Poulton v Chief of Navy [2023] ADFDAT 1

|  |  |
| --- | --- |
| Appeal from: | Defence Force Magistrate |
|  |  |
| File number: | DFDAT 1 of 2023 |
|  |  |
| Judgment of: | **LOGAN J (President), PERRY j (deputy President) AND SLATTERY J (MEMBER)** |
|  |  |
| Date of judgment: | 22 December 2023 |
|  |  |
| Catchwords: | **DEFENCE AND WAR** – appeal against conviction by Defence Force Magistrate (DFM) – where the appellant found guilty of committing an act of indecency without consent – where complainant alleged defendant entered her bed without consent and committed acts of sexual nature – whether conviction unreasonable, or cannot be supported, having regard to the evidence because the DFM acted contrary to the evidence and engaged in speculation – where complainant and defendant gave competing evidence – where DFM directed themselves correctly according to *Liberato v R* (1985) 159 CLR 507 – where DFM rejected the accused’s evidence as unconvincing – where DFM found each charge proved beyond reasonable doubt – whether the evidence before the DFM sufficient in nature and quality to eliminate any reasonable doubt of accused’s guilt – convictions not unreasonable and supported by evidence– observations about drawing charges in accordance with the principles of *R v Merriman* [1973] AC 584 – appeal dismissed |
|  |  |
| Legislation: | *Constitution* s 75  *Defence Force Discipline Act 1982* (Cth) s 61, 146, 149A, 152, 154, 156  *Defence Force Discipline Appeals Act 1955* (Cth) ss 18, 20, 21, 23, 52  *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4A  *Judiciary Act 1903* (Cth) s 39B  *Crimes Act 1900* (ACT) s 60(1)  *Evidence Act 2011* (ACT) s 66  *Court Martial and Defence Force Magistrate Rules 2020* (Cth) r 31  *Defence Force Discipline Appeals Regulation 2016* (Cth) reg 8 |
|  |  |
| Cases cited: | *AK v Western Australia* (2008) 232 CLR 438  *Angre v Chief of Navy (No 3)* [2017] ADFDAT 2  *Boyson v Chief of Army* [2019] ADFDAT 2  *Coulter v R* (1988) 164 CLR 350  *Dansie v The Queen* (2022) 274 CLR 651  *DW v The Queen* (2004) 150 A Crim R 139  *Filippou v The Queen* (2015) 256 CLR 47  *Jones v Chief of Navy* [2012] ADFDAT 2; (2012) 262 FLR 418  *Kantibye v Chief of Army (No 2)* [2022] ADFDAT 4  *Kearns v Chief of Army* [2022] ADFDAT 3  *Liberato v R* (1985) 159 CLR 507  *M v The Queen* (1994) 181 CLR 487  *Mikus v Chief of Army* [2020] ADFDAT 1  *Pell v The Queen* (2020) 268 CLR 123  *Perkins v County Court of Victoria* (2000) 2 VR 246  *Private R Army v Chief of Army* [2022] ADFDAT 1  *Private R v Cowen* (2020) 271 CLR 316  *R v Merriman* [1973] AC 584  *Re Ferriday’s Appeal* (1971) 21 FLR 86  *Rixon v Thompson* (2009) 115 A Crim R 110  *Wills v Chief Executive Officer of the Australian Skills Quality Authority* (2022) 289 FCR 175 |
|  |  |
| Number of paragraphs: | 101 |
|  |  |
| Date of hearing: | 4 December 2023 |
|  |  |
| Counsel for the Appellant: | Mr R Clutterbuck with Mr T Schmitt |
|  |  |
| Solicitor for the Appellant: | Salerno Law |
|  |  |
| Counsel for the Respondent: | Ms M Chalmers SC |
|  |  |
| Solicitor for the Respondent: | Office of the Director of Military Prosecutions |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | DFDAT 1 of 2023 |
|  | | |
| BETWEEN: | JONATHAN JAMES POULTON  Appellant | |
| AND: | CHIEF OF NAVY  Respondent | |

|  |  |
| --- | --- |
| order made by: | LOGAN J (PRESIDENT), PERRY J (DEPUTY PRESIDENT) AND SLATTERY J (MEMBER) |
| DATE OF ORDER: | 22 DECEMBER 2023 |

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 JUDGMENT

THE TRIBUNAL:

#### Introduction

1. This is yet another appeal arising from alleged off-duty behaviours between members of the Australian Defence Force (ADF), found proven at trial, to which excessive consumption of alcohol was one but not the only contributing factor. As found proven, the charges arise from behaviour by a male officer towards a female officer in a vulnerable condition which is unacceptable not just according to military norms but also according to civilian criminal law. However, the behaviour found proven, as the sentence of dismissal from the ADF imposed reflects, has an additional aspect by reason of the impact of such behaviour on morale and trust between members of the ADF. The question for resolution on the appeal is, in essence, whether it was unreasonable, on the evidence, to find the behavioural conduct alleged proven beyond reasonable doubt, and for the reasons which the Defence Force Magistrate (DFM) gave.
2. The appellant, Lieutenant Commander (LCDR) Jonathan James Poulton, to use his then rank in the Royal Australian Navy (RAN), was convicted on 22 May 2023, after trial by a DFM, on four counts of committing an act of indecency without consent, contrary to the *Crimes Act 1900* (ACT), s 60(1), in its application to him as a “defence member” via s 61(3) of the *Defence Force Discipline Act 1982* (Cth) (DFDA). At the time, LCDR Poulton was a Flight Commander in the RAN’s 816 Squadron. In respect of each of these service offences, LCDR Poulton was sentenced to dismissal from the ADF.
3. The complainant was a female member of the RAN then holding the rank of Lieutenant (LEUT). The four offences were alleged to have occurred at Camberwarra, in New South Wales, on the evening of 8 and morning of 9 July 2022, more particularly in the complainant’s residence.
4. As pleaded in the charge sheet, the four charges made against LCDR Poulton were as follows:

i. Being a defence member at Camberwarra, in the state of New South Wales, on or about 09 July 2022, did commit an act of indecency upon [the complainant] by getting into bed with her without her consent or being reckless as to whether she consented.

ii. Being a defence member at Camberwarra, in the state of New South Wales, on or about 09 July 2022, did commit an act of indecency upon [the complainant] by kissing the back of her neck and/or shoulders without her consent, and being reckless as to whether she consented.

iii. Being a defence member at Camberwarra, in the state of New South Wales, on or about 09 July 2022, did commit an act of indecency upon [the complainant] by undoing her bra and/or touching her breast without her consent, and being reckless as to whether she consented.

iv. Being a defence member at Camberwarra, in the state of New South Wales, on or about 09 July 2022, did commit an act of indecency upon [the complainant] by touching her upper thigh without her consent, and being reckless as to whether she consented.

1. The parties to the proceeding before the DFM were each represented by legally qualified officers. The form in which the charges were laid was not the subject of any objection at trial. Nor, although the subject was expressly raised by the Tribunal, was there any issue pressed before the Tribunal concerning the form of the charges. Nonetheless, the form of the charges warrants our making some observations, which we do so at the conclusion of these reasons.
2. It was never in issue at trial that:
   1. the DFDA applied to the conduct charged;
   2. if committed, and this was denied, each of the alleged acts was indecent; and
   3. LCDR Poulton was, and knew that he was, a defence member at the time of the alleged acts.
3. Although he did not deny an association with the complainant on the evening of 8 and morning of 9 July 2022, including at her residence, LCDR Poulton emphatically denied that the events as charged had occurred. The principal issue at trial was therefore whether the alleged offences had been proved beyond reasonable doubt by the prosecution. The hearing of evidence and submissions at trial concluded on 5 May 2023. Proceedings were then adjourned to 22 May 2023. On that day, for reasons which he delivered orally (or *ex tempore* as that method is sometimes termed), the DFM found each of the charges proved beyond reasonable doubt and convicted LCDR Poulton. The DFM then proceeded forthwith to hear submissions concerning punishment and to determine punishment.
4. In the course of the hearing of the appeal on 4 December 2023, the Tribunal made orders that:
5. There be no publication of any matters that identify or are likely to identify the complainant; and
6. LCDR Poulton be granted the requisite extension of time within which to appeal and the appeal be heard instanter.

