

HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

WAYNE RONALD HEMBURY

APPELLANT

AND

CHIEF OF THE GENERAL STAFF

RESPONDENT

Hembury v Chief of the General Staff (M102/1997) [1998] HCA 47
23 July 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Federal Court of Australia and in lieu thereof order that the appeal to that Court be allowed, the convictions quashed and the matter returned to the Defence Force Discipline Appeal Tribunal for the making of such orders as are appropriate conformably with the decision of this Court.*

On appeal from the Federal Court of Australia

Representation:

P A Willee QC for the appellant (instructed by Bullards, Solicitors)

R R S Tracey QC with F B Healy for the respondent (instructed by Australian Government Solicitor)

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CATCHWORDS

Wayne Ronald Hembury v Chief of the General Staff

Military law - Court martial procedure - Requirement that members vote in ascending order of seniority - Misdirection as to voting order - Whether a "material irregularity" giving rise to a "substantial miscarriage of justice".

Military law - Court martial procedure - "substantial miscarriage of justice" - Whether jurisprudence deriving from general criminal law applicable.

Military law - Review jurisdiction of Defence Force Discipline Appeal Tribunal and Federal Court of Australia - Whether involves an exercise of Commonwealth judicial power.

Words and phrases - "substantial miscarriage of justice" - "material irregularity".

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

Defence Force Discipline Rules (Cth), r 33.

1 McHUGH J. The question in this appeal is whether the Defence Force Discipline Appeal Tribunal ("the Tribunal") erred in law in holding that a direction that the members of a court-martial vote in order of seniority, contrary to r 33 of the Defence Force Discipline Rules ("the Rules"), was not "a substantial miscarriage of justice" within the meaning of s 23(1)(c) of the *Defence Force Discipline Appeals Act* 1955 (Cth) ("the Appeals Act"). In my opinion, the Tribunal erred in law in so holding.

2 The appeal is brought against an order of the Federal Court of Australia which dismissed the appellant's "appeal" against an order of the Tribunal. The Tribunal's order affirmed the appellant's convictions of engaging in conduct likely to prejudice Army discipline, assaulting a Defence Force member of inferior rank and disobeying a lawful command.

3 In April 1993, the appellant, a sergeant in the Royal Australian Army, was tried before a restricted court-martial¹ on six charges. The court-martial acquitted the appellant of two charges, convicted him of three charges and was not required to give a verdict on the remaining charge, which was an alternative charge to one of those on which he was convicted. The members of the court-martial were a Lieutenant Colonel, a Major and a Captain. The Judge Advocate directed the court-martial that:

"When you come to voting on the questions of guilt, you should vote orally, in order of seniority."

This direction was plainly in breach of r 33 of the Rules which declares that "[o]n any question to be determined by the court martial, the members of the court martial shall vote orally, in order of seniority commencing with the junior in rank." The respondent concedes that the direction breached r 33 and that the breach was a material irregularity within the meaning of par (c) of s 23(1) of the Appeals Act. That paragraph provides:

"where in an appeal it appears to the Tribunal:

...

- (c) that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred;

1 A restricted court-martial consists of a President and not less than two other members in contrast with a general court-martial which consists of a President and not less than four other members: *Defence Force Discipline Act* 1982 (Cth), s 114.

...

it shall allow the appeal and quash the conviction".

- 4 However, the respondent denies that the material irregularity constituted a substantial miscarriage of justice. That being so, the respondent contends that the Federal Court was correct in rejecting the appellant's appeal to that Court.
- 5 The Tribunal is constituted pursuant to s 6 of the Appeals Act. By s 7(1), the Tribunal consists of "a President, a Deputy President and such other persons as are appointed to be members". A person is not qualified to be appointed as President or Deputy President unless he or she is a Justice or Judge of a federal court or the Supreme Court of a State or Territory². A person is not qualified to be appointed as a member unless that person is qualified to be appointed as President or Deputy President or is a judge of a District or County Court of a State³. Section 20 gives the Tribunal jurisdiction, inter alia, to hear an appeal against a conviction by court-martial. However, an appeal may not be brought "on a ground that is not a question of law" except by leave of the Tribunal⁴.
- 6 Section 52(3) of the Appeals Act gives the Federal Court jurisdiction to "hear and determine matters arising under this section with respect to which appeals are instituted in that Court in accordance with this section". Section 52(1) gives a person a right to "appeal to the Federal Court of Australia on a question of law involved in a decision of the Tribunal in respect of an appeal under this Act".
- 7 To succeed in this appeal, therefore, the appellant must show more than that the Tribunal erred in holding that the breach of r 33 did not constitute a "substantial miscarriage of justice". To succeed, the appellant must show that the Tribunal erred in law in holding that there was no substantial miscarriage of justice.
- 8 In holding that the breach did not constitute a substantial miscarriage of justice, the Tribunal said⁵:

"As noted earlier, the court martial commenced to deliberate upon the verdicts at 0948 hours and was so engaged until 1133 hours, a period of about one and three-quarter hours. It cannot but be the case that before any vote was taken which resulted in the announcement of the verdicts as set out earlier, each of the three officers was well aware of the views of the others,

2 Appeals Act, s 8(1).

3 s 8(2).

4 s 20(1).

5 (1994) 73 A Crim R 1 at 15.

3.

and if contrary to their oath, the junior officers were, or either of them was, willing to mould his or her decision to confirm (sic) with that of the president, he or she must have had every opportunity to do so, irrespective of the order of voting.

It does not appear in those circumstances that any miscarriage of justice resulted, or was likely to result, from the misdirection, and accordingly ground six is rejected."

- 9 Does this passage show that the Tribunal misdirected itself in law? If the direction does not contain an error of law, a further question arises as to whether, having regard to the direction on voting, a finding that no substantial miscarriage of justice occurred was ipso facto an error of law.
- 10 The passage which I have extracted from the Tribunal's reasons indicates that the Tribunal decided the miscarriage issue on the hypothesis that there is no miscarriage, let alone a substantial miscarriage, of justice if the material irregularity was unlikely to have affected the result. Because the Tribunal concluded that the junior officers must have been aware of the views of the President before voting, it held that the failure to vote in the order specified in r 33 was not a miscarriage of justice. The corollary of that conclusion and its reasoning is that, if a reasonable time elapses between retirement and verdict, a breach of r 33 will never be a substantial miscarriage of justice for the purpose of s 23 of the Appeals Act.
- 11 I do not share the view of the Tribunal that the breach of r 33 could not have affected the votes of the junior officers. It is a reasonable hypothesis that, however extensive the discussion of the charges may have been, the junior officers did not become aware of the final view of the President until he cast his vote. Not much experience of small group decision making is needed to know that the final vote of a participant can be contrary to the apparent trend of that person's remarks during the discussion preceding decision. Participants in group decision making often change their views as the result of the discussion and after it has ended. I do not think that the Tribunal could safely conclude that the way that the President would vote was definitely known to the other officers before the ballot. He may, for example, simply have reviewed the evidence pointing out its strengths and weaknesses and not indicated any clear view as to how the case should be decided. Under the pressure of argument, he may have changed his views more than once. He may even have said very little during the discussion. What course the discussion took can only be a matter of speculation. With great respect to the members of the Tribunal, I do not think that they could safely conclude that "each of the three officers was well aware of the views of the others". That being so, the Tribunal erred in directing itself on the issue of "substantial miscarriage of justice". However, that was an error in factual reasoning. It was not an error of law.

- 12 Nevertheless, the reasoning of the Tribunal gives rise to another issue. The Tribunal appears to have been of the view that no miscarriage of justice has occurred unless the accused is able to show that he or she lost a fair chance of acquittal. Can there never be a substantial miscarriage of justice for the purpose of s 23 if the accused defence force member did not lose a fair chance of acquittal by reason of the material irregularity?
- 13 "Miscarriage of justice" is a technical term⁶, familiar to common lawyers for over two centuries. In *Robins v National Trust Co*⁷, Viscount Dunedin, speaking for the Judicial Committee of the Privy Council, said that the term meant "such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all." The Tribunal does not exercise the judicial power of the Commonwealth⁸, but it does exercise judicial power. That being so, the remarks of Viscount Dunedin are a useful indicator, but not a definition, of what is a "miscarriage of justice" for the purpose of s 23.
- 14 Viscount Dunedin's remarks were made in the context of formulating the grounds upon which the Judicial Committee would overturn concurrent findings of fact. In that context, he saw the term as concerned with errors in the procedures of a judicial tribunal in contrast to errors of law which so affected a finding of fact that "it is no finding at all"⁹. That was also the way the Judicial Committee understood the term "miscarriage of justice" in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy*¹⁰. However, in the context of criminal proceedings, Australian courts have long given the term a wider definition than that formulated by Viscount Dunedin in *Robins*¹¹.
- 15 Criminal appeal statutes in this country commonly follow the form of the English *Criminal Appeal Act 1907*. They enable a court of criminal appeal to allow an appeal on various grounds including "miscarriage of justice", but contain a proviso that the court may "dismiss the appeal if it considers that no substantial miscarriage

6 *Holford v The Metropolitan Tramway and Omnibus Co Limited* [1909] VLR 497 at 526.

