Mikus v Chief of Army [2020] ADFDAT 1

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| Appeal from: | Defence Force Magistrate |
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| File number: |  |
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| Judgment of: | **LOGAN J (President), BRERETON jA (deputy president) AND BARR J (MEMBER)** |
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| Date of judgment: | 22 December 2020 |
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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 – whether the reasons of the DFM for conviction were adequate – nature and source of obligation of a DFM to give reasons – *Defence Force Discipline Appeals Act 1955* (Cth), ss 20, 23 – DFDA, s 135 – *Court Martial and Defence Force Magistrates Rules 2020* (Cth), r 52 – whether the DFM’s decision was unsafe or unsatisfactory – whether the DFM’s decision was unreasonable and could not be supported by the evidence – where the prosecution alleged the appellant Lieutenant Colonel had slapped a subordinate Private on her buttocks on the dance floor at a function at an Other Ranks Club – conflict in evidence between eyewitnesses and that given by the appellant – *Liberato v The Queen* (1985) 159 CLR 507 – appeal dismissed  |
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| Legislation: | *Constitution* (Cth) Ch III*Defence Force Discipline Act 1982* (Cth) ss 34, 127, 132, 135, 149A, Pt VIIIA*Defence Force Discipline Appeals Act 1955* (Cth) ss 20, 23*Evidence Act 1995* (Cth) ss 97, 101, 165*Court Martial and Defence Force Magistrate Rules 2020* (Cth) r 52*Australian Military Regulations 1916* (Cth) reg 494*Australian Military Regulations 1927* (Cth) reg 203*Defence Force Discipline Appeals Regulation 2016* (Cth) reg 8*Defence Force Discipline Regulations 2018* (Cth)*Army Act 1881* (Imp) s 37*Army Discipline and Regulation Act 1879* (Imp)  |
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| Cases cited: | *Betts v Chief of Army* [2018] ADFDAT 2*BM v R* [2017] NSWCCA 253*Boyson v Chief of Army* [2019] ADFDAT 2*BP v R* [2010] NSWCCA 303*Commonwealth v Welsh* (1947) 74 CLR 245*Coutts v Commonwealth* (1985) 157 CLR 91*Dickson v R* (2017) 94 NSWLR 476*Douglass v R* (2012) 290 ALR 699*DW v The Queen* (2004) 150 A Crim R 139*Fleming v The Queen* (1998) 197 CLR 250*Hodge v Chief of Navy* [2015] ADFDAT 4*IMM v The Queen* (2016) 257 CLR 300*Leith v Chief of Army* (2013) 234 A Crim R 259*Liberato v The Queen* (1985) 159 CLR 507*Libke v The Queen* (2007) 230 CLR 559*Low v Chief of Navy* [2011] ADFDAT 3*M v The Queen* (1994) 181 CLR 487*Marks v Commonwealth* (1964) 111 CLR 549*MFA v The Queen* (2002) 213 CLR 606*Murdoch (A Pseudonym) v The Queen* (2013) 40 VR 451*Pell v The Queen* (2020) 94 ALJR 394*Pettitt v Dunkley* [1971] 1 NSWLR 376*Private R v Cowen* (2020) 94 ALJR 849*Public Service Board (NSW) v Osmond* (1986) 159 CLR 656*R v Barrowman* (2007) 96 SASR 294*R v Bauer* *(a pseudonym)* (2018) 266 CLR 56 *R v GM* (2016) 97 NSWLR 706*R v Keyte* (2000) 78 SASR 68*R v JRW* [2014] NTSC 52*R v Power* (2003) 141 A Crim R 203 *R v XZ* [2016] NTSC 14*Randall v Chief of Army* (2018) 335 FLR 260*Re Manion’s Appeal* (1962) 9 FLR 91 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518*SKA v The Queen* (2011) 243 CLR 400*SLS v R* (2014) 42 VR 64*Sorby v The Commonwealth* (1983) 152 CLR 281*Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247*The Queen v Baden-Clay* (2016) 258 CLR 308*Velkoski v The Queen* (2014) 45 VR 680*White v Director of Military Prosecutions* (2007) 231 CLR 570*Woolmington v Director of Public Prosecutions* [1935] AC 462*Yewsang v Chief of Army* [2013] ADFDAT 1 |
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| Number of paragraphs: | 93 |
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| Date of hearing: | 4 December 2020  |
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| Counsel for the Appellant: | Mr T Berkley |
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| Solicitor for the Appellant: | Darwin Family Law |
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| Counsel for the Respondent: | Mr S Whybrow |
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| Solicitor for the Respondent: | Office of the Director of Military Prosecutions |

ORDERS

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|  | DFDAT 1 of 2020 |
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| BETWEEN: | JEREMY THOMAS MIKUSAppellant |
| AND: | CHIEF OF ARMYRespondent |

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| order made by: | LOGAN J (President), BRERETON JA (Deputy president) AND BARR J (member)  |
| DATE OF ORDER: | 22 DECEMBER 2020 |

THE COURT ORDERS THAT:

1. Insofar as the same may be necessary, having regard to the grounds pleaded in the notice of appeal, the appellant be granted leave to appeal.
2. The appeal be dismissed.

REASONS FOR DECISION

THE TRIBUNAL:

1. In the Australian Army, it has never been lawful for a superior to strike a subordinate.
2. The present appeal offers a useful opportunity to recall just how longstanding this prohibition is, and the reason for it.
3. Unsurprisingly, given Australia’s constitutional inheritance from the United Kingdom, including with respect to the governance of its army, this Australian prohibition reflects the position in the United Kingdom as at the time of Federation. Immediately before Federation, the discipline of the British Army was governed by the *Army Act 1881* (Imp) (**1881 Act**). The 1881 Act also applied either generally to the various Australian colonial military forces or at least when they were called out for active service: *Justice in Arms*, B Oswald and J Waddell (Eds) (Big Sky Publishing, 2014), p 2. After Federation and following the assumption of control of the former colonial military forces by the Commonwealth, the 1881 Act, to the extent modified by the Australian Military Regulations and Orders, remained applicable to the Australian Army when on active service until the commencement of the *Defence Force Discipline Act 1982* (Cth) (**DFDA**). By s 37(1), the 1881 Act provided:

**37. Ill – treating solider**

Every officer or non-commissioned officer who commits any of the following offences; that is to say:

(1.) Strikes or otherwise ill-treats any soldier; or

shall on conviction by court-martial be liable, if an officer, to be cashiered or to suffer such less punishment as is in this Act mentioned, and if a non-commissioned officer, to suffer imprisonment or such less punishment as is in this Act mentioned.

1. Apart from the prohibition applicable via the application of the 1881 Act to active service duty, a like prohibition was applicable after Federation to members of the Australian Army when not on active service: reg 494(xli) of the *Australian Military Regulations 1916* (Cth) and, later, reg 203(lvi)(a), *Australian Military Regulations 1927* (Cth).
2. The 1881 Act consolidated the many reforms to British military law made by the *Army Discipline and Regulation Act 1879* (Imp) (**1879 Act**), as amended. However, all that it did in relation to the prohibition on the striking of a subordinate by a superior was to declare the position in law which had existed prior to the 1879 Act. In the *Articles of War* (1873), promulgated in 1873 by Queen Victoria, in amplification of the provision made by the annual Mutiny Acts for the discipline of the British Army, Article 100 provided, materially:

100. ANY officer or non-commissioned officer who shall strike or ill-treat any soldier;

…

SHALL, if an officer, on conviction … be LIABLE to be CASHIERED – or suffer such other punishment, according to the nature and degree of the offence, as by the judgement of a general court martial may be awarded …

[Charles Clode, The Administration of Justice under Military And Martial Law: As Applicable to the Army, Navy, Nerines and Auxiliary Forces, 2nd edition, 1873, pp 179-180.]