#### Restriction on publication of identity of complainant

1. The occasion for the Tribunal’s publication restriction in the exercise of the power conferred by s 18(2) of the *Defence Force Discipline Appeals Act 1955* (Cth) (Appeals Act) in relation to matters which might identify the complainant is to be found by analogy with the longstanding practice of civilian criminal courts dealing with sexual offence cases: *Private R Army v Chief of Army* [2022] ADFDAT 1 (*Private R*), at [28]. Neither party opposed that order being made.

#### Extension of time

1. Although LCDR Poulton was convicted on 22 May 2023, he did not file his appeal until 31 August 2023. He thus required an extension of time in which to do so: s 21, Appeals Act. In granting an extension of time at the hearing, the Tribunal stated that the reasons for so doing would be given in conjunction with the reasons in respect of the determination of the appeal.
2. The evidence before the Tribunal discloses the following. The outcome of the automatic review under s 152 of the DFDA was completed and communicated to LCDR Poulton on 15 June 2023. On 14 July 2023, LCDR Poulton petitioned for a review under s 154 of the DFDA. The result of that review was communicated to him on 27 July 2023. This review upheld the conviction and punishment with the consequence that his hitherto stayed sentence of dismissal from the ADF then took effect. The following day, LCDR Poulton made contact with his solicitors, who then moved expeditiously to seek relevant documentation, brief and obtain advice from counsel and file the notice of appeal.
3. On several previous occasions, the Tribunal has observed, and again observes, that it is reasonable that an appellant should exhaust other review mechanisms – including the automatic review under s 152, and a petition of review under s 154 – before being expected to file an appeal to the Tribunal [see for example *Boyson v Chief of Army* [2019] ADFDAT 2, at [44] and, most recently, *Kantibye v Chief of Army (No 2)* [2022] ADFDAT 4 (*Kantibye*), at [16]]. Further, the Tribunal has previously suggested, and again suggests, that amendment of s 21(2) of the Appeals Act ought to be considered, so as to provide that time for an appeal runs at least from notification of the results of a review under s 152, or even notification of results of a review under s 154 if one is sought [*Private R*, at [11]; *Kearns v Chief of Army* [2022] ADFDAT 3, at [9], *Kantibye*, at [16]].
4. As s 156 of the DFDA reveals, that Act is presently cast on the assumption that an appeal to the Tribunal might be lodged before the review processes for which it provides might be completed; hence the provision in s 156(1) of the DFDA for the staying of completion of the review processes pending the outcome of an appeal. There doubtless can be cases in which the circumstances attending a trial and conviction in respect of a service offence by a service tribunal are such as to commend an appeal to the Tribunal forthwith. Provision for a stay of review processes in that event recognises the paramountcy which any order of the Tribunal quashing a conviction would then have. However, given the reporting role in relation to a review consigned by the DFDA (see 154(1)(a)) to legal officers appointed on the recommendation of the Judge Advocate General (an independent office holder), in many cases awaiting the outcome of the review processes can be, and in this case was, a perfectly reasonable course to take. The DFDA is not cast on the assumption that its review processes are mere rubber stamps for outcomes before service tribunals; rather the reverse. Awaiting the outcome of a review process can present both for a petitioner and potential appellant, as well as a service chief, the potential benefit of avoiding the expense of an appeal.
5. The respondent Chief of Navy did not oppose an extension of time. The Tribunal was persuaded, in the events that had transpired, that the appellant had acted reasonably and with due expedition and that no prejudice was thereby occasioned to the Chief of Navy. Accordingly, an extension was granted.

#### Grounds of Appeal

1. The grounds of appeal are as follows:

(a) the learned DFM erred in acting contrary to the evidence and engaging in speculation in rejecting evidence given by the Appellant about his wife's state of knowledge as to his whereabouts;

(b) by reason of (a), the conviction is unreasonable, and cannot be supported, having regard to the evidence.

#### Leave to appeal

1. The grounds thus pleaded engage s 23(1)(a) of the Appeals Act. However, in so doing, they raise a question of fact for which a grant of leave to appeal is required: s 20(1), Appeals Act.
2. As the Tribunal has observed in the past (*Angre v Chief of Navy (No 3)* [2017] ADFDAT 2, at [42] – [43]), by analogy with observations which have been made in relation to purpose of a requirement for leave to appeal generally (*Coulter v R* (1988) 164 CLR 350, at 359), the purpose of the requirement for leave found in s 20(1) of the Appeals Act is to serve as a filter on unmeritorious or trifling appeals, or those which would obviously fail. But where, as particularised, a proposed ground of appeal is reasonably arguable and, if upheld, would result in a conviction being set aside if leave were to be granted and the appeal heard, it is difficult to envisage circumstances in which it would be appropriate to refuse leave.
3. In this case, the Chief of Navy, fairly and commendably, conceded that there were passages, set out below, in the reasons of the DFM which, if read in a particular way, might be thought illogical. One such passage is expressly referred to in appeal ground (a). In these circumstances, the case is one which warrants a grant of leave so as to permit an examination of the evidence and of the reasons of the DFM by the Tribunal. The case will also offer an opportunity to offer some further guidance in respect of the provision by DFM of reasons for decisions.

#### The use on appeal of a s 154 report

1. In summarising below both the prosecution case, the evidence given at trial and the reasons of the DFM, we have drawn upon summaries offered by the s 154 DFDA report furnished to the reviewing authority. To the extent that we have adopted any passages from those summaries, that reflects the result of our separate examination of the evidence in light of the submissions made on the appeal and our resultant concurrence with those passages.
2. Such reports are furnished to the Tribunal by the Registrar of Military Justice, as required by reg 8(1)(b) of the *Defence Force Discipline Appeals Regulation 2016* (Cth), on request by the Tribunal’s Registrar. This regulation recognises the potential under the DFDA and the Appeals Act for there to be a continuum of scrutiny within the executive branch, both within and outside the ADF, of a conviction in respect of a service offence. Where an appeal is instituted after a review, the Tribunal sits at the apex of that continuum within the executive branch. Such scrutiny may later progress into the judicial branch, either by an appeal to the Federal Court of Australia from the Tribunal on a question of law pursuant to s 52 of the Appeals Act or, exceptionally, via a constitutional writ issued pursuant to s 75(v) of the *Constitution* (or equivalent under s 39B of the *Judiciary Act 1903* (Cth)).
3. Provision for the furnishing of such reports recognises that continuum but they in no way bind the Tribunal. In the civilian criminal justice system, it is not uncommon for there to be provision for a report by a trial judge made available to an appellate court. These, too, in no way bind that appellate court but can be of assistance in the exercise of that appellate jurisdiction. Similarly, a s 154 report can provide helpful insight into the issues raised in an appeal, provoke submissions by the parties or the posing of questions by the Tribunal in the course of a hearing to either or each of the parties to an appeal or their representative and, in the summaries which they contain, obviate duplication of effort by the Tribunal, with consequential benefit in terms of expediting the delivery of the Tribunal’s reasons. A report can also assist at an interlocutory stage in determining applications for legal aid by appellants. The furnishing of such reports entails no denial of procedural fairness to a party to an appeal, as the reports are always already in their hands via the normal DFDA processes.