7 [1927] AC 515 at 518.

8 *Re Nolan; Ex parte Young* (1991) 172 CLR 460.

9 *Robins* [1927] AC 515 at 518.

10 [1946] AC 508 at 520-521.

11 [1927] AC 515 at 518.

5.

of justice has actually occurred."¹² In determining whether there has been a "miscarriage of justice" or a "substantial miscarriage of justice" for the purpose of the proviso, Australian courts have not confined themselves to "such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all." They have applied the spirit and usually the words of Fullagar J in *Mraz v The Queen*¹³:

"[E]very accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

- 16 In *Wilde v The Queen*¹⁴, however, Brennan, Dawson and Toohey JJ pointed out that a substantial miscarriage of justice may have occurred despite a Court of Criminal Appeal having concluded that, even if the accused had had a proper trial according to law, the jury would inevitably have convicted him. Their Honours said¹⁵:

"The proviso has no application where an irregularity had occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice."

- 17 I can see no ground for concluding that the jurisprudence concerning miscarriage of justice arising from the common form criminal appeal statutes is not applicable to s 23. For all practical purposes, the Tribunal is a court of criminal appeal. Its members are serving judges. In that context, there can only be a remote and insubstantial possibility that the drafter of s 23 used the term "substantial miscarriage of justice" in ignorance of or dismissive of the jurisprudence on that term in the common form criminal appeal statutes. That being so, the Parliament

12 For example, *Criminal Appeal Act* 1912 (NSW), s 6(1); *Criminal Law Consolidation Act* 1935 (SA), s 353(1); *Crimes Act* 1958 (Vic), s 568(1).

13 (1955) 93 CLR 493 at 514.

14 (1988) 164 CLR 365 at 373.

15 (1988) 164 CLR 365 at 373.

must be taken to have used the term in the sense that courts of criminal appeal have used the term.

- 18 The passages from *Mraz* and *Wilde* indicate that the Tribunal was correct in assuming that a material irregularity does not always amount to a miscarriage of justice. In many cases, such an irregularity will not amount to a substantial miscarriage of justice if the accused did not lose a fair chance of acquittal. But *Mraz* and *Wilde* also indicate that the Tribunal erred, and erred in law, in failing to consider whether the failure to comply with r 33 went to the root of the proceedings. Because that is so, the Tribunal erred in law even if it made no error of law in concluding that the appellant did not lose a fair chance of acquittal.
- 19 The failure of the Tribunal to consider the vital question of whether the breach of r 33 went to the root of the proceedings means that this appeal must be allowed. But that error would only entitle the appellant to have the matter remitted to the Tribunal to consider that question. If, however, the Tribunal was bound, as a matter of law, to hold that breach of r 33 was a substantial miscarriage of justice, the appropriate order would be to allow the appeal and quash the conviction.
- 20 Where the facts as found undoubtedly fall within the provisions of a statutory expression, properly construed, a court is bound to find as a matter of law that they fall within that expression¹⁶. Whether the facts as found can reasonably be regarded by a court as falling within that expression is also a question of law¹⁷. If, however, reasonable minds may differ as to whether the facts as found fall within a statutory provision, the court is considering a question of fact and is not bound as a matter of law to find either way¹⁸.
- 21 The question then is whether the Tribunal, having found that breach of r 33 was a material irregularity, was bound, as a matter of law, to find that the breach was a substantial miscarriage of justice. The appellant had the burden of showing that the material irregularity constituted a "substantial miscarriage of justice". The plain words of s 23(1)(c) indicate that an appellant must show not only a material irregularity but also that it constituted a substantial miscarriage of justice. In that

16 *Farmer v Cotton's Trustees* [1915] AC 922 at 932; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51; *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7.

17 *Farmer* [1915] AC 922 at 931; *Australian Slate Quarries Ltd v Federal Commissioner of Taxation* (1923) 33 CLR 416 at 419; *Federal Commissioner of Taxation v Broken Hill South Ltd* (1941) 65 CLR 150 at 160; *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512.

18 *Dennis v Watt* (1942) 43 SR(NSW) 32 at 32-33; *NSW Associated Blue-Metal Quarries* (1956) 94 CLR 509 at 512; *Hope* (1980) 144 CLR 1 at 8.

respect the onus under s 23 is different from that existing under the common form criminal appeal statutes. It is for the appellant to establish not only that there has been a material irregularity but also that it constituted a substantial miscarriage of justice. Not every material irregularity occurring in the course of a trial will constitute a miscarriage of justice, let alone a substantial miscarriage. Thus, a material irregularity occurring in the course of the proceedings may be corrected later in the proceedings¹⁹.

- 22 Where an accused person is convicted and the judge advocate has erred in law in directing the tribunal of fact in respect of a rule of procedure governing the proceedings, the misdirection is prima facie evidence of a miscarriage of justice²⁰. As Windeyer J pointed out in *Balenzuela v De Gail*²¹, where there has been a misdirection of law, an appellate court must assume that the misdirection "has, or may have, resulted in a miscarriage of justice, for a party has a right to have his case tried according to law." Moreover, such a misdirection must prima facie be regarded as resulting in a "substantial miscarriage of justice". In its context, and having regard to the meaning of that term in the common form criminal appeal statutes, the word "substantial" must be taken to mean "real or of substance as distinct from ephemeral or nominal"²² and as distinct from "large or weighty"²³.
- 23 However, it does not follow that every misdirection is a miscarriage of justice. Leaving aside misdirections that go to the root of the proceedings, the common law has always refused to recognise an error as a miscarriage of justice if the party defending the verdict can demonstrate that the misdirection could not have affected the result of the proceedings²⁴. Because s 23 requires the appellant to prove that the material irregularity has resulted in a substantial miscarriage of justice, however, the burden is on the appellant to show that the irregularity may have affected the result, except in those cases where the error goes to the root of the proceedings.
- 24 In most cases, proof of a material irregularity will be sufficient to make out a prima facie case that the irregularity may have affected the result, thus constituting a

19 See, for example, *Riaz and Burke v The Queen* (1991) 94 Cr App R 339 at 344.

20 See *Holford* [1909] VLR 497 at 526; *Balenzuela v De Gail* (1959) 101 CLR 226 at 233.

21 (1959) 101 CLR 226 at 244.

22 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at 348.

23 *Tillmanns Butcheries* (1979) 42 FLR 331 at 348.

24 *Holford* [1909] VLR 497 at 526; *Balenzuela* (1959) 101 CLR 226 at 233.

substantial miscarriage. That prima facie case will cast a forensic burden on the respondent to point to other matters that indicate that the appellant did not lose a fair chance of acquittal by reason of the material irregularity. If the respondent is able to do that, it is for the Tribunal to be affirmatively satisfied in all the circumstances that the material irregularity constituted a substantial miscarriage of justice.

25 In the present case, the respondent was able to point to a number of matters that tended to show that the misdirection could not have affected the result. It was for the Tribunal to determine whether the effect of those matters was to negative the inference of miscarriage of justice that would otherwise be drawn from the misdirection concerning r 33. More than one view was reasonably open as to whether the appellant might have fairly lost the chance of acquittal by reason of the breach of r 33. Consequently, the Tribunal was not bound as a matter of law to find that he did.

26 The question then is whether the Tribunal was bound to find that breach of r 33 was a substantial miscarriage of justice, irrespective of whether the appellant lost a fair chance of acquittal. That is to say, did breach of r 33 go to the root of the proceedings? In my opinion it did, and the Tribunal was bound to find a substantial miscarriage of justice.

27 Status and authority may not have the influence in decision making that they once had. But no one can doubt, judges least of all, that status and authority remain influential factors in decision making. Human nature being what it is, it must often be the case that a person, favouring one view then another, is ultimately influenced by the prior vote of a person of superior status or authority. That is plainly the theory upon which r 33 proceeds. It is the theory upon which courts-martial have proceeded for more than 300 years²⁵. In his *A Treatise of the Principles and Practice of Naval Courts-Martial*²⁶, John McArthur, "late Officiating Judge Advocate in North America", wrote:

"In order that the minds of the younger members may not be influenced by the opinion of their seniors, the same form is observed as at the trial of a Peer, before the house of lords, and likewise in determinations of the privy council: for the youngest member is to vote first, proceeding up in order to the president, who votes last, and the determination of the court is settled according to the majority of voices."