1. In turn, as Mr E Samuel demonstrates in his work, “An Historical Account of the British Army, and of the Law Military, as declared by the Ancient and Modern Statutes, and Articles of War for its Government: with a Free Commentary on the Mutiny Act, and the Rules and Articles of war; Illustrated by Various Decisions of Courts Martial” (1816) (**Samuel**), at p 348 and following, the prohibition on the striking by a superior of a subordinate, found in the Articles of War, long antedated even the formation of a standing English Army in the aftermath of the Restoration. It may be traced back at least to a like prohibition found in a charter issued by King Richard I to govern the behaviour of his army on their voyage to the Holy Land.
2. According to Samuel, at p 348, the purpose of the prohibition is as follows:

As strife and quarrels might prove more dangerous, in their consequences, from the circumstance of closer association, from the ready recourse to arms, and from the constant habit of using them, in a military community, than in the civil ranks of life; so the aim of the framers of our military code has been on all occasions most conspicuous, in the ordinances declared by them for the prevention and repression of the conduct and actions of soldiers, having a tendency to a breach of the peace, or to the interruption of the quiet of the camp or garrison.

As will be seen, two hundred years after Samuel made that observation, the prohibition remains relevant in relation to “the quiet of the camp or garrison”.

1. All of the heritage just related is evident in the present Australian prohibition, found in s 34 of the DFDA:

**34 Assaulting a subordinate**

(1) A defence member commits an offence if:

(a) the member assaults or ill-treats a person; and

(b) the person is a member of the Defence Force who is of subordinate rank to the member.

Maximum punishment: Imprisonment for 2 years.

(2) Strict liability applies to paragraph (1)(b).

Note: For ***strict liability***, see section 6.1 of the ***Criminal*** ***Code***.

(3) It is a defence if the member proves that he or she neither knew, nor could reasonably be expected to have known, that the other person was a member of the Defence Force of subordinate rank to the member.

Note: The defendant bears a legal burden in relation to the matter in subsection (3). See section 13.4 of the ***Criminal Code***.

1. Nowadays, the provision also serves the function of prohibiting abuses of authority by superiors.
2. The appellant, Lieutenant Colonel (**LT COL**) Jeremy Thomas Mikus, was charged with the following offence against s 34(1) of the DFDA:

Being a defence member at the Gordon Club, Borneo Barracks, Cabarlah, in the state of Queensland, on or about 7 November 2019, did assault [service number] [Private] Jamie Bicsak, who was subordinate to him in rank, by slapping her on the buttocks.

1. LT COL Mikus pleaded not guilty to this charge. On 5 August 2020, following a trial before a Defence Force Magistrate (Group Captain S M Geeves) (**DFM**) over three days the preceding month, LT COL Mikus was found guilty. The following day, the DFM convicted him of the offence and ordered that he be fined the sum of $6,500.00 and severely reprimanded.
2. LT COL Mikus has appealed to the Tribunal against his conviction. As pleaded in the notice of appeal, the grounds of appeal are:

1. that the conviction is unreasonable, or cannot be supported, having regard to the evidence; and/or

2. that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred; and/or

3. that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory.

1. These grounds of appeal correspond with permissible grounds of appeal as respectively specified in ss 23(1)(a), (b) and (d) of the *Defence Force Discipline Appeals Act 1955* (Cth) (**Appeals Act**). They were amplified in paragraph 3 of the notice of appeal and further in the outline of submissions as filed on behalf of LT COL Mikus by direction in advance of the hearing and in later oral submissions.
2. The oral submissions made on behalf of LT COL Mikus confirmed a position evident from his outline and paragraph 3 of the notice of appeal. That was that one basis of challenge was an alleged inadequacy of the reasons given by the learned DFM for his convicting LT COL Mikus. It was pointed out by the Tribunal in the course of oral submissions that this particular basis of challenge might more aptly be characterised as “a material irregularity in the course of the proceedings” and hence one falling within s 23(1)(c) of the Appeals Act. Upon inquiry by the Tribunal as to whether he had any objection, in light of the pleading of the notice of appeal, to a challenge on this basis, the Chief of Army, by his counsel, with the consummate fairness an appellant defence member and the Tribunal are entitled to expect of a service chief respondent, indicated that he had no objection to treating the appeal as if there were also a ground advanced under s 23(1)(c) of the Appeals Act.
3. We were well satisfied, having regard to the outlines of submissions respectively filed in advance by each of the parties, that permitting the point to be raised entailed no procedural unfairness to the Chief of Army. Further, even if, as the appellant’s written outline seemed to assume, a failure to give adequate reasons might be said to be a wrong decision on a question of law (as opposed to exposing the same) and fall under s 23(1)(b) of the Appeals Act, both s 23(1)(b) and s 23(1)(c) of the Appeals Act additionally require an appellant to persuade the Tribunal that a substantial miscarriage of justice has occurred. We therefore proceeded to hear, and now determine, the appeal on the basis that the appeal also raises a ground under s 23(1)(c) of the Appeals Act, as mentioned.
4. The appellant’s outline of submissions refers to and expands upon the pleaded grounds of appeal as follows:

Ground of Appeal No. 1 – that the conviction is unreasonable, or cannot be supported, having regard to the evidence, in that the learned [DFM] rejected the evidence of the appellant without cogent reasons showing a chain of logical reasoning that would allow the DFM to do so.

Ground of Appeal No. 2 – that as a result of a wrong decision on a question of law, or mixed law and fact, a substantial miscarriage of justice has occurred, in that the DFM failed to find that there was a reasonable possibility of collusion, concoction or/or contamination between the prosecution witnesses Bicsak, Harrison-Wolff, Shannon and Callum Edwards.

Ground of Appeal No. 3 – that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory, in that the DFM made the following errors.

[sic]

There followed, in paragraphs 10-15 of the appellant’s outline, a list of the asserted errors. We shall return to a consideration of those when we deal with the grounds of appeal in detail.