#### The Prosecution Evidence

1. LCDR Poulton and the complainant were, according to the complainant, not just fellow officers but known to each other as friends for over a decade prior to the alleged conduct charged. That friendship had waned during a particular seagoing deployment but was restored during a later short-term posting to another ship to undertake a particular task. Their friendship was not a romantic one. However, the complainant stated that, in December 2021, after a celebration in King’s Cross, Sydney at the end of the short-term task and when walking back together towards Fleet Base East where the ship to which they were both posted was berthed, the two had a conversation in which LCDR Poulton allegedly asked the complainant “why hadn’t they gotten together” and if he could kiss her. The complainant’s evidence was that she declined the approach citing her respect for his wife and children, that LCDR Poulton had then dropped the subject and they had just finished their walk back to the ship.
2. On the evening of 8 July 2022, the complainant was at the neighbouring home of her friend, another female naval officer, LCDR A and the latter’s partner, LEUT B. We have refrained from naming these officers solely because of a view we hold that to do so might, indirectly, provide a means by which the identity of the complainant could be ascertained, thus subverting the purpose of the non-publication order which we made. LCDR Poulton, his wife (another naval officer) and their young children also lived in close proximity.
3. That evening, the complainant, LCDR A and LEUT B had a meal and drank a combination of old-fashioned cider whisky cocktails and beer together. A discussion ensued between them as to whether LCDR Poulton, who was friends with each of them, should be invited to join them. The complainant expressed some concern about the accused visiting the house in light of the December 2021 incident, which she described to the others, stating that she and LCDR Poulton had not since spoken. However, the group “agreed it was a one-off thing that had happened and that it was unlikely he would do that again – proposition me”, and that “it would still be fun to have him over for drinks”.
4. Shortly afterwards, LCDR Poulton joined the group. He was wearing a puffer jacket over his pyjamas. The group then talked shop and drank together, initially more old-fashioned whisky and, after the complainant had retrieved ingredients from her home, martinis.
5. It was common ground at the hearing that over the course of the evening the complainant became heavily intoxicated. At around midnight LCDR A and LEUT B went to bed. LCDR Poulton suggested to the complainant that they continue drinking but leave to give those two some privacy. The complainant agreed to this, suggesting that they go back to her house.
6. The two arrived at her house around midnight. There, the complainant made them both a gin-based cocktail. They sat together in her lounge area. The complainant stated that, halfway through her drink, she felt violently ill and dashed into the kitchen area where she vomited. She acknowledged in evidence that, by that stage, she was “quite intoxicated”, having consumed what she estimated to be “a minimum 10 to 15 standard drinks”. She estimated that LCDR Poulton’s level of intoxication was “reasonably high as well”.
7. The complainant stated that, after observing from the lounge area her vomiting, LCDR Poulton had proceeded into the kitchen area, to check if she was okay. The complainant subsequently moved to her en-suite toilet and bathroom, then wearing a black T shirt and jeans over underwear. In the en-suite, the complainant resumed vomiting but also lost control of her bladder, wetting her jeans and underwear. Her T shirt was already soiled by some of her vomit.
8. After leaving the ensuite, the complainant removed her wet and soiled garments, retaining her bra, dressed into pyjamas and fresh underwear, and got into her bed. She again felt bilious and returned to her en-suite where she again vomited into her toilet, once again losing control of her bladder. She returned to her bedroom, where LCDR Poulton was present, and got back into bed, wearing her bra, underwear and pyjama bottoms. Upon her indicating to LCDR Poulton that she had wet herself again, he retrieved a fresh pair of underwear from her chest of drawers and suggested she change into them. The complainant stated that, initially, she had demurred but that LCDR Poulton had stated, “You’ll thank me for it later” and she had then agreed she should change her underwear. The complainant stated that she had then stripped off her pyjama bottoms and underwear in front of LCDR Poulton, put on the fresh underwear, lain back down on one side of her bed and pulled up her doona over her.
9. The complainant stated that, shortly thereafter, she heard LCDR Poulton remove his clothes and she felt him get under the doona on the other side of her bed. She felt his skin on her back and legs and realised he was only wearing underwear. He had not asked her permission to get into her bed and she had not consented to this, although she had not said anything at the time. The complainant stated that, while they were in the bed together, he had asked her to take off her bra but that she had not. Thereafter, he had unclipped her bra. According to the complainant, LCDR Poulton then cupped her left breast with his open hand and kissed her shoulders whilst lying behind and against her. She stated he said, “I want to go down on you.” The complainant stated that, at this time, she was extremely highly intoxicated, “frozen” and “panicked”, and had passed out.
10. The complainant stated that she woke up at about 5:00 am on 9 July 2022 to find LCDR Poulton “still pressed up against me, so I was still on my left side, he was still pressed up against me and had his hand on my body, I don’t remember exactly where, but after I woke up he put it on the top of my right thigh, on the sort of top side of my body, and started digging his fingernails into my leg” but without any pain. They were each still just wearing underwear. The complainant stated that she had ignored him and just checked her phone and watched some sport. After no more than about 15 minutes, to her estimation, LCDR Poulton had got out of bed and get dressed. The complainant stated that, after this, LCDR Poulton moved from the left side of the bed to the right side of the bed, and, after being ignored by LCDR Poulton, had made comments that “he had deserved what he had done as – because he looked after me”. She stated that LCDR Poulton “started saying, “Nothing happened, I just slept on the couch.” And he said that to me a couple of times”. LCDR Poulton then left the room briefly but returned telling her he did not do anything wrong, had slept on the couch and that nothing had happened (or words to that effect). The complainant stated that she had got out of bed, put a dressing gown on over her still unclipped bra and underwear and stood by her opened front door. LCDR Poulton accompanied her and left her unit. In the course of leaving the unit, the complainant stated, he had said more than once to her “I did nothing wrong. I slept on the couch”. She said that when they got to the front door and as she was holding it open for him, she “very clearly” remembered him turning to her and saying, “You can’t even look at me” before leaving.
11. At about 0910 on 9 July 2022, the complainant began a text exchange with LCDR A. This text exchange became Exhibit 6. That exchange was initiated by LCDR A via an inquiry as to whether the complainant was OK and whether she would like anything to eat or drink from McDonald’s restaurant. The text exchange then included the following:

Complainant: *I am beyond maccas, it is bad*

LCDR A: *Oh dear*

LCDR A: *I’m sorry*

LCDR A: *Kinda*

Complainant: *Nah all good*

Complainant: *Just Jono man*

LCDR A: *Did you guys kick on? Also did he go home?*

Complainant: *Yes. no*

LCDR A: *Is he still there?*

LCDR A: *Are you ok?*

Complainant: *I got very sick, he took looking after me as an invitation to stay*