25 Clode, *The Administration of Justice Under Military and Martial Law*, (1872) at 133.

26 (1792) at 61.

The theory expressed in this passage has applied to voting in courts-martial in this country since its settlement in 1788²⁷. As a matter of interest, the same theory governs voting in courts-martial in New Zealand²⁸ and Canada²⁹.

28 Rule 33 should therefore be regarded as fundamental to the proper conduct of a court-martial. That is the most compelling conclusion to be drawn in respect of a rule incorporating a procedure that has lasted for so long, which was again given the force of law in this country as recently as 1984³⁰ and which, so counsel told us, was reviewed and recommended to remain unchanged as recently as 1996. In the light of its long history and legislative recognition, the inevitable conclusion is that those experienced in the conduct of courts-martial believe, and have long believed, that the rule is fundamental to the fair trial of a member of the defence forces. It is not for judges to set their own judgments against the experience of 300 years and the opinion of the Parliament³¹ on this matter. Rule 33 is a fundamental rule which goes to the root of court-martial proceedings.

29 The appeal should be allowed, the convictions quashed and a new trial ordered.

27 Tench (ed Flannery), 1788: *Comprising A Narrative of the Expedition to Botany Bay and A Complete Account of the Settlement at Port Jackson*, (1996) at 48.

28 Armed Forces Discipline Rules of Procedure 1983 (NZ), r 110(2).

29 Queen's Regulations and Orders for the Canadian Forces, reg 112.41(3).

30 *Defence Force Discipline Act* 1982 (Cth), s 149(1)(fa) inserted in 1984.

31 Parliament did not, of course, enact r 133. But it did legislate for "the manner of taking the votes of the members of a court martial" (*Defence Force Discipline Act* 1982 (Cth), s 149(1)(fa) inserted in 1984) and could, if it had wished, have disallowed the rule.

30 GUMMOW AND CALLINAN JJ. This is an appeal from the Full Court of the Federal Court of Australia (Lockhart, Sheppard and Mathews JJ; Black CJ and Madgwick J dissenting)³². The Full Court was exercising the original jurisdiction of the Federal Court. Section 19 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") provides that the Federal Court has such original jurisdiction as is vested in it by laws made by the Parliament and this includes "any jurisdiction vested in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts".

31 Section 52(3) of the *Defence Force Discipline Appeals Act* 1955 (Cth) ("the Appeals Act") states:

"The Federal Court of Australia has jurisdiction to hear and determine matters arising under this section with respect to which appeals are instituted in that Court in accordance with this section and that jurisdiction shall be exercised by that Court constituted as a Full Court."

The subject-matter of the "appeal" is a question of law involved in a decision of the Defence Force Discipline Appeal Tribunal ("the Tribunal") constituted under the Appeals Act (s 52(1)). The Federal Court is to hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision (s 52(4)). Although styled an "appeal", the proceeding before the Full Court was an exercise of original jurisdiction³³. This was a matter "arising under" the Appeals Act, within the meaning of s 76(ii) of the Constitution, with respect to which s 52 of that statute defined the jurisdiction of the Federal Court pursuant to s 77(i) of the Constitution. The content of the constitutional matter was limited to determination of a question of law involved in the decision of the Tribunal. The Full Court was not exercising any jurisdiction analogous to that of a Court of Criminal Appeal.

32 The Tribunal was not exercising the judicial power of the Commonwealth when, on 9 June 1994, it ordered, in respect to the present appellant:

"The Appeal be dismissed and the convictions confirmed."

Nor was the court martial when, on 21 April 1993, it found the accused guilty on certain charges and imposed punishment. This follows from the current state of authority in this Court as to the interrelation between Ch III of the Constitution and

32 *Hembury v Chief of the General Staff* (1997) 74 FCR 457; 144 ALR 601; 92 A Crim R 563.

33 See *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 657.

the defence power conferred upon the Parliament by s 51(vi) thereof³⁴. The only exposure of this controversy to the judicial power of the Commonwealth has been in the Full Court of the Federal Court and the matter of which it was seized was limited by s 52(1) of the Appeals Act to the determination of "a question of law involved in a decision of the Tribunal".

- 33 There is no question here of appellate intervention in respect of an alleged mistrial conducted in the exercise of judicial power. Rather, the issue as understood before the Full Court was whether, as a matter of law, the Tribunal erred in its application of s 23(1)(c) of the Appeals Act. This obliged the Tribunal, with exceptions not presently material, to allow the appeal and quash the convictions if it appeared to the Tribunal:

"that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred".

It is unnecessary to consider whether the misdirection also attracted par (b) of s 23(1). This is cast in the same form as par (c) and provides as a ground:

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

- 34 The facts are detailed by Kirby J in his reasons for judgment and we do not repeat them.

- 35 Paragraph (c) contains the two elements of "material irregularity" and "substantial miscarriage of justice". There may be a "material irregularity" which does not amount to a "substantial miscarriage of justice"³⁵. Further, an "irregularity" may not be "material" because, for example, it was cured by what was done later in the proceeding³⁶.

- 36 The parties accepted in this Court that there was, within the meaning of par (c), a material irregularity in the course of proceedings before the court martial. The question then is whether the Full Court should have held that the Tribunal erred in law by reason of it not having appeared to the Tribunal that a substantial

34 *Re Nolan; Ex parte Young* (1991) 172 CLR 460.

35 *cf Director of Public Prosecutions v Shannon* [1975] AC 717 at 757, 773; Pattenden, *English Criminal Appeals 1844-1994*, (1996) at 158-161.

36 *cf R v Riaz and Burke* (1992) 94 Cr App R 339 at 344.

miscarriage of justice had occurred within the meaning of that paragraph of s 23(1).

- 37 The phrase "miscarriage of justice" has a lengthy history, both in the common law and in various statutes. As Cussen J pointed out in *Holford v The Melbourne Tramway and Omnibus Co Limited*³⁷, "[m]iscarriage' is a technical word". In *Wilson v Wilson*³⁸, the New South Wales Court of Appeal was construing s 75 of the *Matrimonial Causes Act* 1959 (Cth). This provided for the rescission of a decree nisi if the court was satisfied that there had been a miscarriage of justice by reason of fraud, perjury, suppression of evidence "or any other circumstance". Asprey JA said³⁹:

"In *Robins v National Trust Co*⁴⁰ Viscount Dunedin, in delivering the judgment of the Privy Council, said: 'a miscarriage of justice ... means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all.' See also *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy*⁴¹. Examples of situations where a miscarriage of justice has been found are to be seen in cases decided under the English *Rules of the Supreme Court*, 1883, Order 39, r 6 - for example, *Bray v Ford*⁴², and in New South Wales upon applications for a new trial - for example, *Balenzuela v De Gail*⁴³. Examples in the field of criminal law are to be perceived in the cases decided in relation to s 4(1) of the English *Criminal Appeal Act*, 1907 and its counterparts. *What will constitute a miscarriage of justice may vary, not only in relation to the particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question*; and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a

37 [1909] VLR 497 at 526.

38 (1967) 69 SR (NSW) 23.

39 (1967) 69 SR (NSW) 23 at 35.

40 [1927] AC 515 at 518.

41 [1946] AC 508 at 517, 521.

42 [1896] AC 44. [Order 39 r 6 provided:

"a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence ... unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial".]

43 (1959) 101 CLR 226.

different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law (*Mraz v The Queen*⁴⁴). (emphasis added)

- 38 In *Holford*⁴⁵, in a passage adopted by Dixon CJ in *Balenzuela v De Gail*⁴⁶, Cussen J referred to the position with respect to the trial of common law actions at *nisi prius* before the adoption of Rules of Court such as O 39 r 6 under *Judicature Act* procedure. Cussen J was of the view that the new Rules had made very little difference and that it was an error to think that there could never be a wrong or miscarriage unless it could be shown that the jury was in fact influenced in giving their verdict by a misdirection. He continued⁴⁷:

"There is a wrong or miscarriage occasioned by a misdirection in law, or as to the application of evidence, if, as a final result of what has been said by the Judge, the jury retire to their room under a wrong impression in relation to these matters, and the result of the case is such as to show that they may have been influenced in their verdict by the misdirection."