#### The Prosecution Case

1. The prosecution case may be summarised as follows.
2. As at Thursday, 7 November 2019, LT COL Mikus was the Commanding Officer of 1st Combat Signal Regiment. In November 2019, the annual week-long series of events known as the Caduceus Cup [Caduceus was the official staff carried in Roman mythology by Mercury and, similarly in Greek Mythology, by Hermes, the messenger of the gods, usually represented with two snakes entwined around it. There is no unfairness to either party in taking notice that the Caduceus features in the badge of Royal Australian Corps of Signals], in which members of various Royal Australian Corps of Signals regiments participate, was held at Borneo Barracks, Cabarlah in Queensland. Members of 1st Combat Signal Regiment participated in the Caduceus Cup. On the evening of 7 November 2019 and at the conclusion of competitive events, a function was held for the other ranks at the Gordon VC Club at Borneo Barracks (the other ranks club at the barracks), starting at approximately 1800 hrs. The attendees included Signalman (**SIG**) Jamie Bicsak (the complainant and a member of 1st Combat Signal Regiment), her fiancé SIG Callum Edwards (a member of 1st Combat Signal Regiment), Private (**PTE**) Corina Edwards and SIG Benjamin Shannon (a member of 1st Combat Signal Regiment). Sergeant (**SGT**) Christian Smith was the bar manager and RSA (responsible service of alcohol) supervisor at the Gordon VC Club on the night. PTE Jacob Tennant was the disc jockey at the function.
3. At the same time, a formal cocktail function was being held at the Borneo Barracks Officers’ Mess for officers and senior non-commissioned officers. In keeping with the formal nature of the function, attendees wore Mess Dress. The attendees at that function included LT COL Mikus, Major (**MAJ**) Dreu (the executive officer of 1st Combat Signal Regiment), Warrant Officer, Class 1 (**WO1**) Douglas (the then Regimental Sergeant Major (**RSM**) of 1st Combat Signal Regiment) and Captain (**CAPT**) Alexandra Harrison-Wolff (an officer then posted to 1st Combat Signal Regiment).
4. Later in the evening, after the cocktail function ended, MAJ Dreu, WO1 Douglas and CAPT Harrison-Wolff moved to the function at the Gordon VC Club. LT COL Mikus was not with them at that stage, but arrived at the Gordon VC Club approximately one hour later.
5. The prosecution alleged that a number of officers and senior non-commissioned officers went to the Gordon VC Club where they continued to drink alcohol and socialise with the signallers and junior non-commissioned officers. The socialising included conversation in groups and dancing.
6. The prosecution case entailed the following further allegations. Prior to the alleged offending conduct, LT COL Mikus was dancing and enjoying himself amongst the soldiers at the Gordon VC Club. He appeared to be quite intoxicated. He behaved in a way which was quite different to his normal behaviour in the presence of subordinates. When approximately 20 to 25 persons were dancing in a large circle [the “formation” of those dancing was described by some eyewitnesses as a circle. CAPT Harrison-Wolff described it as “a sort of ill-formed accidental circle shape … a sort of semicircle with various groups breaking off from each side of it”. SIG Shannon described it as “kind of a horseshoe shape”], LT COL Mikus veered very quickly towards the complainant and slapped her with an open hand on her buttocks.
7. In her evidence in chief, SIG Bicsak said that she felt a slap on her “bum” while she was dancing in a circle of people. She did not know whether the appellant was in the circle at the time. In cross-examination, she explained that she had moved in towards the centre of the circle. She described the contact as “a quick slap on the bottom”. However, it was a “pretty firm slap”. Although she felt the slap, she did not see who had slapped her. About 30 seconds to a minute after the slap, SIG Callum Edwards (her fiancé) pulled her away and said to her, “That was the CO that just slapped your arse”.
8. SIG Callum Edwards stated that he witnessed the alleged slap. After being referred to a drawing which he had provided to investigators showing the relative positions (prior to the alleged slap) of himself, SIG Shannon, CAPT Harrison-Wolff and the appellant, SIG Callum Edwards gave the following evidence:

PROSECUTOR: From identifying that drawing, you’ve indicated where [the appellant] was positioned. What was he doing at that time?---He had a drink in his hand. Everyone in the circle was all kind of just dancing, having a good time. As … SIG Jamie Bicsak was in the centre of the circle with her back towards us she was dancing for approximately about a minute and then [the appellant] stepped in and slapped her on the buttocks with his right hand.

How did he slap her on the buttocks? --- Just with a big like flat hand and with a quite loud slap.

Did you hear anything?---I remember hearing the sound of the slap. So to me, that felt like it must have been very firm.

How clear was your view of what you say you saw happen?---I could definitely see – from myself to [the appellant] I could completely see him, see his face. I could see CAPT Harrison-Wolff. I could see SIG Jamie Bicsak and I could see SIG Ben Shannon.

What was the distance between where [the appellant] was standing and where SIG Bicsak was?---Probably about 1 to 1.5 metres. The circle was not large, not small, kind of in the middle. So must have been 1.5 metres, ma’am.

1. SIG Shannon and CAPT Harrison-Wolff also said that they observed LT COL Mikus slap SIG Bicsak.
2. SIG Shannon said in evidence that the people dancing at the relevant time were in something of a horseshoe formation. By reference to a rough sketch which he had prepared for investigators, he identified the relative positions of himself, SIG Callum Edwards, SIG Bicsak, CAPT Harrison-Wolff, WO1 Douglas and LT COL Mikus. SIG Shannon was standing next to CAPT Harrison-Wolff. He placed himself about 2 to 2.5 metres from the complainant and 1.5 to 2 metres from LT COL Mikus. After SIG Bicsak stepped from the right of the horseshoe into the centre, SIG Shannon saw LT COL Mikus reach out and slap SIG Bicsak on the buttocks with an open right hand [in cross-examination, and when asked whether the contact could have been with the back of the appellant’s hand, he said it was an open right palm]. LT COL Mikus was so close to SIG Bicsak that he was able to simply lean and strike her without needing to take a step. In an apparently immediate reaction, SIG Bicsak turned to her right [in cross-examination, SIG Shannon said the touch “was hard enough for Jamie to have noticed”. When then asked how he knew that the complainant had noticed, he replied, “Because she turned instantly, sir”].
3. CAPT Harrison-Wolff said in giving evidence simply that she saw LT COL Mikus slap the complainant on the bottom with an open palm, using his right hand. In order to carry out the slap, he took a step forward and “kind of leant over to reach out for where SIG Bicsak was standing”. She gave the following description of the appellant’s movements in cross-examination: “A step forward … almost I suppose like a lunge to reach forward and then stepped back to where he was previously”. SIG Shannon, who was standing next to her, said to her almost immediately, “Well, that was inappropriate” [CAPT Harrison-Wolff later conceded that the statement attributed to SIG Shannon was not a direct quote but something very similar]. When cross examined to the effect that she had not seen any slap, CAPT Harrison-Wolff answered, “I unequivocally saw a slap, sir”. When further questioned as to whether the slap was with the back of the hand or the front of the hand, she answered, “Front of the hand, open palm”. She could not say precisely where the slap struck the complainant’s bottom.
4. CAPT Harrison-Wolff had served with LT COL Mikus in 1st Combat Signal Regiment since January 2019. She had enjoyed a good professional relationship with him. Indeed, she liked him. As she was leaving the Gordon VC Club, after the alleged incident, LT COL Mikus picked her up and carried her for about 10 metres. She agreed with defence counsel that this had probably occurred after she had complained about her shoes hurting. We will say more about this particular incident in [89] below.
5. The prosecution case was thus supported by the evidence of SIG Bicsak as to having received a slap to her bottom, and the evidence of three apparently reliable eyewitnesses who had actually seen LT COL Mikus slap the complainant’s bottom. Given the close proximity of the eyewitnesses to the event described, there is no real issue as to the accuracy of their observations, notwithstanding evidence of deficiency in lighting and the operation of a smoke machine. There was no evidence of ill-feeling or other bias on the part of any of those four witnesses towards LT COL Mikus prior to the alleged assault. In particular, SIG Bicsak was a reluctant witness who had expressed concern about the possible consequences to LT COL Mikus’ career if she were to make a complaint and who did not want the matter to go any further [for example, when MAJ Mathieson conveyed the appellant’s apology to her, she said that she accepted the apology and simply wanted the appellant to be aware that it was unacceptable]. CAPT Harrison-Wolff was in a most unenviable situation, having to give evidence against her Commanding Officer, whom she respected and liked. Indeed, she had experienced feelings of guilt for a considerable period of time because she had not taken steps to extract LT COL Mikus from a situation in which he was becoming increasingly inebriated, drawing attention to himself while dancing, and where those present were starting to make comments about his behaviour.
6. In addition to the eyewitness evidence, the prosecution relied on evidence of conversations which took place in the days after the alleged offending between LT COL Mikus and CAPT Harrison-Wolff; LT COL Mikus and SIG Callum Edwards; and LT COL Mikus and a MAJ Mathieson.
7. The evidence of various witnesses was to the effect that, when spoken to about the matter the following day, LT COL Mikus said he had no recollection of the alleged incident. By implication, he did not deny the possibility that conduct of the kind alleged might have occurred.
8. LT COL Mikus gave evidence. His evidence included a statement that, when he spoke with SIG Callum Edwards the following day, having been informed by the RSM that soldiers were spreading rumours that he had slapped the complainant, he told SIG Callum Edwards that he had “absolutely no memory of anything like that from the evening”. He further said, “It is not something that I would do, and I’m really sorry that you’ve had to hear that, but it is absolutely not something that I would do”.
9. In other words, he did not deny to SIG Callum Edwards that he had slapped the complainant, but rather said he had no recollection of having done it and that it was not something that he would do. The irony in LT COL Mikus’ evidence is that if one accepts, as the DFM did, that SIG Callum Edwards had actually witnessed the slap, he was not someone who had simply heard rumours to that effect spread by the soldiers.
10. LT COL Mikus’ evidence before the DFM entailed what is capable of being regarded as a significant “shift” from not remembering to outright denial of the alleged incident [see the discussion of the evidence by the DFM in his reasons]. In relation to the allegation that he had slapped SIG Bicsak on her bottom with his open right hand, he replied during his examination in chief, “That did not occur”. He accepted the possibility that he had come into (physical) contact with SIG Bicsak, but only because “the room was heavily populated and so people were quite tightly packed in”. He did not recall having any contact with SIG Bicsak. He denied the evidence of CAPT Harrison-Wolff that he left the perimeter of the circle and moved in about 2 or 3 metres with his arm extended [CAPT Harrison-Wolff’s evidence was in cross-examination]. He denied the incident described in the evidence of SIG Shannon.