Complainant: *He left when I sobered up at 5*

Complainant: *It’s fine, I’m just annoyed*

Complainant: *Mostly about how much I threw up*

LCDR A: *Waste of good scotch!*

Complainant: *Actually, can I get a large maccas coke please*

LCDR A: *You poor thing*

LCDR A: *Yes absolutely*

LCDR A: *We aren’t 20 anymore*

LCDR A: *Want a hash brown too?*

Complainant: *Yeah alright thanks*

LCDR A: *Oh dude, I’m sorry,*

Complainant: *Eh, it’s cool. Didn’t have anything on this weekend anyway!*

1. LCDR A delivered the requested food and drink to the complainant at her house a short time later but, at that stage, the interaction between the two of them was brief. The complainant ate and drank the items delivered and then went back to sleep.
2. The following text exchange, which became Exhibit 9, separately occurred between LCDR A and LCDR Poulton in the period between 0905 and 0945 on 9 July 2022:

LCDR A: *Are you alive?*

LCDR Poulton: *Nope*

LCDR A: *Oh dear... did you and [the complainant’s given name] kick on?*

LCDR Poulton: *Somewhat*

LCDR A: *Oh dear*

LCDR Poulton: *Yeah. Today is going to be a little sad*

LCDR A: *I’m in the maccas queue, want some?*

LCDR A: *I had a missed call from your wife at 2*

LCDR Poulton: *But what ever we are all adults*

LCDR Poulton: *Nah all good thanks*

LCDR Poulton: *Yeah I passed out on the couch*

1. Exhibit 10 was a continuation of this text exchange between LCDR A and LCDR Poulton in which, immediately after the “passed out on the couch” text, the following exchange occurred:

LCDR Poulton: *Woke around 5*

LCDR Poulton: *Wandered home*

LCDR A: *Oops! Are you in bulk trouble? [sic]*

LCDR Poulton: *Mmmm don’t think so*

LCDR A: Oh good!!

LCDR Poulton: *Because [given name of LCDR Poulton’s wife] is going to barista course and leaving kids with me*

LCDR A: *Oh brutal*

LCDR A: *Oh buddy*

LCDR A: *I’m sorry*

LCDR Poulton: *Y*

LCDR Poulton: *It was fun*

1. At 10:45am on 9 July 2022, the complainant received a text message from LCDR Poulton; “*WTF happened last night? I have flashes of gin vomit and walking home at 0500*!” She did not reply to this message.
2. Around the middle of the day, there was a brief further text exchange between LCDR A and the complainant about whether the complainant wanted food from a shop in Cambewarra. The complainant declined, stating that she still did not feel well. LCDR A subsequently asked if the complainant was “sure you don’t want [food]”? The complainant responded in these terms:

I said no, and that’s when I said to her by text that it - it wasn’t just the – the hang over that was making me feel sick; it was what had happened to me. We - we texted about that for a bit.

1. At about 1600, LCDR A and LEUT B called in on the complainant to check on her before they headed off for the evening to LEUT B’s house. They had a brief conversation at the complainant’s front door. The complainant stated in evidence, “I just remember vividly saying to them that I shouldn’t have to say no twice.”
2. At about 1612, shortly after LCDR A and LEUT B had left, a further text exchange occurred between LCDR A and the complainant. It was initiated by a text by LCDR A, who mentioned that she had left two avocados at her house, to which the complainant was welcome if she wanted them. The complainant did not reply immediately. However, a little less than an hour later, commencing at 1700 on 9 July 2022, the following text exchange (also part of Exhibit 6) occurred between her and LCDR A:

Complainant: *Thanks man. Also, I really don't feel well. Like, not the hangover. The whole situation with Jono.*

Complainant: *I’m don’t really feel okay*

LCDR A: *Oh honey, I’m so sorry.*

LCDR A: *Can I help?*

LCDR A: *I feel awful for inviting him over*

Complainant: *No don’t. You nor I could have anticipated him. I haven’t had shit like this happen to me in a really long time, and I just feel a bit sick*

LCDR A: *Can I help?*

Complainant: *And no. I just need to talk to someone*

1. It was not controversial that the complainant’s references to “Jono” in these text exchanges were references to LCDR Poulton.
2. The complainant complained to her mother the following day, Sunday, 10 July 2022, during a telephone call. In her evidence, and although she recalled that her daughter’s account had been disjointed, the complainant’s mother summarised the complaint made by her daughter in this way: “What she told me was that she had drunk far too much, made a complete mess of herself, including soiling herself, she did tell me that at the time. And that she collapsed into bed and later found the person assaulting her while she was in her own bed.” The complainant’s mother also recalled that her daughter’s voice had “sounded terrible”.
3. LCDR A and LEUT B each gave evidence of the socialising on the evening of 8 July 2022, and of their observations of the complainant at the time when they delivered food and drink from McDonalds to her the following day. Each of them observed the complainant to be upset. LCDR A also related a conversation which she had had with the complainant when the food and drink from McDonalds was delivered. LEUT B’s evidence was of not overhearing that conversation due to standing back about a metre to give the other two some space. LCDR A stated that, “[the complainant] and I had a little bit of a chat, she told me that she wasn’t feeling particularly good, she’d thrown up the night before, which she didn’t feel great about. She’d told me that Jon had stayed with her while she was sick, but that she didn’t feel great, and that he had looked after her while she was unwell, but then proceeded to – you know, she woke up with him in her bed.” Her reference to “Jon” is a reference to LCDR Poulton.
4. LEUT Best, a female naval officer member of the Royal Navy on exchange with the RAN also gave evidence. She related that she had had a telephone conversation with the complainant in about mid-July about an incident the complainant had experienced earlier that month. She recalled that the complainant had “sounded quite upset”. As summarised by LEUT Best in evidence, the account given to her by the complainant as to events after she and LCDR Poulton had left LCDR A’s house was as follows:

[The complainant] then proceeded to go back to her house after they had finished drinking, at which point due to her level of intoxication she was quite unwell and was very embarrassed that she was actually sick in her bathroom, after which she then went to bed. At no point in this did she ever invite LCDR Poulton back to her house. When she did arrive and went to bed, LCDR Poulton then proceeded to also get into bed with her naked without consent and much to [the complainant’s] objection and his hands were everywhere. Of most concern was because of her level of intoxication she was unable to take control of the situation and unable to get him out of her bed despite her best efforts.

1. LCDR Garrett also gave evidence. She related a conversation which she had had with the complainant when the two met at HMAS Albatross to hand over some clothing. Referring to the complainant, LCDR Garrett stated, “She went to give me the clothes. I noticed that she looked visibly upset, like she was about to cry. I asked her what was wrong, and she said, in a recent weekend past, that she’d been sexually assaulted by someone she considered a friend.” She also described another conversation which she had had with the complainant in January 2023 concerning the events of the evening 8 and morning of 9 July 2023.
2. The complainant also related in evidence having, on or about Tuesday, 12 July 2022, told another close friend of hers, Dr Kate Hill, a medical practitioner, about the incident. Dr Hill was not called by the prosecution. However, in a statement of agreed facts tendered to the DFM, it was agreed that Dr Hill had stated in a statutory declaration, “To the best of my recollection, [the complainant’s given name] didn’t provide any specifics of what touching occurred; [the complainant’s given name] mentioned that she had to be quite forcible to ask Jono to leave the house and that their interaction was tense.” It was further an agreed fact that this was the evidence which Dr Hill would have given if called. Once again, it was uncontroversial that the reference to “Jono” was a reference to LCDR Poulton.
3. The complainant gave evidence that she had told other people in her workplace about the incident but none of these other people were called.
4. According to the complainant, on the morning of 9 July 2022, after she had her first conversation with LCDR A, she made some investigation via the internet about sexual assault and decided that what she had experienced was not a sexual assault and so decided not to go to the civilian police but instead resolved to report the incident to the military police. On Monday, 11 July 2022, the complainant attended the military police office and made a statement about the incident.
5. The complainant was cross examined at some length by one of LCDR Poulton’s defending officers in respect of her evidence. The thrust of the cross-examination was that the complainant was heavily intoxicated that night and she was unclear about what had in fact happened. It was suggested that it was reasonably possible that the complainant had reconstructed the incident and that none of the allegations she made against LCDR Poulton were in fact correct. The complainant remained adamant that the events which she had described had in fact occurred in her bedroom. The defending officer also highlighted to her in cross examination inconsistencies in her complaints to friends and family and also her failure to include the whole of her complaint in her initial statement to the military police. It was put to the complainant that the complaint to LCDR A itself developed over the course of the day and was as such not immediate.