- 39 In *Balenzuela*⁴⁸, Windeyer J expressed his agreement with Dixon CJ and Cussen J that the common law principles then still obtaining in New South Wales and the judicature system rules were, in relation to new trials, "not so far apart as might appear". Windeyer J also emphasised that, where the complaint was of misdirection of law, "there has been an error in law; and the court must assume that it has, or may have, resulted in a miscarriage of justice, for a party has a right to have his case tried according to law"⁴⁹.

- 40 Here, the adjective "substantial" qualifies "miscarriage of justice". However, Windeyer J's reasoning applies with added force where the proceeding in question leads to the imposition of a punishment yet is not conducted by a court. Here, there was a misdirection on a matter of law which was a material irregularity in the course of the proceeding. The appellant, under the present state of authority in this Court, did not have the right to the determination of his guilt, on charges of offending against a law of the Commonwealth, by a court exercising the judicial

44 (1955) 93 CLR 493 at 514 per Fullagar J.

45 [1909] VLR 497 at 526.

46 (1959) 101 CLR 226 at 233.

47 [1909] VLR 497 at 526.

48 (1959) 101 CLR 226 at 244.

49 (1959) 101 CLR 226 at 244.

power of the Commonwealth. Nevertheless, he had, at the least, a right to have his case determined by a court martial which proceeded according to the law of the Commonwealth.

41 The majority in the Full Court accepted the proposition that the statements of principle in cases decided upon provisos - such as that found in s 6(1) of the *Criminal Appeal Act* 1912 (NSW) - as to what constitutes a "substantial miscarriage of justice" are equally applicable to explain what is meant by that term in s 23(1)(c) of the Appeals Act. That proposition should be rejected. It may be taken that s 6(1) would have applied in an appeal against conviction in respect of a federal offence where the trial had been conducted in a New South Wales court⁵⁰. But that is not to the point.

42 The Full Court was empowered by s 52(4) of the Appeals Act to make such order as it thought appropriate by reason of its decision. These orders included an order setting aside the decision of the Tribunal (s 52(5)(a)).

43 We agree that in the circumstances of this court martial both limbs of s 23(1)(c) applied and we agree with the orders proposed by Kirby J.

50 *Peel v The Queen* (1971) 125 CLR 447 at 457, 462, 467-468.

44 KIRBY J. "There are dangers lurking in military trials". So wrote Black J, for the majority of the Supreme Court of the United States in *Toth v Quarles*⁵¹. In the United States the dangers were "sought to be avoided by the Bill of Rights and Article III of our Constitution"⁵². In this country, there is no Bill of Rights. Chapter III of the Constitution has been held to be compatible with the system of courts martial⁵³. No point of constitutional invalidity was argued in this appeal⁵⁴. Accordingly, the checks imposed are those which the Parliament has provided.

45 Relevantly, the Parliament has enacted the *Defence Force Discipline Act* 1982 (Cth) ("the Discipline Act") and the *Defence Force Discipline Appeals Act* 1955 (Cth)⁵⁵ ("the Appeals Act"). By s 149 of the Discipline Act, the Judge Advocate General⁵⁶ is empowered to make rules of procedure "providing for or in relation to the practice and procedure to be followed by service tribunals". Such rules may, by that section, provide for "the manner of taking the votes of the members of a court martial"⁵⁷. This appeal concerns the consequence of a failure on the part of a Judge Advocate accurately to instruct a court martial on the requirements of the Rules as to the procedure for voting.

51 350 US 11 at 22 (1955), cited in *O'Callahan v Parker* 395 US 258 at 265 (1969); cf *Solorio v United States* 483 US 435 (1987). See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 566-567.

52 350 US 11 at 22 (1955).

53 See generally *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 467-468, 481; *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 539-541, 579, 591, 605; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 475, 480-481.

54 cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 592 per Deane J, at 603 per Gaudron J.

55 The Appeals Act was originally called the *Courts-Martial Appeals Act* 1955 (Cth), but its short title was amended by the *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth), s 13.

56 Appointed pursuant to s 179 of the Discipline Act.

57 Discipline Act, s 149(1)(fa).

The facts

46 Sergeant Wayne Hembury (the appellant), a sergeant of the Australian Regular Army, was charged in April 1993 before a restricted court martial⁵⁸ on six counts. The court martial was constituted by a Lieutenant Colonel, a Major and a Captain of the Army. Each member of the court martial had, prior to its commencement, taken the requisite oath or affirmation which is in form similar to the judicial oath⁵⁹. Five of the charges against the appellant concerned allegations of sexual harassment directed at a female officer junior to him in rank. The sixth, a charge of disobeying a lawful command, also related to the alleged sexual harassment. The appellant pleaded not guilty to all charges. The hearing took place. A Judge Advocate instructed the court martial on the applicable law. Generally, the Judge Advocate's instructions were accurate and clear. He told the members that they were not to allow themselves to be influenced by any extraneous matters and that they were individually bound to decide the charges strictly in accordance with the evidence. It was in his closing remarks, just before the court martial retired to consider its decisions, that the Judge Advocate said:

"When you come to voting on the questions of guilt, you should vote, orally, in order of seniority. Voting is by majority vote. It does not have to be unanimous."

47 The members of the court martial retired at the conclusion of the hearing, noted with military precision as 9.36 am on 21 April 1993. They were recalled for about ten minutes for a brief and immaterial direction, and then retired again. They returned at 11.33 am on the same morning. The appellant was acquitted of the first charge involving an act of indecency; but he was convicted of the alternative second charge involving conduct likely to prejudice Army discipline. He was acquitted of the third charge, involving another act of indecency; but he was convicted of the alternative fourth charge involving an assault on a Defence Force member of inferior rank. No decision was taken on the fifth charge, being a further alternative to the third. The appellant was convicted on the sixth charge involving disobedience of a lawful command. The Judge Advocate then directed the court martial on sentencing. At the end of his address, he said:

"[T]here is one matter I omitted to tell you, which I am sure will be obvious to you, but as far as voting is concerned on punishment it is done in the same

58 See Discipline Act, s 114. A general court martial consists of a President and not less than four other members. A restricted court martial consists of a President and not less than two other members.

59 See Defence Force Discipline Rules (Cth) ("the Rules"), r 35(2).

manner as reaching your verdict. In other words, orally, starting with the junior member and it will be a majority vote on punishment."

In respect of the fourth charge the appellant was sentenced to military detention for a period of three months but this sentence was suspended for twelve months. In respect of the other charges of which he was convicted, fines were imposed upon him and he was severely reprimanded.

Applicable legislation

48 Something of the history of the Discipline Act is told in the reasons of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*. The Discipline Act amounted to⁶⁰:

"the first occasion in this country when provisions for common application to the naval, military and air forces of the Commonwealth have been enacted to define service offences, criminal liability, punishments, apprehension and investigation and to confer jurisdiction on service tribunals organised in a common system. The Discipline Act swept aside a complex of Commonwealth Acts and regulations and Imperial Acts and regulations which had theretofore applied naval, military and air force law to the navy, the army and the air force."

49 In addition to procedures to be followed by service tribunals which the Act itself laid down⁶¹, it provided that the Judge Advocate General could make rules⁶². Originally, there was no reference in the Discipline Act to a power to make rules "for or in relation to ... the manner of taking the votes of the members of a court martial". That power was added in 1984⁶³, apparently because of concern that, otherwise, a rule providing for the manner of voting by a court martial might go beyond the rule-making power conferred by the Parliament⁶⁴. Pursuant to the rule-making power, the Judge Advocate General made the Defence Force Discipline Rules ("the Rules")⁶⁵. Rule 33 of those Rules provides:

60 (1989) 166 CLR 518 at 550.

61 Discipline Act, Pt VII.

62 Discipline Act, s 149.

63 By *Defence Legislation Amendment Act* 1984 (Cth), s 65.

64 Defence Legislation Amendment Bill 1984, Explanatory Memorandum at 44.

65 Statutory Rules 1985, No 128.

"Manner of voting of court martial

33. On any question to be determined by the court martial, the members of the court martial shall vote orally, in order of seniority commencing with the junior in rank."

50 In relation to appeals⁶⁶ from a court martial, the Appeals Act, relevantly, provides:

"23(1) ... where in an appeal it appears to the Tribunal:

...

(c) that there was a material irregularity in the course of the proceedings before the court martial ... and that a substantial miscarriage of justice has occurred

...

it shall allow the appeal and quash the conviction".