#### Liberato and the reasons of the DFM

1. Although the DFM reserved his decision, that decision and the reasons for it were delivered *ex tempore*. As delivered, the reasons were lengthy but much of the reasons entailed a summary of the evidence given by the various witnesses. The analysis of that evidence and the explanation as to why the evidence of particular witnesses was or was not accepted is to be found in the concluding few pages of the transcript.
2. The DFM’s reasons disclose, appropriately in the circumstances, recognition of a need to give himself a so-called “*Liberato* direction”. The direction takes its name from *Liberato v The Queen* (1985) 159 CLR 507 (***Liberato***). The usual occasion for the giving of a “*Liberato* direction” is in a case which turns on the conflicting evidence of one or more prosecution witnesses and one or more defence witnesses. Such a direction is to the effect that, even if the tribunal of fact (jury or judge or magistrate sitting alone) does not positively believe the defence witness(es) and prefers the evidence of the prosecution witness(es), the tribunal of fact should not convict unless satisfied that the prosecution has proved the defendant’s guilt beyond reasonable doubt. The direction which the DFM gave himself was as follows:

In a criminal trial it is not a question of my making a choice between the evidence of the prosecution and the evidence of the accused and LTCOL Schurmann and LTCOL Anderson. The proper approach is to understand [that] the prosecution case depends upon my accepting that the evidence of the complainant and other credible witnesses was true and accurate beyond reasonable doubt, despite the sworn evidence by the accused and the two other Lieutenant Colonels.

I have directed myself that I do not have to believe the accused is telling the truth before he is entitled to be found not guilty.

Here it is often said that usually, one of three possibilities results, that is, where there is defence evidence.

First, I may think that the accused’s evidence is credible and reliable and that it provides a satisfying answer to the prosecution’s case. If so, my verdict would be not guilty.

Second, “I might think that [although] all the accused’s evidence was not convincing, it leaves me in a state of reasonable doubt as to what the true position was. If so, my verdict will be not guilty, or thirdly; I might think that the accused’s evidence should not be accepted. *If that is my view, I must be careful not to jump from that view to an automatic conclusion of guilt. If I find the accused’s evidence unconvincing, I must set it to one side and go back to the rest of the evidence and ask myself whether, on consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.*

[emphasis added]

1. The DFM returned to *Liberato* later in his reasons when analysing the evidence of the various witnesses. He stated:

I have directed myself in accordance with the directions I have set out at the commencement of these reasons. In particular, I have reminded myself of a relevant direction. It is often referred to as the *Liberato* direction. It applies to when an accused gives or calls evidence, as is the case here. In this case I find the accused’s evidence unconvincing. Therefore, I will set his evidence to one side and go back to the rest of the evidence and ask myself whether on consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt the prosecution has proved each of the elements of the offence.

1. Insofar as there was a need, flowing from *Liberato*, for the DFM to remind himself of the overarching need for the prosecution to prove its case beyond reasonable doubt, even in a case of evidentiary conflict and where, materially, he had not accepted evidence given by LT COL Mikus, the reminders which he gave himself satisfied this need.
2. Those reminders engage with a fundamental principle applicable to any charge before a service tribunal that a service offence has been committed. That is that the onus is on the prosecution to prove beyond reasonable doubt each and every element of the offence charged. An accused is not obliged to prove his innocence, for that is presumed, and bears no onus at all save to the extent that there is express statutory provision in relation to a particular defence. In relation to the civilian criminal justice system, this has been described as “a cardinal principle of our system of justice”: see, *Sorby v The Commonwealth* (1983) 152 CLR 281, at 294 (Gibbs CJ). Both before and after the enactment of the DFDA, this principle, the root authority for which is *Woolmington v Director of Public Prosecutions* [1935] AC 462, at 481 – 482, has been held by the Tribunal to be applicable to the trial of service offences: see, respectively, *Re Manion’s Appeal* (1962) 9 FLR 91, at 103 – 104, and *Randall v Chief of Army* (2018) 335 FLR 260. Unsurprisingly therefore, this principle was at the forefront of the oral submissions made on behalf of LT COL Mikus. It must inform our consideration of each of the pleaded grounds of appeal. It also supplies the occasion for an examination of the adequacy of the reasons given by the DFM for why he found the offence charged proved.