#### The Defence Evidence.

1. LCDR Poulton gave evidence at the trial. He denied ever having had any romantic or sexual interest in the complainant. He particularly denied that he had propositioned the complainant in December 2021.
2. As to the evening 8 and morning of 9 July 2022, LCDR Poulton’s version, including how he came to be in the complainant’s home, was broadly but not completely consistent with the complainant’s version, up to the point of the alleged events in her bedroom. Contrary to the complainant’s version, LCDR Poulton stated that he had in fact been invited into the complainant’s unit because she had “a gift for [him]”, although he was never told what that gift was. LCDR then made drinks for himself and the complainant, and after a period of time, the complainant became violently ill. LCDR Poulton said he was concerned for the complainant’s welfare, walked to the kitchen sink to offer assistance, and then followed the complainant into her bedroom to provide further support. After the complainant vomited in the ensuite, LCDR Poulton stated that he provided further assistance to her in the ensuite, and then manoeuvred her from the ensuite to bed. LCDR Poulton said that he had assisted the complainant on her second visit to her ensuite and had then assisted her to change her underwear.
3. LCDR Poulton stated that there was never any indecent behaviour on his part, as alleged, in the complainant’s bedroom. He stated that after the complainant got under the doona in her bra and underwear, he took up a position on the bed on top of the doona. He remained clothed and was “leaned against the bedhead with my jacket draped over me” in a “slouched sitting up position”. LCDR Poulton said he briefly surfed social media, and then fell asleep, accepting that he was on “drunk duty”. He set an alarm for 0500, and woke up at this time. At around that time he touched the leg of the complainant, but that this was a naval “shake a leg” technique, used at sea to rouse a person for duty. He did this to ensure that she was OK – “I gave her probably a gentle shake and then a bit more of a “Wake up, [complainant’s given name], shake, how I would describe that.” He stated that the touching was done with his hand on the outside of the doona. It was never part of the prosecution case that, if this account were reasonably possible, it could amount to an indecent assault.
4. LCDR Poulton stated that, before he left the complainant’s premises, he told her “just to sort of reiterate it, don’t stress about last night, there’s no need to be embarrassed … I’ll tell people I passed out on the couch”. He admitted to having lied in his text message to LCDR A on the morning of 9 July 2022 about sleeping on the couch but stated that his reason was to save the complainant embarrassment. LCDR Poulton also explained that the text he sent to the complainant that same morning was “an easy way to check if she was still alive and feeling okay”, as well as an “attempt to save that embarrassment as in almost alluding to that I don’t remember the events of the evening”. He said that he felt the complainant was “a little bit rude” not replying to him. He considered that he did not need to follow up as he knew she was okay, because she “was walking under her own stead” and was “coherent” in the morning when she let him out the door.
5. LCDR Poulton also gave evidence that he had personal family experience with sexual assault and had thereby witnessed the impact on close family members. He stated that, because of this, he viewed sexual-based crimes as “pretty disgusting” and “would hope it [that opinion of sexual-based crimes] is a view of everybody”. He maintained that he was simply on “drunk duty” that night and that he had not contacted his wife about where he was as he felt it unnecessary.
6. Three witnesses gave evidence corroborating LCDR Poulton’s good character. Their evidence was uncontested.

#### The DFM’s reasons and their alleged illogicality and inadequacy

1. In *Mikus v Chief of Army* [2020] ADFDAT 1 (*Mikus*), at [40] and following, the Tribunal discussed whether a DFM was subject to an obligation to give reasons and, if so, the source, nature and extent of an obligation of a DFM to give reasons. The Tribunal’s conclusion was that a DFM was obliged to give reasons for a conviction decision. We adhere to the conclusion, for the reasons given in *Mikus*, that the DFM was subject to an obligation to give reasons.
2. As in *Mikus*, the present is not a case where the DFM gave no reasons. Thus, also as in *Mikus*, the adequacy or otherwise of the DFM’s reasons must be judged by reference to the issues that arose at the trial and the nature of the evidence led at trial and other relevant circumstances. This flows from an application by analogy of the following observations made in the ACT Court of Appeal in *DW v The Queen* (2004) 150 A Crim R 139, in which, 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 ...

1. Recalling that, this year, Australia marked the 50th anniversary of the cessation of its involvement in the Vietnam War, we consider it appropriate to make these additional observations in relation to the obligation of a DFM to give reasons. As the decisions of the Tribunal of that era and since reveal, that war was the last occasion in which the ADF regularly conducted hearings in respect of service offences in a theatre of war. Under the prevailing military law of that era, there was no provision for trial by a DFM. Nonetheless, one sees in some decisions of the Tribunal of that era, an understanding that operational circumstances may be pertinent in determining whether an irregularity attended a trial: see *Re Ferriday’s Appeal* (1971) 21 FLR 86, at 98 – 99 per Street J, President (as his Honour then was).
2. Necessarily, having regard to the subject matter, scope and purpose of the DFDA, the ADF’s disciplinary code is intended for application in both peace and war in all its phases and intensities, be that in Australia or anywhere abroad. It is thus by no means impossible to envisage circumstances in which the operational circumstances under which a DFM came to hear and determine a charge in respect of an alleged service offence may become relevant to any assessment of the adequacy of that DFM’s reasons. The *Court Martial and Defence Force Magistrate Rules 2020* (Cth) (*CM/DFM Rules*) made by the Judge Advocate General under s 149A of the DFDA, in conjunction with the right of appeal against conviction to this Tribunal under the Appeals Act, may mean that, depending on operational circumstances, a summary of reasons sufficient to expose why a defence member was convicted is compliant with the obligation to give reasons.
3. In this case, the trial before the DFM was conducted under peacetime conditions. Further, the DFM gave extensive reasons, not a summary. Although those reasons were delivered orally, they were lengthy. They entailed the exposing of directions on issues of law which the DFM had given himself, a summary of the evidence tendered at the trial, reference to the submissions of the parties and an explanation as to why the DFM had found the charges proved beyond reasonable doubt.
4. These features of the case mean that it is neither necessary nor appropriate for us to make any further observations concerning the impact which operational conditions may have on the adequacy of a DFM’s reasons.
5. Further, flowing from the fact that reasons were given, it seems to us, as was held likewise in *Mikus*, at [15] and [63], that there is not for that reason a wrong decision on a question of law in terms of s 23(1)(b) of the Appeals Act, or a material irregularity in terms of s 23(1)(c) of the Appeals Act, each of which would be exposed by a failure to give any reasons.
6. As the above summary of the evidence reveals, this was a case where the defendant gave evidence. Thus, the DFM appropriately gave himself what has come to be termed a “Liberato direction” [as to which see *Liberato v R* (1985) 159 CLR 507 (*Liberato*), at 515]. Moreover, in the course of his reasons and having summarised the evidence before him and the submissions of both the prosecution and the defence, the DFM returned to the three-staged test posed in *Liberato* in deciding whether he was satisfied that the prosecution had proved the case beyond reasonable doubt.
7. The first stage of the test required that the DFM address whether the accused’s evidence was believed, in which case he was obliged to acquit the accused. The DFM found that he did not accept that LCDR Poulton had given a truthful and accurate account. The DFM found that his evidence was not credible or reliable.
8. Having so addressed and answered the first stage of the test, the DFM was obliged to address the second stage of the test. That required that he ask himself whether, even though the accused’s evidence was difficult to accept (or unconvincing), it may nonetheless, as a matter of reasonable possibility, be true. If so, the DFM was also obliged to acquit the accused. Unlike in *Kantibye*, the DFM’s reasons disclose that he made no error in applying the second stage of the test. The DFM found, explicitly, that LCDR Poulton’s account could not, as a matter of reasonable possibility, be true. It did not leave him in a state of reasonable doubt as to what the true position was. The DFM just did not accept LCDR Poulton’s account.
9. Overtly in his reasons, and correctly, the DFM, appreciated that this was not the end of his task. In conformity with the third stage of the test described in *Liberato*, he stated in his reasons, “But that is not the end of the case though under the third limb of *Liberato*. Having rejected the accused’s evidence, I must and do put it to one side and go back to the prosecution case and consider whether I am satisfied beyond a reasonable doubt that the prosecution has proved its case in respect of each charge.”
10. What followed in the DFM’s reasons was not just an answer to the third stage question in *Liberato* but also an elaboration on why he had made the findings about LCDR Poulton’s account that led him to address the third stage question.
11. Given the way in which the case for LCDR Poulton was put on the appeal, it is necessary to set out a lengthy excerpt from this following part of the DFM’s reasons. That is because it was submitted on LCDR Poulton’s behalf that the DFM’s reasons were attended with illogicality such that the resultant guilty verdict was unreasonable, or could not be supported, having regard to the whole of the evidence.
12. In this following part of his reasons, the DFM stated:

In deciding to reject the evidence of the accused, I particularly remind myself of the reasons he gave as to why he did not contact his wife at 0100 hours, while checking social media on his mobile phone and lying next to the complainant on her bed. His reasons under cross-examination were that it did not seem required and that it did not seem to him that he needed to tell her. [We interpolate that this is an accurate rendition of an explanation LCDR Poulton gave in his evidence.] Such reasons, to my mind, fly in the face of the content of Exhibit 9 and the oral evidence of LCDR A.

The accused’s wife had, at about 0200 hours, tried to call LCDR A. It seemed to me that his wife was at least interested in his whereabouts. This was hardly surprising in my view, considering the accused had departed his house about six hours earlier on 8 July 2022, dressed in his pyjama bottoms, a T-shirt, a puffer jacket and carrying a near full bottle of wine. I find his answers unconvincing in terms of content and the manner he gave them.

1. The contents of Exhibit 9 are quoted above in our summary of the prosecution evidence. It was put for LCDR Poulton, correctly, that this text exchange was no proof at all that he was aware, before then, that his wife had tried to call him at 0200 on the evening 8 and morning of 9 July 2022. Moreover, it was submitted, again correctly, that there was no evidence that LCDR Poulton was earlier aware that his wife had made any call during that evening. It was submitted that the reasons disclosed an illogicality in discounting LCDR Poulton’s credibility based on a missed call by his wife to another of which he knew nothing. Taking up ground (a) in the grounds of appeal, it was further put that the DFM had engaged in unwarranted and, as she had not given evidence, unsupported speculation about his wife’s state of knowledge as to his whereabouts.
2. Immediately after the excerpt from his reasons just quoted, the DFM stated:

I have also, in deciding to reject the evidence of the accused, borne in mind the deliberate lie he told LCDR A, and I refer to exhibits 9 and 10, about passing out on the couch at the complainant’s house and the reasons for telling it, his reason being to save the complainant embarrassment.

The complainant had already, according to Exhibit 6, disclosed to LCDR A at about 0911 hours on 9 July ‘22, that she had been sick and thrown up while the accused was at her house. His text message to LCDR A about passing out on the couch was sent at about 0945 hours. The content of Exhibit 6 is, in my view, consistent with the evidence of the complainant under cross-examination that she was not embarrassed about vomiting and, as it turned out, soiling herself. I have used this lie as only going to credit. I find his answers unconvincing in terms of content and the manner he gave them. I have also, in deciding to reject the evidence of the accused, borne in mind his text to the complainant, that is Exhibit 9, which referred to among other things:

*WTF happened. Flashes of vomiting and stumbling home at 0500 hours.*

And his explanation for doing so. I find that the message suggested that he did not recall what had happened that night. The accused himself accepted that this was not true, he did recall. I find that the text message constituted a deliberate lie. The explanation offered was that it was an easy way to check in if the complainant was still alive and feeling okay and also an attempt to save embarrassment. Again, according to Exhibit 6, the complainant had already, at about 0911 hours on 9 July ‘22, been in contact with LCDR A about having been sick and throwing up.

The accused sent this text message to the complainant at about 1045. The accused could have simply asked how the complainant was feeling without suggesting that he did not recall earlier events. I confirm that I have used this lie as only going to credit. I find his answers unconvincing in terms of content and the manner he gave them. I find that the reasons the accused gave for lying to LCDR A and the complainant were vague and illogical.

[emphasis in original]

1. It was submitted on behalf of LCDR Poulton that this passage of the DFM’s reasons manifested a further illogicality of reasoning in that he could not possibly have known that the complainant was not embarrassed about having been sick from excessive alcohol consumption and vomiting.
2. Read a particular way, and as the Chief of Navy conceded, these two passages in the DFM’s reasons might be regarded as exhibiting the illogicality identified in the submissions made for LCDR Poulton. However, also as the Chief of Navy submitted, that is not the only way in which to read these passages.
3. First and foremost, the reasons of the DFM must be read as a whole. Next, and no less importantly, it is to be remembered that these reasons were delivered orally. Further, they have not been revised from transcript by the DFM, even for matters of grammar or style.
4. In *Wills v Chief Executive Officer of the Australian Skills Quality Authority* (2022) 289 FCR 175 (*Wills*), at [141], and citing well-known and authoritative observations concerning the approach to reasons furnished by civilian public administrative officials and tribunals, Perry J, with whom Logan and Griffiths JJ agreed, stated:

… it is well established that the reasons of an administrative decision-maker “are not to be construed minutely and finely with an eye keenly attuned to the perception of error”: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–2 (Brennan CJ, Toohey, McHugh and Gummow JJ (quoting with approval *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287)). When, therefore, it is said that such reasons should be read beneficially, ultimately this means that “a commonsense and realistic approach should be taken to understanding the reasons as a whole to see what it was that the Tribunal was saying”: *Fang Wang v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1044 at [14]–[15] (Allsop J (as his Honour then was)).

1. Unlike the West Australian legislation considered by the High Court in *AK v Western Australia* (2008) 232 CLR 438, which prescribed particular criteria to be addressed by a trial judge in a judge alone trial in respect of an offence, neither the DFDA nor the *CM/DFM Rules* specify particular criteria which must be addressed in the reasons of a DFM. Instead, r 31 of the *CM/DFM Rules* states:

**Functions of Defence Force magistrate**

In addition to any functions conferred on the Defence Force magistrate by the Act, the regulations or any other rule, the functions of the magistrate at any proceedings before the magistrate are to ensure:

(a) that the proceedings are conducted in accordance with the Act and these Rules and *in a manner befitting a court of justice*; and

(b) that an accused person who is not represented does not in consequence of that fact suffer any undue disadvantage; and

(c) that *a proper record of the proceedings is made* and that the record of proceedings and the exhibits (if any) are properly safeguarded.