51 The foregoing provision is in some ways different from its predecessor, the *Courts-Martial Appeals Act* 1955 (Cth), s 23. That provision followed more closely the structure of criminal appeal legislation common throughout Australia. It provided a prima facie right to have an appeal allowed where the Defence Force Discipline Appeal Tribunal ("the Tribunal") considered that the court martial's finding "involves a wrong decision of a question of law"⁶⁷. But it empowered the Tribunal to refuse to allow the appeal "if it considers that no substantial miscarriage of justice has occurred"⁶⁸. This language was construed to impose upon the prosecution, where a wrong decision of a question of law was demonstrated, an onus of establishing affirmatively that the circumstances justified a refusal to allow the appeal⁶⁹.

52 The alteration of the statutory language in the Appeals Act gave rise to much debate before the Tribunal and in the Federal Court concerning a suggested change in the preconditions for appellate intervention and about who bore the onus to show that a substantial miscarriage of justice had occurred. Although the construction

66 The proceeding is described as an "appeal" in the Appeals Act. For discussion on this point, see the reasons of McHugh J and Gummow and Callinan JJ.

67 *Courts-Martial Appeals Act* 1955 (Cth), s 23(1)(a)(ii).

68 *Courts-Martial Appeals Act* 1955 (Cth), s 23(2).

69 *R v Williams* [1956] VLR 96 at 97; *Re Smerdon* (1979) 37 FLR 49 at 56.

of s 23(1)(c) of the Appeals Act was mentioned briefly during argument to this Court, and raised in a ground of appeal⁷⁰, because in this case the relevant facts are undisputed, it is unnecessary to explore these questions. Nothing turns on the onus of proof. The case depends on whether what the Judge Advocate told the court martial was erroneous; whether this amounted to a "material irregularity"; and whether "a substantial miscarriage of justice has occurred".

Decisions of the Tribunal and the Federal Court

- 53 No point was taken, either before the court martial or originally in the appeal to the Tribunal concerning the suggested error of the Judge Advocate's instruction to the court martial. The error was drawn to the notice of the appellant's representative by a member of the Tribunal⁷¹. It led to an application and leave to add a further ground of appeal. The Tribunal⁷², which was obliged to deal with many other grounds of appeal argued for the appellant, dealt with this one quite briefly⁷³. After referring to the apparent policy behind r 33⁷⁴, it concluded that the direction amounted to a "material irregularity". It rejected the argument that, in the context, the passage complained of was to be construed as a direction to vote "in order of seniority" from the junior to the senior. It held that the meaning of "in order of seniority" was the reverse of what r 33 provided. However, in reaching a conclusion that no miscarriage of justice had resulted, the Tribunal relied on the fact that the court martial had retired for approximately one and three quarter hours to deliberate upon its decision. It said⁷⁵:

"It cannot but be the case that before any vote was taken which resulted in the announcement of the verdicts as set out earlier, each of the three officers was well aware of the views of the others, and if contrary to their oath, the junior officers were, or either of them was, willing to mould his or her decision to conform with that of the president, he or she must have had every opportunity to do so, irrespective of the order of voting."

70 Notice of Appeal to the High Court of Australia, 27 November 1997 at par 2.3.

71 *Hembury v Commonwealth of Australia* (1994) 73 A Crim R 1 at 14.

72 Northrop J (President), Cox J (Deputy President), Badgery-Parker J (Member).

73 (1994) 73 A Crim R 1 at 14-15.

74 "[T]o avoid a situation in which junior members of a court martial are overborne by their superior officer": (1994) 73 A Crim R 1 at 14.

75 (1994) 73 A Crim R 1 at 15.

54 In the Federal Court, the appeal from the decision of the Tribunal was heard by five judges⁷⁶. By majority⁷⁷, the appeal was dismissed. It was accepted that the Judge Advocate, in the passage complained of, had made an error, the inadvertence of which was demonstrated by the correct instruction which he gave on the matter of voting on punishment⁷⁸. Like the Tribunal, the Federal Court was not persuaded that the passage could be construed to mean "in order of seniority" from junior to senior. Before the Federal Court it was common ground that the misdirection constituted a "material irregularity in the course of the proceedings"⁷⁹. This was because it involved a departure from the rule provided by statute. But the question remained whether as a matter of law, "a substantial miscarriage of justice" had occurred.

55 For the majority, Lockhart J upheld the decision of the Tribunal. Important to his Honour's conclusion was the nature of the misdirection, the circumstances in which it had occurred, the protracted deliberations of the court martial and the failure of the appellant's defending officer to seek a correction. Sheppard J, the other member of the majority, found the point more difficult. He accepted that, a special provision having been made, both in the Discipline Act and the Rules for the manner of voting, the requirement of reverse seniority could not be disregarded as insignificant⁸⁰. Like Madgwick J, a member of the minority, he was sceptical that a mere order of voting could overcome the effect of the free exchange of opinions likely to have occurred in the time of the court martial's deliberations⁸¹. Ultimately, Sheppard J concluded that the second "element" necessary to authorise the Tribunal to quash the conviction did not exist. There had not been "a substantial, that is, grave or serious, miscarriage of justice"⁸². The third member of the majority, Mathews J, agreed with the reasons of both Lockhart and Sheppard JJ⁸³.

76 (1997) 74 FCR 457; 144 ALR 601.

77 Lockhart, Sheppard and Mathews JJ; Black CJ and Madgwick J dissenting.

78 (1997) 74 FCR 457 at 459, 467; 144 ALR 601 at 603, 610.

79 Appeals Act, s 23(1)(c). See (1997) 74 FCR 457 at 478; 144 ALR 601 at 621.

80 (1997) 74 FCR 457 at 477; 144 ALR 601 at 619.

81 (1997) 74 FCR 457 at 478; 144 ALR 601 at 620-621.

82 (1997) 74 FCR 457 at 479; 144 ALR 601 at 622.

83 (1997) 74 FCR 457 at 483; 144 ALR 601 at 625.

56 Black CJ (with the concurrence of Madgwick J) was of the opinion that the achievement of the "important purposes"⁸⁴ of r 33 had been undermined by the erroneous instruction. His Honour considered that "if a direction is given contrary to its requirements that irregularity is likely to go to the root of the proceedings"⁸⁵. Black CJ concluded that "the matter was by no means one in which convictions were inevitable"⁸⁶. Because the error went to the root of the trial, without more, it necessarily occasioned a "substantial miscarriage of justice"⁸⁷. In the opinion of Madgwick J, it denied one of the "essential requirements of the law"⁸⁸. In this way, by majority, the Federal Court came to the conclusion that the appellant's convictions should stand. It is from that result that, by special leave, this appeal now comes.

Defence of the decision

57 By the time the appeal reached this Court there was much common ground. What remained for decision was whether the Federal Court had erred in holding that the second "element", namely that "a substantial miscarriage of justice has occurred" had not been established either on the evidence or because the irregularity was so fundamental that it went to the "root of the proceedings" requiring that relief be afforded.

58 In defence of the successive decisions of the Tribunal and of the Federal Court, the respondent supported the reasoning of Lockhart J, in turn upholding that of the Tribunal. It was impossible, so he argued, to consider that deliberations lasting nearly two hours would not have disclosed to the junior members of the court martial the opinions of its president. Rule 33 did not establish a rigid procedure forbidding free discussion of opinions. The requirement of reverse seniority applied only to voting which, one might infer, would ordinarily come at the conclusion of deliberations upon all of the matters in contest. If, contrary to the oath or affirmation taken, a member was, or members of the court martial were, susceptible to being overborne by the opinions of a senior officer, the order in which the final vote was taken would scarcely be likely to inject courage and integrity at the last minute, where those qualities were otherwise lacking. The fact that voting had to be declared orally, in the presence of the senior officer, would mean that there was no way that disagreement could be hidden. Without denying

84 (1997) 74 FCR 457 at 464; 144 ALR 601 at 607.

85 (1997) 74 FCR 457 at 465; 144 ALR 601 at 608.

86 (1997) 74 FCR 457 at 465; 144 ALR 601 at 608.

87 (1997) 74 FCR 457 at 465; 144 ALR 601 at 608.

88 (1997) 74 FCR 457 at 483; 144 ALR 601 at 626 citing *R v Hall* [1971] VR 293 at 299.

the requirements of the rule, or the history that lay behind it, the respondent supported the remarks of Lockhart J⁸⁹ to the effect that the purpose of the rule in the latter part of the twentieth century was open to question. He submitted that it served a useful purpose at a time when (1) promotion was ordinarily dependent on the opinion of senior officers of the same regiment who would constitute the court martial; (2) there was greater deference to authority than is typically the case in Australia today; and (3) punishments available to a court martial were generally much more severe, including capital and corporal punishment. But not today.