#### The obligation of a DFM to give reasons

1. In this case, irrespective of whether he was under an obligation so to do, the DFM gave reasons. Further, the submissions of each of the parties assumed the existence of such an obligation. That does not render the question of whether there is such an obligation wholly academic, because the nature and extent of any obligation is necessarily relevant to whether or not the reasons given are adequate.
2. In the past, the Tribunal has regarded the common law as the source of an obligation on the part of a DFM to give reasons: *Yewsang v Chief of Army* [2013] ADFDAT 1 (***Yewsang***), at [11] – [12]. This year, there have been two developments in relation to service tribunals which make it opportune to reconsider that subject. Important observations have been made by the High Court in *Private R v Cowen* (2020) 94 ALJR 849 (***Private R v Cowen***) about the nature of the power exercised by service tribunals, including thus a DFM. Also, the Judge Advocate General has made the *Court Martial and Defence Force Magistrate Rules 2020* (Cth) (**2020 Rules**) under s 149A of the DFDA.
3. Ascertaining the source, nature and extent of an obligation of a DFM to give reasons is not straightforward.
4. There is no provision in the DFDA which expressly provides that a DFM must give reasons either for a decision to dismiss a charge of the commission of a service offence or to convict the accused person of that charge.
5. Trial by a DFM is governed by s 135 of the DFDA. By s 135(1), a DFM is required to try a charge in accordance with the provisions of that section. Those provisions require a DFM to dismiss a charge if the DFM rules that the prosecution evidence is insufficient to support the charge (s 135(1)(c), DFDA), to acquit the accused person if the DFM finds that person not guilty (s 135(1)(e), DFDA) and to convict the accused person if the DFM finds that person guilty (s 135(1)(f), DFDA). However, s 135 of the DFDA does not expressly state that a DFM must give reasons for any such ruling or, as the case may be, any of those findings.
6. There are corresponding provisions in s 132 of the DFDA to those mentioned in s 135 in relation to trial by court martial, save that dismissal for insufficient evidence is a sequel to a ruling by the judge advocate appointed to the court martial: s 132(1)(c), DFDA.
7. Section 149A of the DFDA empowers the Judge Advocate General, by legislative instrument, to make rules, to be known as the Court Martial and Defence Force Magistrate Rules, providing for the practice and procedure to be followed by a court martial or a DFM. At the time when the trial of the present charge occurred in July 2020, the 2020 Rules, as so made, had recently come into force. Within the 2020 Rules, r 52, which governs the record of proceedings before a court martial or a DFM, does not, in terms, require a DFM to give reasons. It does, in r 52(1), contain an overarching requirement that, “Where the proceedings before a court martial or Defence Force magistrate are not recorded electronically, they shall be recorded in sufficient detail *to enable the course of the proceedings to be followed, and the merits of the case to be judged*, from the record …” (emphasis added). Rule 52 also makes alternative provision for the “proceedings” before a court martial or DFM to be recorded electronically: r 52(2). The term, “proceedings” is not defined in the 2020 Rules. However, read in context and having regard to purpose, it is no great stretch of language to construe “proceedings” as extending to the recording of reasons. To record reasons is one thing, to be obliged to give them is another.
8. Rule 5 of the 2020 Rules is a “fail safe” provision, looking in the first instance to “the established course that would, in the particular case, have applied in a trial by jury in a civil court in the Jervis Bay Territory in its criminal jurisdiction” (r 5(a)) and “if there is no such established course, such course shall be adopted as the interests of justice require” (r 5(b)). In a trial by jury in a civil court in the Jervis Bay Territory in its criminal jurisdiction, the jury is not obliged to give reasons either for a finding of not guilty or a finding of guilty.
9. The *Defence Force Discipline Regulations 2018* (Cth), also made under the DFDA, contain no provision requiring a DFM to give reasons.
10. Looking further afield, and materially, reg 8(1)(a) of the *Defence Force Discipline Appeals Regulation 2016* (Cth), made under the Appeals Act, requires the Registrar of Military Justice, on request by the Tribunal’s Registrar, to give to the Tribunal, “a record of the proceedings of the court martial or Defence Force magistrate”. Once again, “proceedings” would be sufficient to embrace any reasons given by a DFM but it is, likewise to r 52 of the 2020 Rules, difficult to regard this provision as the source of an obligation to give reasons.
11. The absence of any explicit statutory obligation for a DFM to give reasons takes one to the common law. As the Tribunal observed in *Leith v Chief of Army* (2013) 234 A Crim R 259, at [101], by reference to *Marks v Commonwealth* (1964) 111 CLR 549, at 573; *Commonwealth v Welsh* (1947) 74 CLR 245 and *Coutts v Commonwealth* (1985) 157 CLR 91, at 108, “There is longstanding authority that legislation concerning the armed forces should be considered against the background of the common law”.
12. A DFM is not a judge appointed under Ch III of the *Constitution*. Rather, a DFM is an officer in the Australian Defence Force (**ADF**) appointed from the judge advocates’ panel by the Judge Advocate General to be a DFM: s 127, DFDA. Necessarily therefore, a DFM is, like all members of the ADF, a member of the executive branch of government established under Ch II of the *Constitution*. That status might be thought to suggest that a DFM has no obligation to give reasons because, at common law, an administrator is not obliged to give reasons for a decision: *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 (***Public Service Board (NSW) v Osmond***).
13. However, a much more nuanced position, than a bare conclusion that administrative power is exercised, is applicable in relation to a service tribunal, constituted by a DFM, as in the present instance. Though it is unequivocally the position that a DFM does not exercise the judicial power of the Commonwealth under Ch III of the *Constitution*, that is not to say that a DFM is not obliged to act judicially. In *Private R v Cowen*, at [56], Kiefel CJ, Bell and Keane JJ stated:

Whether service tribunals exercise judicial or administrative power, *the power is required to be exercised judicially*, that is to say, *in accordance with the requirements of reasonableness and procedural fairness to ensure that discipline is just*. This Court is invested with jurisdiction by s 75(v) of the *Constitution* to supervise the exercise of power by officers of the Commonwealth to ensure that their powers are exercised judicially in that sense.

[emphasis added]

1. In so doing, their Honours took up and applied this observation, made by Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 (***Re Tracey; Ex parte Ryan***), at 540 – 541, which, at [46] they endorsed as “clearly correct”:

… the defence power is different because the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as part of the organization of the force itself.

This observation was also, at [95(b)], regarded as correct by Gageler J in his separate judgment in *Private R v Cowen*.

1. Of the other judges in *Private R v Cowen*, Nettle J went beyond just stating that the power of a service tribunal is required to be exercised judicially. His Honour opined, at [111]:

Previous decisions of this Court establish that *the power exercised by service tribunals is judicial power*, albeit of a kind that is placed outside the “law of the land” and thus outside the requirements of Ch III of the *Constitution*.

[emphasis added]

1. In her separate judgment, Gordon J, at [133], referred to service tribunals as having, “disciplinary powers to be exercised judicially by members of the armed forces” with the nature of that power being “*sui generis*”, a description which had earlier commended itself to Gleeson CJ in *White v Director of Military Prosecutions* (2007) 231 CLR 570, at [14]. For his part, Edelman J, at [171], considered that, “the weight of authority and principle supports the conclusion of Mason CJ, Wilson and Dawson JJ in *Re Tracey; Ex parte Ryan* that service tribunals exercise judicial power”. His Honour further opined, at [188]:

Provided that a service tribunal is constituted in a manner that is broadly consistent with its core historical antecedents it will not infringe the constitutional implication that the judicial power of the Commonwealth can only be exercised in accordance with Ch III of the *Constitution*.

1. It is neither necessary nor appropriate for the Tribunal to set out, much less itself analyse, the detailed examinations of authority which underpinned the various observations made in *Private R v Cowen* about the nature of the power exercised by a service tribunal. The point of present relevance is that there is nothing in the judgments delivered in *Private R v Cowen* which would support a conclusion that the function consigned to a DFM is to be assimilated with a mere exercise of executive power such that it is in any way apt to draw an analogy with *Public Service Board (NSW) v Osmond* and conclude that, at common law, a DFM is under no duty to give reasons; rather they support the reverse conclusion.
2. *Public Service Board (NSW) v Osmond* does, however, also bring with it the reminder given by Gibbs CJ, at 666 – 667, that the giving of reasons for a decision is an accepted aspect of the judicial function.
3. In *Yewsang*, at [11], the need for a judicial officer sitting alone to expose reasons for the order made in a way sufficient to permit an effective appeal moved the Tribunal to regard the following principle expounded by Asprey JA in *Pettitt v Dunkley* [1971] 1 NSWLR 376 (***Pettitt v Dunkley***), at 382, in relation to a judicial officer sitting without a jury in the civil courts, as equally applicable to a DFM:

In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong compelling reason, the case is such that the judge’s findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law.

1. In *Public Service Board (NSW) v Osmond*, at 666, Gibbs CJ remarked of this observation in *Pettitt v Dunkley* that it “may have broken new ground”. However, in *Fleming v The Queen* (1998) 197 CLR 250, at [22], in the joint judgment of Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ, their Honours expressly refrained from accepting that this was so. Further and in any event, their Honours regarded the reasoning in that case, that it was subversive of the statutory right of appeal conferred in respect of the order made by the judge sitting alone not to regard that right, as necessarily carrying with it an obligation to give reasons.
2. Exactly the same conclusion, and for the same reasons, ought to be drawn in relation to a DFM, having regard to the right of appeal to the Tribunal conferred by s 20 of the Appeals Act and the grounds upon which, by s 23 of that Act, an appeal may be brought. As in *Fleming*, in relation to *Pettitt v Dunkley*, we do not regard *Yewsang* as having “broken new ground” in relation to a conclusion that, at common law, a DFM was under an obligation to give reasons, having regard to the nature of the function consigned to a DFM. We consider that the later observations in *Private R v Cowen* about the nature of the power exercised by service tribunals support that conclusion. But in any event, it would be subversive of the statutory right of appeal to this Tribunal against a conviction in respect of a service offence by a DFM to conclude that a DFM has no obligation to give reasons. Further, we consider that, in its application to a DFM, this conclusion is reinforced by r 52 of the 2020 Rules, in the specification of the requirement that proceedings be recorded in sufficient detail, “to enable the course of the proceedings to be followed, and the merits of the case to be judged”. The clear purpose of this rule is not just to enable the effective review, under Pt VIIIA of the DFDA, of proceedings before a service tribunal (including a DFM) but also the effective exercise of the right of appeal conferred by the Appeals Act. The reasons given by a DFM must be adequate and sufficient to explain the finding under s 135 of the DFDA made by that DFM.
3. This conclusion in relation to the existence of an obligation to give reasons, even in the absence of an express statutory obligation, also accords with the approach of the ACT Court of Appeal in *DW v The Queen* (2004) 150 A Crim R 139 (***DW v The Queen***), at [24] – [26], and of Doyle CJ, (Wicks J agreeing) in *R v Keyte* (2000) 78 SASR 68 (***Keyte***), at [48].
4. In *DW v The Queen*, at [27], it was stated:

… Any grounds of appeal based upon an alleged inadequacy of the reasons that have been provided must obviously be determined by reference to the issues that arose at the trial, the nature of the evidence, the scope of the appeal and other relevant circumstances. However, the general scope of the duty should be noted: it is a duty to explain his or her decision; not to write an exhaustive treatise on every aspect of the trial …

The same applies in relation to the reasons of a DFM. Whether they are delivered orally, as in the present case, or in writing, there is no requirement for them to be lengthy or elaborate. However, where more than one conclusion is open on the evidence, it will generally be necessary for those reasons at least to explain why one conclusion was preferred to another.

1. This is not a case where no reasons were delivered. For the reasons given, a failure to give reasons by a DFM would constitute a material irregularity in terms of s 23(1)(c) of the Appeals Act, if not also a wrong decision on a question of law in terms of s 23(1)(b) of that Act. Rather, this is a case where, as the passage quoted from *DW v The Queen* highlights, the adequacy of the DFM’s reasons must be judged by reference to “the issues that arose at the trial, the nature of the evidence”. Against this background, we turn to consider ground 1.

#### Ground 1 – were the DFM’s reasons inadequate?

1. In this case, the major issue confronting the DFM, as his reasons disclose he plainly recognised, was that he had conflicting accounts on the evidence as to whether the event charged had occurred at all. Appropriately, and as we have mentioned, the DFM gave himself a “*Liberato* direction” and also reiterated his understanding of the ramifications of that case.
2. Counsel for LT COL Mikus focussed on these passages in the DFM’s reasons so as to ground a submission that the DFM had “simply [preferred] one account over another” and proceeded to convict upon it applying a standard less than proof beyond reasonable doubt:

In this case I find the accused's evidence unconvincing. Therefore, I will set his evidence to one side ....

And later:

Conversely, I cannot say that I found the accused as impressive a witness as the complainant and the three other eyewitnesses when giving evidence. I carefully observed him in the witness box whilst giving his evidence-in-chief and under cross-examination: I accept, however, that he was not shaken under cross-examination.

1. The vice in this submission is that it proceeds from a reading of these passages in isolation from a reading of the reasons as a whole. In the first of the passages relied upon, having stated he would put the evidence given by LT COL Mikus to one side, the DFM stated that he would therefore “go back to the rest of the evidence and ask myself whether on consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt the prosecution has proved each of the elements of the offence”.
2. In turn, this qualification cannot be read in isolation from the *Liberato* direction the DFM gave himself and the later reminder he gave himself by reference to *Liberato*. It was after he gave himself a *Liberato* direction that the DFM proceeded to scrutinise and evaluate the evidence of each of the “critical” prosecution witnesses. Of these, the DFM stated:

In terms of findings of credit based on her demeanour, I found the complainant, PTE Bicsak, to be an honest and impressive witness. I did not perceive her as attempting to embellish her evidence and in my view she made concessions when appropriate. The complainant was not shaken under cross-examination. I have referred in detail to portions of her cross­examination in my summary of the evidence. Under cross-examination she recalls feeling a pretty firm slap while dancing and that it was her partner, Callum, who told her what had happened.

The same can be said, in my view, particularly of the following eyewitnesses, of the alleged conduct of the accused. I found CAPT Harrison­Wolff, SIG Shannon and SIG Edwards to be honest and impressive witnesses. I did not perceive them as attempting to embellish their evidence. They also made concessions where appropriate. They were not shaken under cross-examination.

Again, I have already referred to some portions of CAPT Harrison-Wolff's evidence whilst under cross-examination. She unequivocally saw the accused slap the complainant on her backside. She saw him do that. It was not something that SIG Shannon had told her had happened and she saw the accused lunge forward, as she described it. The flashing lights and smoke did not interfere with her visual acuity. It was not some form of trickery involving light or smoke. She was not confused about what she says she saw. She had no doubt about what she saw.

SIG Shannon, under cross-examination, confirmed that smoke and lights did not affect his visual acuity. He saw the accused slap the complainant on her backside. When confronted by the learned defending officer, he was certain that he knew what he saw. His evidence was that he was very clear on what he saw.

Similarly, SIG Edwards, whilst under cross-examination and whilst despite consuming alcohol, was very clear also on what he saw. When confronted by the learned defending officer, he confirmed that he saw the accused slap his fiancée on the backside with his own eyes.

[sic]

1. The DFM expressly adverted to, and discounted, a risk of collusion between the eyewitnesses, noting similarities and also differences in detail between their respective accounts. The DFM also expressly took into account, in relation to reliability of observation and recollection, that the three eyewitnesses, and LT COL Mikus, had consumed alcohol on the evening in question. The DFM stated:

Whilst the complainant and three eye witnesses did indeed have something by way of alcohol to consume on the evening, I do not regard their levels of intoxication to be such as to affect their overall ability to recall what occurred.

He continued:

Turning to the charge itself, I accept the evidence of the complainant and the three eye witnesses as to what occurred on the dance floor of the Gordon Club. I accept the evidence of the critical witnesses that the accused assaulted the complainant, that the assault was intentional, the complainant did not consent to the assault, and that the assault was unlawful. Such conduct on the part of the accused is probably and most likely explained away by his level of intoxication but, nevertheless, it is conduct that satisfies the elements of the charge.

In doing so, I reject the accused’s denial that the alleged conduct did not take place or was otherwise accidental, that is not intentional touching, in the course of a dance routine. The best evidence in my view in relation to an assault occurring, the element of intention and the issues of consent and unlawfulness comes from the critical witnesses in this case.

[sic]

1. It was only after this that he ultimately concluded:

I therefore accept the evidence of the complainant and the three eye witnesses beyond reasonable doubt that the accused did engage in the conduct particularised in the charge on the charge sheet ….