[Emphasis added]

1. By implication, the conduct of a hearing “in a manner befitting a court of justice” bespeaks that reasons must be given but does not seek further to prescribe their content. So, too, does an obligation to keep a “proper” record of proceedings. It is difficult to see how a record could be “proper” if it did not admit of meaningful challenge to a conviction under the Appeals Act or, for that matter, meaningful review under the DFDA. However, as we have observed already, the very purpose of the DFDA and the contexts in which a DFM may come to sit may dictate that what is “a befitting manner” and what is a “proper record” may perhaps be a summary of reasons rather than a reasoned narrative.
2. It may also be that an analogy with the approach revealed in the authorities in respect of reasons given in the course of civilian public administration can be taken too far with respect to the reasons of a DFM. Although service tribunals constituted under the DFDA do not exercise the judicial power of the Commonwealth under Ch III of the *Constitution*, they are at the very least obliged to act judicially [*Mikus* at [52] – [56], citing *Private R v Cowen* (2020) 271 CLR 316]. Conviction decisions of a DFM may, and in this case did, carry with them penal consequences. Further, it bears repeating that the reasons (or perhaps in operational conditions a summary of reasons) of a DFM must by necessary implication be such as to permit the meaningful exercise of the right of appeal against conviction as conferred by the Appeals Act. In turn that means that the reasons (or such a summary) must admit of a meaningful hearing by the Tribunal on one or more of the grounds specified in s 23 of the Appeals Act, including on a ground available by leave of the Tribunal. These are part of the purposes of the giving of reasons by a DFM.
3. These considerations in turn mean that a degree of caution must be exercised when considering civilian criminal law authorities concerning the obligation of courts of summary jurisdiction (including a Magistrates Court) to give reasons. The bases upon which the decisions of such courts may be challenged on appeal, if at all, as opposed to in some instances only by way of what these days is termed constitutional writ, can supply the context in which courts make observations on the nature and extent of a civilian court of summary jurisdiction to give reasons. This is one of the points made by The Honourable Justice M Weinberg AO, writing extra-judicially, in an illuminating paper, “Adequate, Sufficient and Excessive Reasons”, Speech at the Judicial College of Victoria, 4 March 2014, at 7 – 13.
4. In relation to a DFM, and by analogy, we agree with an observation made by Buchanan JA in one of the summary justice authorities which Weinberg JA discusses in his paper, *Perkins v County Court of Victoria* (2000) 2 VR 246 (*Perkins*). In *Perkins*, at [64], Buchanan JA stated:

The degree of detailed reasoning required of a tribunal depends upon the nature of the determination, the complexity of the issues and whether the issues are ones of fact or of law or of mixed fact and law, and the function to be served by the giving of reasons. As to the last matter, reasons which are required to enable a right of appeal on questions of fact to be exercised might not be required if an appeal is limited to questions of law.

1. As Weinberg JA observes in his article and following his reference to *Perkins* and other authorities concerning courts of summary jurisdiction, although courts of summary jurisdiction “are obliged to give reasons for what they do, they are not expected to go into matters in anything like the detail that would be expected from judges in the higher courts when delivering reasons for judgment”. To require more of a DFM in a service disciplinary system designed to be used in peace and war may be to render that system incapable in practice of serving the purpose for which it has been enacted. Equally, to require less may likewise be subversive of that purpose and of the related right of appeal to the Tribunal.
2. It is also necessary to remember that the finding of the DFM was, as the reasons explicitly disclose, in part based on demeanour. In *Mikus*, at [71], the Tribunal made these observations on findings so based:

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] SASC 77; (2003) 141 A Crim R 203, at [57], [59], [63] – [65]; *DW v The Queen*, at [28]; *R v Barrowman* [2007] SASC 28; (2007) 96 SASR 294, at [6] – [7]. *Douglass v R* [2012] HCA 34; (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].

1. We adopt the approach discussed in the preceding paragraphs to our examination of the reasons of the DFM in this case, rather than uncritically applying the civilian public administration authorities mentioned in *Wills*.
2. In our view, in each of the excerpts from his reasons quoted, the DFM is not just expressing reasons why he has rejected LCDR Poulton’s evidence. He is also engaging in interpolated asides.
3. In the first passage quoted above at [68], and by way of aside, the DFM makes reference to the missed call at 0200 to LCDR A from LCDR Poulton’s wife. The essence of his reasoning in that passage expressed is this. Here is a married man who has left his wife and children at home at or about 2000 on the evening of 8 July 2022, wearing nothing more than his pyjamas and a puffer jacket and carrying a near full bottle of wine, to socialise with fellow naval officer neighbours. Here is a man who has admitted he lied in texts about where he slept at the residence of one of them, who had stated in evidence that he had been awake at 0100 on top of the bed at that residence, next to a female naval officer he acknowledged was clad only in underwear (but said was under the doona), checking social media on his mobile phone but has said he didn’t think it was necessary, although he had the means so to do, to text his wife to inform her where he was. The aside about the wife’s missed call to LCDR A is, at most, an exposed way of highlighting the incredibility the DFM found, for the reasons just given, in LCDR Poulton’s explanation for his lie.
4. When the DFM stated that the evidence of LCDR A “fl[ew] in the face” of LCDR A’s evidence, the DFM was not stating that LCDR A’s evidence demonstrably *proved* that LCDR Poulton knew of his wife’s interest in his whereabouts at that time, and therefore was being untruthful in stating that he considered it unnecessary to contact her. Of course, LCDR Poulton could not be aware of the attempted phone call between LCDR A and the accused’s wife. Rather, the evidence verified the view of the DFM that, in the circumstances, the accused’s wife would have inevitably been interested in the accused’s whereabouts. That evidence therefore confirmed the DFM’s finding that the accused’s testimony (being that he considered it unnecessary to tell his wife of his whereabouts) was implausible. So read, it does not carry with it any premise that LCDR Poulton was aware, before the text exchange between LCDR A and him, that she had had a missed a 0200 call from his wife.
5. As to the second excerpted passage at [70] above in which there was claimed illogicality, in our view there is an aside or interpolation about the complainant’s credibility, based on the consistency of her account in oral evidence with the text exchange on the morning of 9 July 2022 between LCDR A and her (Exhibit 6). The DFM was entitled to conclude the two are consistent. There was no controversy on the appeal about the admissibility of the various text exchanges. They were admitted without objection at trial. Further, a basis for their admission could be found in s 66 of the *Evidence Act 2011* (ACT), in its application to the proceeding via s 4A of the *Jervis Bay Territory Acceptance Act 1915* (Cth) and s 146 of the DFDA. Immediately after this aside or interpolation, there is a sentence which commences, “I have used this lie as only going to credit.” Had a new paragraph commenced here, and as we observed to counsel at the hearing, it would be difficult to see any basis for illogicality. We consider that is the better way to read this passage.
6. The DFM’s reasons also disclose that his conclusions about LCDR Poulton’s credibility were also based on his observation of him during his oral evidence. That is an advantage that he peculiarly enjoyed. Related to that and reading the reasons as a whole, the DFM’s assessment of LCDR Poulton’s credibility was multi-faceted and the result of a cumulative whole, which included demeanour when giving oral evidence.
7. For these reasons, we are not satisfied that the reasons of the DFM are illogical.