59 The respondent also denied that the inadvertent slip which had occurred amounted to a fundamental error. If such a view were taken, he suggested, it would plunge courts martial into "outworn technicality"⁹⁰. It would needlessly occasion the "deplorable result" of unmeritorious new trials⁹¹. Out of a recognition of the mistakes which inevitably occur in any system of justice - and are perhaps more likely to occur in a non-judicial disciplinary body such as a court martial - the Parliament had amended the applicable legislation to make it plain that even a "material irregularity" was not, alone, enough to authorise the Tribunal to allow an appeal and quash a conviction. A second "element" namely "substantial miscarriage of justice" was required. In this regard the alteration of the legislation had underlined a purpose of avoiding costly and inconvenient retrials where all that could be shown was a material irregularity. Looked at in the whole context of the proceedings before the court martial here, the slip complained of was not, so it was argued, sufficient to show a substantial miscarriage of justice. When the mistake which had occurred was placed in the context of the entire proceedings, the respondent suggested that no substantial miscarriage of justice appeared. What had happened was the kind of harmless error which the second "element" in the Appeals Act was designed to accommodate.

60 These arguments, or some of them, convinced six experienced judges who, successively in the Tribunal and in the Federal Court, disposed of the appellant's appeals in favour of the respondent. I have reached the contrary conclusion.

Fundamental error and the root of the proceedings

61 The principal submission for the appellant was that the misdirection was of a kind which would be classified as "radical" or "fundamental" and such as involved a "departure from the essential requirements of the law that ... goes to the root of

89 (1997) 74 FCR 457 at 468; 144 ALR 601 at 611.

90 *Driscoll v The Queen* (1977) 137 CLR 517 at 527 per Barwick CJ.

91 cf *Balenzuela v De Gail* (1959) 101 CLR 226 at 243.

the proceedings"⁹². These expressions come from the treatment by this Court and other courts of the common form statutory provisions affording courts of criminal appeal the jurisdiction to uphold appeals against criminal conviction and to quash convictions. Discussion of such "radical" or "fundamental" error normally arises where the appellate court is of the opinion that what has occurred in a criminal trial is such a serious irregularity that "the accused has not had a proper trial"⁹³ or that the purported trial was "hardly a trial at all"⁹⁴. The importance of such a determination is that, where it is made, of its nature it has been held to exclude the application of the proviso⁹⁵.

62 Obviously, classifications expressed in terms of "so extreme an irregularity"⁹⁶ or "fundamental error"⁹⁷ are such that exactitude is impossible to attain. Unanimity on the application of the classification may be elusive. The borderland between a "very serious irregularity" and a "fundamental" one is likely to be strewn with judicial disagreement. Moreover, the function of any body, court or tribunal, afforded the power by statute to dispose of proceedings is to comply with its statutory charter. That is why judicial elaboration of "fundamental" and "radical" error usually resorts to the Polonian advice that courts should avoid mechanical approaches and determine each case "upon its own circumstances"⁹⁸. Often what is being said is that, where mistakes are truly "fundamental" ones, there can be no question of providing relief on the basis of a statutory proviso enacted to cure "trivial and immaterial"⁹⁹, "collateral"¹⁰⁰, unimportant¹⁰¹, inoperative or

92 *Wilde v The Queen* (1988) 164 CLR 365 at 373; cf *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601; *Makin v Attorney-General for New South Wales* [1894] AC 57 at 70; *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148.

93 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

94 *Glennon v The Queen* (1994) 179 CLR 1 at 8.

95 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *KBT v The Queen* (1997) 72 ALJR 116 at 125-126; 149 ALR 693 at 705-706; *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148.

96 *Couper v The Queen* (1985) 18 A Crim R 1 at 8.

97 *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 147.

98 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

99 *Bray v Ford* [1896] AC 44 at 48.

100 *Balenzuela v De Gail* (1959) 101 CLR 226 at 233.

101 *Bray v Ford* [1896] AC 44 at 48 ["important and serious"].

insubstantial error. In such cases, the court must "exclude the application of the proviso"¹⁰², ie the error is such that the court should not apply the proviso to uphold the result of the trial¹⁰³.

- 63 At least in the case of statutory bodies of limited powers, such as the Tribunal, courts have no authority to instruct them to ignore the requirements which the Parliament has established for the performance of their functions. Nor do courts have a right to alter those requirements by adding a completely different regime for allowing appeals and quashing convictions distinct from that which the Parliament has enacted. The kinds of "radical" or "fundamental" errors that have been described by the courts in the context of criminal appeals have typically concerned mistakes of law and procedure which are profound and which clearly distort the course of the proceedings. Extensive cross-examination on a criminal record on the face of statutory prohibition is one example¹⁰⁴. Another is the total omission, mis-statement or wrongful elaboration of the onus of proof¹⁰⁵. Another would be where the court of trial was erroneously

102 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

103 *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148.

104 *Couper v The Queen* (1985) 18 A Crim R 1.

105 *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143.

constituted¹⁰⁶. Another, where an accused is presented to the court prematurely¹⁰⁷. These are all cases of most serious departures from the essential requirements of the law. The "proviso" assumes that those requirements have been fulfilled. It is unavailable to repair mistakes of that order.

64 I would not regard the misdirection by the Judge Advocate complained of in this appeal as falling in the same category as the "radical" or "fundamental" errors just mentioned. Rule 33 appears in the context of other rules laying down the functions of, and procedures within, a court martial. By comparison with other rules in the collection (eg providing for the president to speak on behalf of the members of the court martial¹⁰⁸) it cannot, I think, be said that any infraction of r 33 "goes to the root of the proceedings" and is necessarily fatal to their validity. But there is a more basic difficulty with the proposition. It is that the only authority which is given by the Parliament to the Tribunal to allow an appeal and quash convictions entered by a court martial is that contained in s 23(1) of the Appeals Act. That provision requires, in every case, that the Tribunal be satisfied that what is complained of is a "material irregularity" and also "a substantial miscarriage of justice"¹⁰⁹. Whatever may have been the position under the *Courts-Martial Appeals Act*¹¹⁰, expressed in terms closer to those of the "proviso" governing criminal appeals in Australia, the dual requirement must now, in every case, be established. Thus even if the "material irregularity" were thought to be "fundamental", "radical" or one which "goes to the root of the proceedings", that alone would not be enough. By the Appeals Act it is still necessary that it should appear that a "substantial miscarriage of justice has occurred". In a case where such an egregious mistake was demonstrated, it would ordinarily, without more, amount to a "substantial miscarriage of justice" thereby fulfilling the dual requirement laid down by the Act. Because, for my own part, I would not classify the misdirection in this case as "fundamental", "radical" or such as went to the "root of the proceedings", it is necessary to consider whether, upon ordinary principles, notwithstanding the arguments of the respondent, a "substantial miscarriage of justice has occurred" such that the Tribunal and the Federal Court ought to have allowed the appellant's appeal.

65 For four reasons, I consider that a substantial miscarriage of justice did occur. My reasons require reflection on (1) the history and purpose of the rule; (2) the history of the legislation supporting the rule; (3) the nature and powers of a court

106 *R v Hall* [1971] VR 293.

107 *R v Henderson* [1966] VR 41 at 43.

108 r 31(c).

109 Appeals Act, s 23(1)(c).

110 ss 23(1) and 23(2).

martial; and (4) the intended operation of the Appeals Act. Let me explain these points in turn.

History and purpose of the rule of reverse seniority

66 Given the provenance of the Australian Defence Forces, the court martial provided in the Discipline Act must be traced to British military history. The first express mention of the procedure of voting in a court martial by reverse order of seniority may be found in Articles of War published under the authority of King James II in 1672. The Articles were drawn up for use of the Army as a book of military discipline¹¹¹. They were, in turn, said to be modelled on rules applicable to the French Army¹¹². They provided for the constitution of "Councils of War". The effect of the Articles was that "[a]fter deliberation, and at the request of the President, each Captain gave his opinion, beginning with the youngest till it came to the President, who pronounced last"¹¹³. Depending on the plurality of votes, the clerk drew up the sentence which was signed by the President and the Captains participating. This requirement of the Articles of 1672 was explained in these terms, 200 years after their adoption¹¹⁴:

"It has been a fundamental principle in all Military Codes that, to secure the freedom of Junior Officers, the votes should be taken from the youngest up to the eldest member of the Court. In no other way could this freedom be secured; for the service of all Officers upon a Court-martial is, as we have seen, a Military duty discharged under the Mutiny Act, in subordination to the President appointed by the Convening Officer. The votes of the Juniors, unless given before those of their Superiors, might place them in direct conflict with their declared opinions."

111 Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 34. The Articles of 1672 were ascribed to Prince Rupert acting under a commission received from the King. They involved a collation of earlier Articles of War drawn up during the Civil War by Lords Essex and Strafford, in turn modelled on Lord Essex's Articles of 1642.