1. Undoubtedly, an assessment of demeanour played a role in the acceptance by the DFM of the evidence of SIG Bicsak and the three eyewitnesses.
2. Where the question is one of accepting and rejecting the evidence of a witness on demeanour-based grounds, little may be required, and there is no requirement for a judge to give a detailed explanation for a decision to prefer the evidence of one witness against that of another: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, at 280 (McHugh JA); *Keyte*, at [56] (Doyle CJ); *R v Power* (2003) 141 A Crim R 203, at [57], [59], [63] – [65]; *DW v The Queen*, at [28]; *R v Barrowman* (2007) 96 SASR 294, at [6] – [7]. *Douglass v R* (2012) 290 ALR 699, does not contradict that proposition, though it held that as a criminal trial depends on whether the evidence as a whole proves the elements of the offence beyond reasonable doubt, reasons which record no finding about the accused’s evidence will be insufficient if they do not suffice to exclude the possibility that the judge simply preferred the complainant’s evidence and proceeded to convict upon it, applying a standard less than proof beyond reasonable doubt: at [14].
3. Read in context and as a whole, but taking into account in particular the passage quoted above, it is manifest that the DFM’s reasons do indeed exclude the possibility that he has “simply preferred [the complainant’s] evidence and proceeded to convict upon it, applying a standard less than proof beyond reasonable doubt”.
4. It is true that the DFM did not explicitly state why he found LT COL Mikus’ evidence to be “unconvincing” – by which he meant, in the context of the explanation earlier given, that he did not accept it. However, reading his reasons as a whole, his reasons for so finding can be discerned. The DFM’s conclusion that the charge was proved beyond reasonable doubt flows from his satisfaction that there was consistent, credible and corroborated direct evidence, from four witnesses, to the contrary of that given by LT COL Mikus. In addition, as we have mentioned, demeanour played a role. In this respect, the reasons for rejecting the evidence of a witness need not be sourced in that witness’s evidence, nor in the manner in which it was given; they can be founded on extraneous circumstances, including the strength of evidence to the contrary. The objection, posed by LT COL Mikus’ counsel, that the appellant had not been told what more he could have done, is not to the point. As counsel for the Chief of Army submitted, although another sentence or two in the judgment might have made it clearer, the reader of the judgment would not be under any misapprehension as to why LT COL Mikus’ evidence had not been accepted.
5. In any event, there has been no substantial miscarriage of justice. We refer to our observations in relation to the evidence in the prosecution case at [29] and that of the Defence at [32] – [33] above. There was consistent, credible, corroborated direct evidence from four witnesses. The reported reactions of the participants – including that SIG Bicsak was not particularly upset, but that SIG Shannon observed “that was inappropriate” – have the ring of truth. There was contemporaneous complaint. Most of the critical prosecution witnesses were, to a greater or lesser extent reluctant to incriminate their Commanding Officer, and none had any apparent motive so to do. There was a conspicuous shift in LT COL Mikus’ position from when he was confronted in the days following the incident, when his response was to the effect “I don’t remember” (as attested to by numerous witnesses, including even his RSM), to one of categorical denial at trial. It is also clear that the DFM’s rejection of the appellant’s evidence was partly based on demeanour.
6. For these reasons, we reject appeal ground 1.

#### Ground 2 – Failure to find a reasonable possibility of concoction, collusion or contamination

1. Although the ground of appeal as formulated was that the DFM erred in law in failing to find that there was a reasonable possibility of concoction, collusion or contamination, in the course of argument it was reformulated as a submission that the DFM ought to have, but did not, warn himself (under s 165 of the *Evidence Act 1995* (Cth) (**Evidence Act**)) that the evidence of the four direct witnesses might be unreliable because of the risk of concoction, collusion or contamination.
2. The appellant’s submission seeks to import into this context a principle which is applicable to the *admissibility* of similar fact or tendency evidence, where there are multiple complainants who give evidence of similar acts by an accused against each of them. At common law, similar fact evidence was not admissible if joint concoction, collusion or contamination could not be excluded, as the evidence would not possess the requisite probative value. Thus, in *R v JRW* [2014] NTSC 52 (***R v JRW***), at [34], Riley CJ said:

[34] In order to determine the admissibility of the tendency evidence it is necessary to consider the possibility of joint concoction in relation to the evidence of each of the complainants. If joint concoction cannot be excluded, the evidence will not possess the same probative value as would otherwise be the case. It is the possibility of concoction, not the probability or a real chance of concoction, which will lead to the evidence being excluded.

[footnote references omitted]

1. However, as Blokland J observed in *R v XZ* [2016] NTSC 14 (***R v XZ***), having referred to *Murdoch (A Pseudonym) v The Queen* (2013) 40 VR 451, at [7]; *SLS v R* (2014) 42 VR 64, at [178]; *BP v R* [2010] NSWCCA 303 (***BP v R***), at [123]; and *Velkoski v The Queen* (2014) 45 VR 680, at [173(c)], it was not the risk of any contamination whatsoever which necessarily required the exclusion of tendency evidence, but a risk of contamination going to the substance of the evidence and not merely to the incidental details: *R v JRW*, at [37]. Her Honour explained (*R v XZ*, at [16]):

The Crown must exclude “a real chance of contamination going to the substance of the evidence” to enable the tendency evidence to be admitted. There must be an identified basis found in the evidence for a conclusion that it is reasonably possible that there may have been concoction, collaboration or contamination. It is not enough the opportunity existed; a mere speculative suggestion of concoction, collusion, collaboration or contamination is not sufficient.

[footnote references omitted]

1. Under s 97(1) of the Evidence Act, tendency evidence is inadmissible unless the court thinks that the evidence will, either by itself or in combination with other evidence, have significant probative value. Under s 101(2) of that Act, such evidence is not to be admitted in a criminal proceeding against a defendant unless its probative value substantially outweighs any prejudicial effect it may have on the defendant. Initially, a similar view was taken in respect of the admissibility of tendency evidence, so that it would not be admitted unless the prosecution excluded “a real chance of contamination going to the substance of the evidence”. Thus in *BP v R*, Hodgson JA (with whom Price and Fullerton JJ agreed) said:

123 In my view, it is not a risk of any contamination whatsoever that would necessarily require the exclusion of evidence: it must be a risk of contamination that goes to the substance of the evidence, and not merely to incidental details of no materiality. I accept that, unless the Crown negates a real chance of contamination going to the substance of the evidence, then the evidence of other witnesses should not be admitted as tendency evidence. However, the risk of unconscious influence as to incidental details would not in my view necessarily require the evidence to be excluded.

1. However, in *R v Bauer* *(a pseudonym)* (2018) 266 CLR 56 (***Bauer***), the High Court noted, at [68], that in *R v GM* (2016) 97 NSWLR 706, the New South Wales Court of Criminal Appeal held that, despite the decision in *IMM v The Queen* (2016) 257 CLR 300, the possibility of contamination, concoction or collusion remained a relevant consideration in the determination of whether tendency evidence has significant probative value for the purposes of s 97 because the risk of contamination, concoction or collusion may give rise to a “competing inference” sufficient to render the evidence inherently implausible. The High Court in *Bauer* also noted that in *BM v R* [2017] NSWCCA 253, the New South Wales Court of Criminal Appeal said that, until and unless the High Court said otherwise, the possibility of contamination, concoction or collusion remained relevant to admissibility. In *Bauer*, the High Court stated that those statements now required qualification, as follows:

[69] In this context, reference to competing inferences is unhelpful, and likely to lead to error. Relevantly, the only sense in which competing inferences are of significance in the assessment of the probative value of evidence is in the determination of whether the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. As was established in *IMM*, that is a determination to be undertaken taking the evidence at its highest. Accordingly, unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability. Subject to that exception, the risk of contamination, concoction or collusion goes only to the credibility and reliability of evidence and, therefore, is an assessment which must be left to the jury. To the extent that *GM* or *BM* suggests otherwise, it should not be followed.

[70] In *Murdoch*, which predated *IMM*, the Victorian Court of Appeal stated that, in determining the admissibility of tendency evidence given by two complainants against an accused, if a trial judge determines that the similarity in the complainants’ accounts is capable of reasonable explanation on the basis of contamination, concoction or collusion, the evidence cannot possess sufficient probative value for the purposes of s 101 of the *Evidence Act*. In light of *IMM*, that approach must be taken as overruled. At common law, there is a need for separate judicial consideration of the risk of contamination, concoction or collusion, and a requirement that evidence be excluded if there is a reasonable possibility of it being affected by contamination, concoction or collusion. That requirement exists because of the common law rule of exclusion that, because tendency evidence is inadmissible unless there is no reasonable view of it consistent with innocence, tendency evidence is not admissible if there is a realistic possibility of it being affected by contamination, concoction or collusion. Under the *Evidence Act*, the position is different. The replacement of the *Hoch* test with the less demanding s 97 criterion of significant probative value means that that common law rule of exclusion has no application. Under the *Evidence Act*, provided evidence is rationally capable of acceptance, the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence.