#### Unreasonable verdict?

1. As presented in oral submissions, LCDR Poulton’s contentions ranged beyond just the alleged illogicality, and sought to place the DMF’s reasons against a background of alleged inconsistencies such that the conviction was, in terms of s 23(1)(a) of the Appeals Act, one which was unreasonable, or could not be supported, having regard to the evidence. Adapting to this ground in the Appeals Act what was emphasised in relation to a like ground of appeal in the civilian criminal justice system last year by the High Court in *Dansie v The Queen* (2022) 274 CLR 651 (*Dansie*), at 657 [37] [citing *M v The Queen* (1994) 181 CLR 487 and *Filippou v The Queen* (2015) 256 CLR 47], what is required of the Tribunal under this ground is independently to determine for itself whether the evidence was sufficient in nature and quality to eliminate any reasonable doubt that the accused is guilty of the service offences charged. This requirement is not satisfied by a mere examination of the reasons of the Tribunal for error. If the Tribunal’s own assessment of the evidence leads it to have a reasonable doubt that the accused was guilty, the Tribunal will conclude that it was not open to the tribunal of fact, be that court martial panel or, as in this case a DFM, to be satisfied beyond reasonable doubt that the accused was guilty, unless that Tribunal’s advantage in seeing and hearing the evidence is capable of resolving that doubt [*Dansie*, at 660 [15]]. In particular, in undertaking this assessment, and as is likewise the case in relation to the analogous ground of appeal in the civilian criminal justice system, the reasons of the DFM, “must be approached by the court of criminal appeal performing that function with circumspection lest the findings of fact made by the trial judge divert the court from undertaking the requisite independent assessment of the evidence”: *Dansie*, at [19]. Thus, for the purposes of this assessment, we have put aside our earlier conclusion that the reasons of the DFM do not exhibit illogicality.
2. We have already referred above, in summary, to the evidence which was before the DFM. Our own, independent examination of that evidence leaves us without a doubt that it was sufficient both in nature and quality to convict LCDR Poulton of the service offences charged.
3. If accepted, the evidence of the complainant was sufficient to prove each of the service offences alleged. Of course, she was, by her own admission, heavily intoxicated by the early hours of 9 July 2022. But that does not render her evidence incapable of credibility. It is just a factor to take into account. Looking to the contents of the texts authored by the complainant, and to her conversation with LCDR A over the course of 9 July 2022, and using what was stated solely for the purposes of assessing credibility, we are struck by the emotional rawness and consistency of the complainant’s accounts that day. At a more general level of abstraction, that is also so in relation to the accounts of others in evidence as to the accounts of the incident given to them by the complainant of the incident. It is true that there are some differences in detail but none of these are such as to regard the complainant’s account as to what occurred as glaringly improbable. These differences in detail are evident enough in the evidentiary summary above. But these differences can be regarded as indicative of normal differences in human memory. What is consistent in the recollections of the complainant’s accounts is that she had a non-consensual experience of a sexual nature in July 2022.
4. Unlike, for example, *Pell v The Queen* (2020) 268 CLR 123, here there is no other body of unchallenged evidence which renders the account given by the complainant improbable. To the contrary, it was common ground on the evidence that the accused was present in a private venue, the complainant’s residence and that, for reasons associated with an unpleasant sequel to her acknowledged intoxication, she had consensually removed her underwear in his presence and replaced them with fresh underwear before lying on her bed wearing nothing but a bra and those fresh underwear. It was also common ground on the evidence that only the complainant and LCDR Poulton were present in her residence at the time. Nothing about that scenario renders the account given by the complainant improbable.
5. Like that of the complainant, the evidence given by LCDR Poulton depended, for its acceptance, even as a possibility, on an assessment of credibility. He was never under any obligation to prove his innocence. The onus of proving the service offences charged beyond reasonable doubt always remained on the prosecution. As we have already observed, in assessing credibility, the DFM enjoyed the advantage of observing demeanour which we do not. But there is nothing in our assessment of the evidence which suggests to us that this advantage was abused. LCDR Poulton’s account, namely sitting on the top of the complainant’s bed in the early hours of the morning of 9 July 2022, checking social media but not at least at that time sending his wife a message as to where he was, has the appearance of contrivance about it to us. So, too, does his gratuitous statement and later acknowledged lie, “Yeah I passed out on the couch” in his 0945 text to LCDR A, which immediately followed his awareness from her text to him that she had a missed call from his wife at 0200.
6. For these reasons, our conclusion, based on our own assessment of the totality of the evidence, is that the convictions were not unreasonable, and can be supported, having regard to the evidence.

#### Conclusion and an observation about drawing charges

1. We make the following additional observations about the form of the charges laid on the basis of the prosecution evidence, lest it be thought from our review of the evidence that this subject had escaped our attention.
2. On the evidentiary case accepted by the DFM, the events at the complainant’s residence on the evening of 8 and morning of 9 July 2022, after they had left LCDR A’s residence, occurred over a period of some four to five hours, from at or about midnight to 0500. It is possible to discern two phases, a phase after the complainant and LCDR Poulton entered her residence, entailing shortly afterwards multiple episodes of vomiting and loss of bladder control by the complainant, which ultimately saw her change into fresh underwear in his presence and lie under the doona on her bed, where the conduct charged as charges 1, 2 and 3 occurred and a phase upon her waking up at about 0500 on the morning of 9 July 2022, when the conduct charged as charge 4 occurred, also in her bed. On any view, the conduct charged as charges 1, 2 and 3 occurred in a compressed period. It might also be thought of as inter-connected conduct.
3. Unlike in *Jones v Chief of Navy* [2012] ADFDAT 2; (2012) 262 FLR 418 (*Jones*), this was not a case where there was any objection at trial to the form of the charges. Moreover, any such objection was expressly disclaimed on the hearing of the appeal.
4. In *Jones*, at [55], the Tribunal cited with approval an approach to the drawing of charges counselled in circumstances such as the present by Lord Diplock in *R v Merriman* [1973] AC 584, at 607, which is to adopt a “practical approach”. His Lordship there stated, “where a number of acts of a similar nature committed by one or more defendants were connected with one another, in time and place of their commission or by their common purpose, in such a way as they could fairly be described as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment.” This practice is sometimes termed with respect to criminal case pleading, “the single transaction rule” and operates as an exception to the rule against duplicity in charges. The rule against duplicity, which has been described as “easy to state but … often difficult to apply”, requires that only one offence should be charged in any charge on an indictment: *Jones*, at [52].
5. It has been said of the rule against duplicity (and its single transaction exception) that it is a rule of law and that, although matters of judgement are entailed in the drawing of charges on the basis of particular evidence to be led by the prosecution, that does not thereby convert a rule of law into the exercise of a discretion: *Rixon v Thompson* (2009) 115 A Crim R 110, at [81].
6. We are by no means convinced that it was necessary in the circumstances to avoid duplicity for four charges to be laid against LCDR Poulton. The two phases to which we have adverted might aptly have lent themselves to two charges. But there was no controversy that each of the alleged acts, if proved, could constitute an act of indecency and the evidence of the complainant, if accepted, reasonably admitted of a conclusion that each of the acts charged occurred. In circumstances where the form of the charges was not at trial, and is not on appeal, controversial, we do not consider it either necessary or appropriate further to consider the ramifications (if any) of the form in which the Director of Military Prosecutions chose to charge LCDR Poulton. Particularly that is so because we are satisfied it visited no procedural fairness on him.
7. What follows from the foregoing is that, although leave to appeal should be granted, the appeal should be dismissed.

|  |
| --- |
| I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Perry and Slattery. |

Associate:

Dated: 22 December 2023