember any specific conversations or interactions with her”. This was not a denial that he had said what was attributed to him by SCDT Y, such as to create an inconsistency between the two witnesses. LT Carroll also could not remember – but did not deny - sitting on couches in the Beersheba Bar, saying “I do not recall sitting – sitting on those lounges at all, to be honest sir”. LT Carroll’s evidence on this matter also did not create any inconsistency between LT Carroll and SCDT Y.

### SCDT Roach and SCDT Y

1. The appellant next focused upon SCDT Y and SCDT Roach, the principal prosecution witnesses on the charges on which the appellant was convicted. The appellant put his submissions in respect of both witnesses together, and it is convenient to analyse them together in these reasons.
2. The appellant submits that the DFM based his ultimate findings on an acceptance of SCDT Y and SCDT Roach as reliable witnesses. That is only partly true. As the earlier analysis shows, the DFM based some of his findings on inferences drawn from the appellant’s own evidence, or evidence that was uncontested.
3. The appellant points out that SCDT Y acknowledged that she had consumed “about eight drinks over the course of the night”, an amount which the appellant submitted was not inconsequential. So much may be accepted. Those eight drinks were four cans of Canadian Club Dry pre-mixed cans, two Bundaberg Rum pre-mixed cans, a Rekorderlig Cider, and another drink, which she later identified as a Toohey’s Extra Dry, a full-strength alcoholic drink. The appellant submits that the number of 'standard drinks' represented by this quantity of alcohol was not calculated but that it was likely to impair her recollection of the evening.
4. The appellant further submits that SCDT Y must have been impaired because she could not recall “drinking games” that had taken place that night according to the evidence of other witnesses. But this submission relies upon an incomplete account of her evidence. It is quite clear that when the cross examiner clarified what he meant by “drinking games”, as “boatmen’s races conducted in the Sportsman’s bar”, she remembered them immediately and gave responsive answers about them. She agreed she had participated in boat races herself but could not recall whether she had done so that night.
5. The appellant criticises the DFM for not mentioning SCDT Y’s claimed defective recollection on this subject. But upon proper analysis of the transcript of the cross examination on the subject there was nothing for the DFM to say. It is clear from the transcript she was responsively drawing upon actual recollection of the detail of this aspect of the evening. She had witnessed many “boat races” over the years, and while her inability to recall whether she had done so on this occasion shows that her recollection of the evening is imperfect, it does not follow that her recollection of the matters that she does remember is inaccurate.
6. The DFM said the following as to SCDT Y’s state of sobriety:

I pause there to note that in relation to her state of sobriety her evidence is uncontested. That does not mean to say that I should accept it, but when she says she was chatty she, essentially, was not so adversely affected by the consumption of alcohol. I accept her evidence on that point.

…

I also accept her evidence on that point, finding her an honest and reliable witness with no axe to grind, with no moment of malice or exaggeration, that her assessment, even approaching cautiously the fact that she had been consuming alcohol, in her position as [an officeholder] of the rugby club, was that the defendant, contrary to his current recollection, was grossly intoxicated on the evening in question.

1. The Tribunal cannot conclude that the DFM must have had a reasonable doubt about the appellant’s guilt because he should somehow have discounted SCDT Y’s account of her own sobriety because of what she had drunk. The DFM was entitled to accept her uncontested evidence that although she was “chatty”, she was “not so adversely affected by the consumption of alcohol” as to render her evidence unreliable. And objectively there is much to support the DFM’s acceptance that her evidence was reliable. Her evidence in chief and her cross examination are characterised by answers that draw upon immediate recollection, are responsive and add detail to the picture of the scene that she is describing.
2. Moreover, the account of the events of Charges 2 and 3 that she gave to CAPT Hardy on Monday 28 September was substantially consistent with the account she gave in her oral testimony and supports her credibility. This is what she said to CAPT Hardy:

Later, I returned to the bar and sat down on the couches, LTCOL Kearns was already sitting on the couches in a three-seater couch near the bar and near the steps that lead down to the ACM dining area, when I sat down, pretty much straight away he started to play with my hair, then moved to my shoulder and leg, where he was touching the outside of my thigh, each time he touched me I tried to pull away from him. He did not say anything to me when he was touching me. When the bar was closing, I cannot remember the time, I moved away from LTCOL Kearns. LTCOL Kearns did not say anything to me upon moving away or in the time since this event occurred.