112 de Gaya, *The Art of War and the way that it is at Present Practised in France* (1678) cited in Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 33.

113 Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 34.

114 Clode, *The Administration of Justice Under Military and Martial Law* (1872) at 133.

Contemporary records indicate that the first trials conducted in the Australian settlements, by a military tribunal under military law, were carried out in accordance with the foregoing procedure¹¹⁵:

"[B]y a majority of votes, beginning with the youngest member and ending with the president of the court."

- 67 One authority on courts martial in the Royal Navy¹¹⁶ suggested that the origin of the reverse seniority rule was not French Army law but British judicial practice:

"In order that the minds of the younger members may not be influenced by the opinion of their seniors, the same form is observed as at the trial of a Peer, before the house of lords, and likewise in determinations of the privy council: for the youngest member is to vote first, proceeding up in order to the president, who votes last, and the determination of the court is settled according to the majority of voices."

To this day, the deliberations of the Privy Council and the House of Lords follow the same tradition¹¹⁷. It seems that in some appellate courts in the United States of America a similar tradition is observed. "[E]ach judge, in reverse order of seniority, expresses a view either agreeing or disagreeing with the reporting judge"¹¹⁸. The Supreme Court of the United States, on the other hand, reportedly conducts its conference in "descending order of seniority"¹¹⁹. No similar formality appears ever to have been observed by this Court or any other Australian appellate court.

- 68 Despite the doubts expressed¹²⁰ about the utility of adhering to a rule on the order of voting, which could easily be undermined by prior discussion of the issues for decision, the persistence in the court martial in British military law, and in the

115 Tench (ed Flannery), 1788: *Comprising A Narrative of the Expedition to Botany Bay and A Complete Account of the Settlement at Port Jackson* (1996) at 48.

116 McArthur, *A Treatise of the Principles and Practice of Naval Courts-Martial* (1792) at 61.

117 Paterson, *The Law Lords* (1982) at 92.

118 Wachtler, *After the Madness: A Judge's Own Prison Memoir* (1997) at 216, describing the practice of the New York Court of Appeals.

119 Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (1992) at 174.

120 (1997) 74 FCR 457 at 468 per Lockhart J, 478 per Sheppard J, 483 per Madgwick J; 144 ALR 601 at 611, 620, 626.

law governing the defence forces of countries whose military tradition derives from Britain, is very well established. Under the *Manual of Military Law* (1956) of the United Kingdom, it was provided that, following the conclusion of the hearing and the retirement of the Judge Advocate from the court martial, each member in private will give his opinion by word of mouth on each charge separately, commencing with the junior¹²¹. The Court having come to a finding, the President reopens the proceedings and announces the finding in open court¹²².

- 69 In 1972, the Rules of Procedure (Army) (UK) came into operation. Provision is made in r 66 for the expression of opinion in reverse order of seniority¹²³. The same rule as to voting in succession in a court martial, beginning with the junior in rank, applies in Canada¹²⁴ and in New Zealand¹²⁵. In the United States, the Uniform Code of Military Justice, made pursuant to specific powers conferred on the Congress by the United States Constitution¹²⁶ provides for voting on the findings and sentence by secret ballot¹²⁷. However, there too, in rulings other than final rulings where there is a difference of opinion in the court martial, the courtroom is to be cleared and the question decided by a voice vote "beginning with the junior in rank"¹²⁸.

121 United Kingdom, *The War Office Manual of Military Law* (1956) at Pt I, Section IV, par 78. See also *Queen's Regulations and Admiralty Instructions* (1 April 1958), Ch 21, par 2182.

122 United Kingdom, *The War Office Manual of Military Law* (1956) at Pt I, Section IV, par 79.

123 r 66(1) "The opinion of the president and each member as to the finding shall be given in closed court, orally and, on each charge separately and their opinions shall be given in order of seniority commencing with the junior in rank."

124 Queen's Regulations and Orders for the Canadian Forces, reg 112.41(3). See also Jacobson, "In Defence of the Canadian Court-martial System" (1997) 4(3) *National Network News*, published at http://www.sfu.ca/~dann/nn4-3_11.htm.

125 Armed Forces Discipline Rules of Procedure 1983 (NZ), r 110(2) "Each member of the court-martial shall give his opinion on the finding orally, in closed court, and in order of seniority commencing with the most junior in rank."

126 Art I, §8, cl 14. See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 540.

127 10 USC §851(a) (Art 51(a)).

128 10 USC §851(b) (Art 51(b)). See also Winthrop (edited by Kavass and Sprudz), *Military Law and Precedents*, 2nd ed (1979) at 376.

70 Rule 33 of the Rules is therefore to be understood against the background of this long history and widespread practice. Although there are differences of expression as to the applicability of reverse seniority for voting and the statement of opinions, in the foregoing examples the essential point is the same. In part, the rule may indeed rest on tradition and ancient usage. But in part, it clearly arises from a felt need in the environment of a military hierarchy, subordination and discipline, that the independence of the members of the court martial should be reinforced by informing them that voting should occur in reverse seniority. Against this history and the widespread practice of military law, the rule cannot be dismissed as redundant, outmoded or irrelevant to the practice of a contemporary Australian court martial. There have been recent reviews of the Rules. Deletion of r 33 as anachronistic has not been proposed and has not been adopted.

History and purpose of the legislation

71 The foregoing conclusion is reinforced when the history behind r 33 itself is remembered. The rule was submitted to the Parliament for disallowance if it thought fit¹²⁹. It was not disallowed. This fact reinforces the conclusion that it should not be treated by a court as ceremonial, anachronistic or optional. It is a rule that is to be obeyed. Misdirection about it will constitute a material irregularity. It will require correction by the Tribunal if a "substantial miscarriage of justice has occurred".

The nature and purposes of a court martial

72 A third consideration which reinforces this conclusion is the context in which the rule appears. A court martial is not a court of law. Although it is obliged to dispense justice it has been held that it does not exercise the judicial power of the Commonwealth¹³⁰. It is a body constituted, ordinarily, by lay people. The participation of a member with legal training would be wholly accidental. These features of courts martial are recognised by the detailed provisions made concerning their procedures both by the Discipline Act and by the Rules. This is a reason for requiring a high level of accuracy in the instruction of a court martial about any procedures laid down by the Parliament or by Rules made under

129 *Acts Interpretation Act* 1901 (Cth), s 48; *Discipline Act*, s 149(2). A review of the Rules was conducted in 1995 and a report made to the Judge Advocate General, recommending that r 33 not be amended: Commonwealth, *Defence Force Discipline Rules - Draft Report*, September 1995 at 50. In subsequent reports to Parliament, the Judge Advocate General did not make any suggestion that r 33 be amended. See Commonwealth, *Report of the Judge Advocate General under the Defence Force Discipline Act 1982* (1996) and Commonwealth, *Report of the Judge Advocate General under the Defence Force Discipline Act 1982* (1997).

130 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 541, 579, 591, 603-604.

Parliamentary authority. A court martial has large powers. The present case is an illustration. The imposition of a punishment (although in this case suspended) of military detention may deprive a citizen of liberty. Rules of procedure have been enacted, or made, both to reduce the risks of unreasonable, irregular or unsafe convictions of the accused and to enhance the confidence of serving officers and of the community more generally in the integrity of military justice. Whereas a greater measure of flexibility might be accorded to a judge exercising the judicial power of the Commonwealth in the ordering of procedures of the court (because by training and experience the judge could ordinarily be expected to protect the essential rights of the accused) the same may not necessarily follow in relation to a non-judicial administrative body with large powers to convict an accused person and to order that he or she be detained, fined and otherwise compulsorily dealt with.

Intended operation of the Appeals Act

73 It is with these considerations in mind that I return to the intended operation of s 23(1)(c) of the Appeals Act. Reading that paragraph, without knowledge of judicial consideration of similar texts, it would be easy to perceive in the phrase "substantial miscarriage of justice" more than appears. Sheppard J may have done this when he indicated that "substantial" in the context meant a miscarriage which was "grave or serious"¹³¹. In other contexts, this is certainly what "substantial" may mean¹³². But the expression "substantial miscarriage of justice" is one commonly used in legislation providing for the ordering of retrials. In that context it is "a technical word, and includes [a] technical meaning"¹³³. The expression, although an evaluative one, appears in legislation which assumes that the individual affected is entitled to have proceedings before a court martial conducted in accordance with the law. Because, as with a jury, a reviewing tribunal or an appellate court cannot know, or discover (without impermissible invasion of the privacy of the court martial's deliberations¹³⁴) precisely how the members voted and in what order, it is mere speculation to cogitate upon the impact (if any) which the particular misdirection had in fact on the decision of this court martial. The Tribunal, and the majority of the Federal Court, thought it likely to have been

131 (1997) 74 FCR 457 at 479; 144 ALR 601 at 622.