[footnotes and citations omitted]

1. These principles are simply not relevant to this case. First, they are concerned with the threshold for the admissibility of similar fact or tendency evidence. No question of the admissibility of such evidence arises in the present case. Secondly, in any event, as *Bauer* establishes, the rule that tendency evidence is excluded where a real possibility of contamination, concoction or collusion is not negated, does not apply in proceedings to which the Evidence Act, or its equivalents, apply.
2. While *Bauer* confirms that “the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence”, this does not involve any such proposition as contended for by the appellant, to the effect that the prosecution must negative any real possibility of contamination, concoction or collusion. Conformably with that position, and as we have already highlighted, the DFM did consider, and reject, the suggestion of contamination, concoction or collusion.
3. The evidence does not indicate that there was any significant risk of collusion, concoction or contamination. The main indicium invoked on behalf of LT COL Mikus was that all the direct witnesses gave consistent evidence of the main event, namely the slap on the buttocks with an open right hand. However, it is entirely unsurprising that such a signal event would be accurately and precisely recalled by those who saw it, even if their recollections of some of the surrounding circumstances were less clear and consistent. No suggestion was made to any of the witnesses in cross-examination that their evidence had been affected or influenced by anything that anyone else had said. In fact, although CAPT Harrison-Wolff (whose conduct, in what would have been a most difficult position, demonstrated a high order of moral courage) spoke to three female soldiers together on the following day, including SIG Bicsak, the others present were not eyewitnesses, and she did not speak to eyewitnesses together. What she did say to them, on the evidence, was non-specific, and in particular did not refer explicitly to a slap, let alone to a slap with an open right hand. There is no reasonable basis for supposing that there was coaching, collusion or contamination. The following words of the High Court, in *Bauer*, are equally applicable here:

[71] Counsel for the respondent submitted that, even so, there remained a real possibility of contamination, concoction or collusion which rendered the tendency evidence inadmissible. That submission must be rejected. As both the trial judge and the Court of Appeal concluded, there was “thin support” for any suggestion of contamination, concoction or collusion, and nothing submitted by counsel before this Court throws any doubt on that conclusion.

[footnote references omitted]

1. For these reasons, appeal ground 2 fails.

#### Ground 3 – Unsafe and unsatisfactory

1. The principles applicable to an appeal on the ground that a conviction is “unsafe or unsatisfactory”, as derived from cases such as *M v The Queen* (1994) 181 CLR 487 (***M v The Queen***); *MFA v The Queen* (2002) 213 CLR 606; *Libke v The Queen* (2007) 230 CLR 559 (***Libke***); *SKA v The Queen* (2011) 243 CLR 400 (***SKA***); *The Queen v Baden-Clay* (2016) 258 CLR 308 (***Baden-Clay***); and *Dickson v R* (2017) 94 NSWLR 476 (***Dickson***), have been explained in their application in this Tribunal, in *Yewsang*; *Hodge v Chief of Navy* [2015] ADFDAT 4, at [31] – [36]; *Betts v Chief of Army* [2018] ADFDAT 2, at [74]; and *Boyson v Chief of Army* [2019] ADFDAT 2 (***Boyson***), at [49] – [53]. There is nothing in the more recently decided *Pell v The Queen* (2020) 94 ALJR 394 (***Pell***) which would occasion calling into question these explanations.
2. For present purposes, in the context of an appeal to this Tribunal from a conviction by a DFM, those principles may be stated as follows:
3. First, the question for the Tribunal is whether it thinks that, upon the whole of the evidence, it was open to the DFM to be satisfied beyond reasonable doubt that the appellant was guilty [*M v The Queen*, at 493; *Baden-Clay*, at [66]].
4. Secondly, to address that question, the Tribunal must make its own independent assessment of the sufficiency and quality of the evidence [*M v The Queen*, at 492 – 494; *SKA*, at [14] (French CJ, Gummow and Kiefel JJ); *Dickson*, at [84]; *Yewsang*, at [57] – [59]].
5. Thirdly, it will not suffice to set aside the conviction if it appears only that it was possible on the evidence for the DFM to reach a different conclusion, but the conviction must be set aside if the Tribunal decides that the DFM should have had a reasonable doubt about the appellant’s guilt (in the sense that it must, as distinct from might, have entertained such a doubt), even if there was sufficient evidence in law to support it [*M v The Queen*, at 493 – 495; *Libke*, at [113]; *Dickson*, at [85]; *Low v Chief of Navy* [2011] ADFDAT 3, at [70] – [74]].
6. Fourthly, a doubt experienced by the Tribunal will generally be a doubt which the DFM ought also to have experienced and if, after giving full weight to the primacy of the DFM, the Tribunal is left in reasonable doubt, it is only where the DFM’s advantage in seeing and hearing the evidence is capable of resolving the doubt that the Tribunal can conclude that there was no miscarriage of justice [*M v The Queen*, at 494; *Dickson*, at [85]].
7. Although under this ground LT COL Mikus pointed to a number of specific matters, to which reference will be made, his submissions rightly acknowledged that under this ground it was essentially for this Tribunal to consider whether, on the evidence, the DFM ought to have entertained a reasonable doubt as to the appellant’s guilt, and that for that purpose a doubt entertained by the Tribunal will generally be one which ought to have been entertained by the DFM.
8. The issue before the Tribunal is therefore whether it was open (in the sense described in *SKA* and *Libke*), on the whole of the evidence, for the DFM to be satisfied, beyond reasonable doubt, that the appellant had, as alleged, slapped the complainant’s buttocks. For the reasons set out above for concluding that there has been no substantial miscarriage of justice, it was.
9. It was submitted that the inherent unlikelihood of a Commanding Officer, who had a reputation of being reserved, engaging in the conduct alleged was a significant factor weighing against its probability. That may be, but four witnesses gave direct, consistent evidence of it. It is also clear that LT COL Mikus was disinhibited on this occasion: he had, on his own evidence, consumed seven – eight alcoholic drinks, immediately following a lengthy flight from the Middle East via Darwin and Sydney to Brisbane and then a two-hour road trip from Brisbane to Cabarlah (all in company with his RSM); he asked SIG Callum Edwards whether he was planning to “hook up” with either of the Edwards twins; he was prevailed upon to remove his mess jacket and wear a hi-vis jacket, and to dance with his soldiers; perhaps most tellingly, he was prepared to pick up and carry his female subordinate CAPT Harrison-Wolff out of the room when leaving, in response to her complaint that she had sore feet. The argument that this was highly improbable conduct for a Commanding Officer is countered by the direct evidence, and the evidence of his disinhibition. In making these observations, we have expressly taken into account the evidence, mentioned by the DFM in his *Liberato* direction, that LT COL Mikus was, for a time, engaged in conversation with fellow Lieutenant Colonels at the Gordon VC Club. That evidence did not include any contradiction by direct observation of the incident on the dance floor as related by the prosecution witnesses.
10. The Tribunal recognises that, in this day and age, there may be occasions when it is appropriate for officers, including a Commanding Officer, to attend all ranks social functions, notwithstanding the longstanding prudent practice of separate messing arrangements for officers, senior non-commissioned officers and other ranks. However, on the evidence, the situation on the dance floor that evening for officers, who had already been at a separate Officers’ Mess function, was truly fraught.
11. The Chief of Army rightly submitted that in distinction to *Pell* and *Boyson*, this was not a case in which, despite credible evidence supporting the prosecution case, there was such evidence pointing to its improbability as to raise a reasonable doubt. It was well open on the whole of the evidence for the DFM to be satisfied, beyond reasonable doubt, that LT COL Mikus had, as alleged, slapped the complainant’s buttocks. This is not a case in which the DFM ought to have had a reasonable doubt.
12. Ground 3 therefore fails.

#### Conclusion

1. Leave to appeal (which is required, at least for the “unsafe and unsatisfactory” ground), should be granted, but the appeal should be dismissed.

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| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Decision of the Honourable Justices Logan (President), Brereton (Deputy President) and Barr (Member). |

Associate:

Dated: 22 December 2020