1. The appellant also submits that SCDT Roach, by his own admission, had consumed at least as much alcohol as OCDT Y. The appellant was critical of how the DFM dealt with SCDT Roach’s testimony, which was as follows:

... I then heard from SCDT Roach; he said he had had approximately eight or nine drinks, varying in strength. In evidence-in-chief he said, at page 131:

‘From what I can remember, [the Appellant] had had more to drink than I had, and was more intoxicated than I was.’

… To the extent that whilst I do not have to accept that, it was not challenged on that impressionistic view. And I approach with caution anybody on this evening who had been drinking a substantial amount of alcohol, such that they were intoxicated, and their impressionistic views of somebody else who has been drinking a substantial amount of alcohol.

But even so, in support of [SCDT Y] or capable of supporting her views of the defendant's level of intoxication, Roach said:

*‘I was definitely feeling the effects of alcohol after the amount that I had been drinking, and had a good day of sport. But I could somewhat remember what was happening and was aware of my surroundings’*

So, he said, line 25:

*‘OCDT X was slightly tipsy; I would probably say on the same level of myself, relative as to how much she can drink. And from what I could gather, LTCOL Kearns was more intoxicated than myself and OCDT X.’*

1. The appellant puts several submissions based upon this evidence. He submitted that on his own evidence, SCDT Roach placed himself “on the same level” of intoxication as OCDT X, whom the learned DFM had "cause to doubt" because she was "severely intoxicated."
2. But this submission is not persuasive. The DFM had made repeated observations about the need for care in assessing the evidence of intoxicated witnesses and closely considered the effect of intoxication on those witnesses. He said:

I approach with caution anybody on this evening who had been drinking a substantial amount of alcohol such that they were intoxicated, and their impressionistic views of somebody else who had been drinking a substantial amount of alcohol.