132 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 382 per Deane J; *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 511.

133 *Balenzuela v De Gail* (1959) 101 CLR 226 at 233 applying *Holford v Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497 at 526 per Cussen J.

134 cf *United States v Martinez* 17 Military Justice Reporter 916 at 920-921 (1984).

insignificant, having regard to the considerable time spent in deliberation. But there is no way of knowing whether this was so.

- 74 The need to be careful in such cases to avoid usurping the functions of the tribunal of fact and speculating on the basis of inadequate information has been emphasised by this Court¹³⁵. Although there will be occasions where a misdirection amounting to a "material irregularity" will not constitute a "substantial miscarriage of justice" (and such is inherent in the language of s 23(1)(c) of the Appeals Act) such cases will be comparatively rare. They might present themselves where the misdirection is viewed, in the context, as generally favourable to the appellant¹³⁶. Or where, for some other reason, the decision arrived at was legally or factually inevitable or virtually inevitable¹³⁷. Against the background of legal history, and the strict approach conventionally taken to errors of law¹³⁸, the words "substantial miscarriage of justice" in a provision such as s 23 are used in contradistinction to a miscarriage which is *de minimus*. Where the material irregularity concerns a legal misdirection about a matter of procedure which might have affected the outcome of the proceedings that will ordinarily amount to a substantial miscarriage of justice. This is because it is an accepted element of justice in our legal system that trials of serious matters must conform to the law with a high measure of exactitude. It would be quite wrong to distort the language of s 23 of the Appeals Act to require an appellant, in effect, to demonstrate that he or she was innocent or that the material irregularity clearly affected the court martial's decision when this will ordinarily be unknown and unknowable.

135 *Balenzuela v De Gail* (1959) 101 CLR 226 at 236, 244.

136 *Balenzuela v De Gail* (1959) 101 CLR 226 at 233.

137 *Balenzuela v De Gail* (1959) 101 CLR 226 at 242.

138 *Balenzuela v De Gail* (1959) 101 CLR 226 at 244.

Conclusion and orders

- 75 Whilst it is true that there are weaknesses in the assumptions that lie behind r 33, that an order of voting alone can guarantee that all members of a court martial will reach their own independent decision, uninfluenced by considerations of rank, seniority, experience, self-interest or otherwise, the rule is not surplusage. Its long history and the trouble taken to introduce it into the new Australian disciplinary procedures suggest that compliance with it is still considered by the law-makers and by the Defence Forces to be an important obligation of courts martial in this country. So does the administrative character of a court martial and the large powers it enjoys over the liberty and reputation of citizens who happen to be members of the Defence Forces.
- 76 The members of the present court martial were entitled to accurate instruction by the Judge Advocate on the requirements of r 33. The mistake which occurred was a material irregularity. Because it is impossible to know whether the erroneous direction influenced the deliberations of the court martial and because the convictions of the appellant were neither legally nor factually inevitable, the irregularity amounted to a substantial miscarriage of justice in this case. Accordingly, both elements of s 23(1)(c) of the Appeals Act were established. The Tribunal ought to have allowed the appeal and quashed the convictions of the appellant. The Federal Court, in the appeal to it, ought to have so decided¹³⁹.
- 77 Initially, the appellant asked that an order of acquittal be entered. In a case where an appeal is allowed and convictions quashed on the basis of a material irregularity constituted by a misdirection, the order that is usually appropriate is one requiring a retrial free of the identified error. However, the Court was informed that the appellant is no longer a serving member of the Army. The prosecuting authorities may wish to consider this fact, the burdens of a retrial on the complainant and the costs and utility thereof. The respondent asked that the matter be returned to the Tribunal to make such orders as are appropriate, after hearing the parties. This is what should be ordered. I did not take the appellant ultimately to disagree.
- 78 The appeal should be allowed. The orders of the Federal Court of Australia should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be allowed; the convictions of the appellant quashed; and the matter returned

139 A similar conclusion was reached in a United States Court of Military Review where it was established that the president of a court martial had proceeded to an oral rather than a secret written ballot. The Court found that the accused was deprived of a substantial right which warranted the setting aside of the findings and sentence: *United States v Martinez* 17 Military Justice Reporter 916 at 921 (1984).

33.

to the Tribunal for such orders as are appropriate, conformably with the decision of this Court.

79 HAYNE J. The circumstances giving rise to this appeal are set out in the reasons of other members of the Court and I do not repeat them.

80 The language of s 23(1)(c) of the *Defence Force Discipline Appeals Act* 1955 (Cth) ("the Appeals Act")

"that there was a material irregularity in the course of the proceedings ... and that a substantial miscarriage of justice has occurred"

is similar to the language found in provisions governing appeals to the Court of Appeal, Criminal Division, for England and Wales between 1966 and 1995. Section 2(1)(c) of the *Criminal Appeal Act* 1968 (UK) ("the 1968 Act") provided that

"(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think -

...

(c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."¹⁴⁰

But, as Gummow and Callinan JJ point out in their reasons for judgment, there are difficulties in attempting to draw analogies between the powers of a court of appeal and the powers of a court, in this case the Federal Court of Australia, exercising original jurisdiction in hearing and determining a question of law involved in the decision of a body which does not exercise judicial power. Such analogies may be apt to mislead.

81 The utility of seeking to draw any analogy between the Appeals Act and the 1968 Act is further affected by two other considerations. First, at the time that s 23(1)(c) was enacted in its present form¹⁴¹, it had not been determined authoritatively how the Court of Appeal, Criminal Division should apply the

140 Section 2 of the 1968 Act consolidated amendments made to the *Criminal Appeal Act* 1907 (UK) by s 4 of the *Criminal Appeal Act* 1966 (UK). The *Criminal Appeal Act* 1995 (UK) repealed s 2(1) and substituted a new sub-section with effect from 1 January 1996.

141 The present form of the provision was introduced into the Appeals Act by the *Defence Force (Miscellaneous Provisions) Act* 1982 (Cth) with effect from 3 July 1985.

proviso to s 2(1) of the 1968 Act in cases of material irregularity¹⁴². And even with the benefit of later decisions, I doubt whether the 1968 Act provides useful guidance in construing s 23(1)(c) of the Appeals Act.

82 Secondly, it will be noted that the proviso to the 1968 Act speaks of "miscarriage of justice" rather than "substantial miscarriage of justice". The proviso to s 4 of the *Criminal Appeal Act* 1907 (UK) had used the expression "substantial miscarriage of justice" but the Donovan Report¹⁴³ suggested the deletion of the word "substantial" because it seemed to the committee "to be devoid of practical significance"¹⁴⁴.

83 However this may be, the language of criminal appeal statutes in this country is different again. Those statutes¹⁴⁵ use language similar to the *Criminal Appeal Act* 1907 (UK). Drawing analogies from those statutes is, then, even more difficult.

84 I do not think it necessary, in deciding this case, to attempt to explore the relationship between the proviso to criminal appeal statutes in this country and the grounds which the proviso qualifies. Nor do I think it necessary to attempt to define the relationship between the two elements of s 23(1)(c) of the Appeals Act. There was a material irregularity in the course of the proceedings of the appellant's court martial. For the reasons given by Gummow and Callinan JJ, a substantial miscarriage of justice occurred. The appeal should be allowed.

142 cf *DPP v Shannon* [1975] AC 717 at 756-757, 762, 773; *R v Rose* [1982] AC 822 at 833; *R v Preston* (1992) 95 Cr App R 355 at 381-382 (CA); [1994] 2 AC 130 at 171-172 (HL); *R v Mills* [1997] 3 WLR 458 at 468; [1997] 3 All ER 780 at 790; Buxton, "Miscarriages of Justice and the Court of Appeal", (1993) 109 *Law Quarterly Review* 66 at 69-70.

143 Great Britain, *Report of the Interdepartmental Committee on the Court of Criminal Appeal*, (1965) Cmnd 2755 ("the Donovan Report").

144 Donovan Report, at par 164.

145 *Criminal Appeal Act* 1912 (NSW), s 6; *Crimes Act* 1958 (Vic), s 568; *Criminal Law Consolidation Act* 1935 (SA), s 353; *Criminal Code* (Q), s 668E; *Criminal Code* (WA), s 689; *Criminal Code* (Tas), s 402; *Criminal Code* (NT), s 411.