1. And he was able to act on SCDT Roach’s statements that he “could somewhat remember” and “was aware of my surroundings” and could accept SCDT Roach’s comparative assessment of his own and the appellant’s comparative intoxication without necessarily accepting SCDT Roach’s comparative assessment of his own and OCDT X’s comparative intoxication.
2. This was well open to him because he had other direct evidence about how severely impaired OCDT X’s memory was from her contemporaneous text messages the following morning in which she asked SCDT Y the questions “can you rejog my memory, did we just go straight back to our rooms after mess” and “did something happen, I know Elksy walked me back to my div”. These messages show significant lack of memory of the evening. The appellant’s analysis does not cause the Tribunal to conclude the DFM must have had a doubt about the appellant’s guilt.
3. The appellant also submitted that it is unclear on the evidence whether the alcohol consumed by SCDT Roach included any from the drinking game in which he is likely to have participated. SCDT Roach had been awarded three points for his participation in the rugby that day and the Rugby Club tradition was that someone awarded three points should participate in a drinking “boat race”.
4. But this submission is also not persuasive. The DFM was entitled to accept SCDT Roach’s assessment of the number of drinks that he had consumed and his own sobriety, without having to work out whether any of the drinks had been consumed during boat races.
5. This Tribunal does not find the appellant’s criticism of the DFM’s reasoning persuasive. The appellant’s contention was that no proper basis existed for the rejection of the appellant's testimony by accepting the testimony of other witnesses, who by their own admissions were intoxicated. However, the DFM gave multiple reasons, not dependent on the relative sobriety of the witnesses – for disbelieving the appellant. Necessarily, those reasons include the combined effect of the evidence that was inconsistent with his. Ultimately, the critical factual questions were (in relation to the second charge) whether the appellant touched SCDT Y on her thigh, and (in relation to the third charge) he twirled her hair and/or massaged her shoulder. As the DFM repeatedly observed, caution is required in assessing the evidence of intoxicated witnesses. However, it is within ordinary human experience that while intoxication may impair acuity of perception or recollection, it does not obliterate it, and many events – including in particular those that are out of the ordinary – may be remembered. In particular, where multiple witnesses who, though to a greater or lesser extent intoxicated at the time, recall the same event, it is not incumbent to entertain a reasonable doubt as to the accuracy of the substance of their recollection.
6. The evidence of SCDT Y was consistent with her contemporaneous complaint to CAPT Hardy. There was also a substantial body of evidence that there was an immediate contemporaneous reaction by bystanders which bespoke something seen at the time to be inappropriate having occurred, and an associated concern for the welfare of SCDT Y. As to the touching of the thigh, the appellant’s evidence was that while he could not recall putting his hand on her leg, he may have done so, it being a “not uncommon” gesture on his part. As to the hair-twirling, the evidence of SCDT Y in that respect was corroborated by the evidence of SCDT Roach and SCDT Elks, while the appellant’s evidence was that he recalled tapping her on the arm and upper shoulder, but did not recall coming into contact with her hair, and denied “twirling” it. That being the status of the evidence, there was and is no reason to doubt that both the touching of the thigh, and the twirling of the hair, occurred, were intentional, and were to the appellant’s knowledge not consensual.
7. As it does not appear to us that the evidence required that the DFM entertain a reasonable doubt as to the appellant’s guilt, it is unnecessary to consider whether the DFM’s position of advantage in seeing and hearing the witnesses explains why he did not do so.
8. Grounds (a) and (b) of the appeal fail.

### Some Additional Observations

1. By a notice dated 9 August 2021, a little over two months after his conviction and punishment by DFM, administrative action was initiated against the appellant proposing to terminate his appointment on the basis that the retention of his service was not in the interests of the Defence Force. By the time these proceedings were heard by the Tribunal, his appointment had been terminated on another basis and he was no longer a member of the ADF.
2. On 7 May 2021 the DFM made a considered decision under *DFDA,* Pt IV that the appellant had continuing value to the ADF and should be retained in service but with a loss of seniority within his existing rank of LTCOL. The transcript of the punishment hearing shows the DFM reached this decision based not only on the circumstances of the convictions and a victim’s impact statement but on extensive examination of the appellant’s service record, officer performance appraisals, character, and a psychological analysis of the appellant’s circumstances.
3. The subsequent administrative decision to initiate action to terminate his service could have produced quite a different outcome for the appellant. This Tribunal is not reviewing that decision and its factual basis and the reasons for it are not before this Tribunal. But the appellant has contended in documents before this Tribunal that the termination action initiated against him was based upon the same or substantially the same facts as those that led to his convictions. This Tribunal is not charged with deciding whether that contention is correct or not.
4. But the contention raises a wider question about administrative decisions after *DFDA* action against a member and the authority of the decisions of superior service tribunals under the *DFDA*. The apparatus of the *Appeals Act* provides for public external review of the conviction, but not the punishment, of defence members by superior service tribunals under the *DFDA*. The public functions of review by this Tribunal under the *Appeals Act* are one of several statutory safeguards that maintain confidence in the independent administration of justice under the *DFDA* leading to both conviction and punishment. Another statutory safeguard is the requirement under *DFDA,* s 140 for superior service tribunals to hold trials in public.
5. This Tribunal’s functions in scrutinising the proper administration of justice leading to conviction by superior service tribunals, give it an interest in matters which may undermine the authority and independence of those tribunals, even matters occurring after conviction. Maintaining public confidence in the convictions of superior service tribunals is not limited to looking at events before conviction.
6. An administrative decision made close in time to a punishment imposed by a service tribunal under the *DFDA*, but which produces on substantially overlapping facts an outcome which may objectively be described as more severe, may need to be reconciled with the operation of *DFDA*, s 162.
7. Several provisions of the *DFDA* prohibit commanders from increasing punishments imposed under the *DFDA*. Under *DFDA,* s 68 a commanding officer of a convicted person “may moderate the consequences of” a punishment “imposed” by service tribunal, but has no power to increase the punishment. And upon review of action under *DFDA*, Pt IV under *DFDA*, s 162 a conviction may only be quashed under s 162(1) if it is “excessive” or “wrong in law” and once quashed any substitute punishment imposed under s 162(5), “shall not…be more severe” than the punishment imposed by the service tribunal. No power exists in the reviewing authority to quash a conviction on the grounds of insufficiency of punishment.
8. An administrative decision maker considering termination of a defence member after *DFDA* action on facts substantially overlapping with the *DFDA* action does not act as a reviewing authority under the *DFDA*. But such a decision-maker may have to examine real questions of continuing fidelity to the commands of *DFDA,* s 68 and s 162 and what punishment is being imposed in practice and whether the administrative decision is consistent with the maintenance of good conscience by command.
9. *DFDA*, s 68 and s 162 reflect well-established principles that military command is bound to observe good conscience in punishing a defence member. The High Court in *Lane v Morrison* (2009) 239 CLR 230, at [85] (*Lane*), identified that the central point of the court-martial within military command structures such as the ADF is to inform the conscience of the commanding officer. In *Lane*, at [85], the High Court cited the following reasoning of Platt J in the Supreme Court of New York in *Mills v Martin* (1821) 19 Johns 7, at 30, as accurately capturing this aspect of the role of the court-martial within the command system:

The proceedings of the court-martial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgment of the court-martial; and, it is equally clear, that the court could not punish without his order of confirmation.

1. The court-martial informs the conscience of command and command acts on good conscience by confirming or moderating, but not increasing, the punishment fixed by the court-martial. Recognising that a punishment imposed by a service tribunal in relation to a defence member sets the upper limit of post-conviction action binding on the conscience of command for that member provides safeguards for the ADF and for the member.
2. For command, it promotes military cohesion and defence members’ acceptance of discipline decisions by separating command from any perception of personal bias or ill-will in the exercise of discipline. For the member punished, command’s fidelity to good conscience in confirming or moderating punishments confers security and stability and promotes loyalty to the service in that member and in all members who see command observing the precepts of good conscience in punishments.
3. Moreover, as this Tribunal emphasised in *Howieson v Chief of Army* [2021] ADFAT 1, at [62] (*Howieson*), an administrative decision to terminate a member’s service where a court-martial has imposed a sentence which gives the member an opportunity for rehabilitation “could be regarded as undermining the court-martial process”. We add the reasoning here to that to that expressed in *Howieson* on this subject.
4. If the obligations of good conscience upon command in imposing *DFDA* punishments recognised in *Lane* and embedded in *DFDA,* s 68 and s 162 are ignored post-conviction, leading to the administrative termination of the service of defence members, stigma, loss of morale and confidence in the administration of justice in the ADF may be most acute for those directly affected by the termination but similar effects are likely to be felt more widely. But more broadly, as *Howieson* emphasises, the authority of *DFDA* in specialist superior service tribunals seeking to do justice by balancing rehabilitation against other sentencing factors may also be undermined.
5. This question may need to be addressed in the future when what it means to “impose” a punishment under the *DFDA* falls to be decided; and whether that means more than just to pronounce the punishment but to carry it out.

#### Conclusion

1. Leave to appeal should be granted, but the appeal must be dismissed.

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| I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Decision of the Honourable Justices Logan, Brereton and Slattery. |

Associate:

Dated: 12 August 2022