

TRANSCRIPT OF PROCEEDINGS
PRE-TRIAL DIRECTIONS HEARING VIA TELECONFERENCE
MONDAY 29 AUGUST 2011
COL P.J. MORRISON, Judge Advocate
ACCUSED: Army LTCOL M

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**TRANSCRIPT OF PROCEEDINGS
TRANSCRIPT-IN-CONFIDENCE**

AUSTRALIAN DEFENCE FORCE

CANBERRA

PRE-TRIAL DIRECTIONS HEARING VIA TELECONFERENCE

COL P J MORRISON, Judge Advocate

**LTCOL T BERKLEY, with SQNLDR J LIDDY, Prosecutor
CAPT T HOYLE, with COL M GRIFFIN, Defending Officer
MR T BEGBIE, with MR MELICAN, for the Commonwealth**

ACCUSED: Army LTCOL M

1024 MONDAY, 29 AUGUST 2011

TRANSCRIPT VERIFICATION

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and accurate

 31 Aug 2011
Signed..... Date(Judge Advocate)


Signed..... Date29/08/11.....(Transcriber)


Signed..... Date29/08/11.....(Transcriber)

EXHIBIT LIST

Date: 29/08/11

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JUDGE ADVOCATE: This is COL Morrison. I declare the proceedings open. Before we proceed, I've been given notice of the orders which are going to be sought by the Commonwealth. To avoid rendering the Commonwealth's application meaningless, I direct that in these proceedings, and until further order, the accused be referred to as LTCOL M. Having said that, can I ask counsel to announce their appearances, please.

PROSECUTOR: Yes, sir, LTCOL Tom Berkley to prosecute, with SQNLDR Liddy. If the court pleases.

DEFENDING OFFICER: Mr Judge Advocate, CAPT Tim Hoyle with COL Michael Griffin for the accused.

JUDGE ADVOCATE: Yes.

MR BEGBIE: If it please you Judge Advocate, Tim Begbie for the Commonwealth instructed by Peter Melican from Australian Government Solicitor and with two Commonwealth instructing officers in the room as well.

JUDGE ADVOCATE: Yes. Do we have LTCOL M on the line?

ACCUSED: Yes, you do.

JUDGE ADVOCATE: That is LTCOL Berkley for the prosecution, CAPT Hoyle for the defence, Mr Begbie for the Commonwealth and I heard then from LTCOL M. Can I just check with each of you, please, that you could hear each other.

PROSECUTOR: Yes, from the prosecution point of view, we've got a good connection.

DEFENDING OFFICER: And from our perspective, we can hear quite clearly. I can indicate that it is only COL Griffin and myself that are in this room.

MR BEGBIE: Yes, the Commonwealth can hear fine, thanks.

JUDGE ADVOCATE: And LTCOL M, you could hear all those parties?

ACCUSED: Yes, I can.

CMDR LUXTON: Sir, I should mention CMDR Luxton, I'm here on behalf of the Registrar.

JUDGE ADVOCATE: Yes. I was going to place that on the record, CMDR Luxton. CMDR Bob Luxton is the acting Deputy Registrar and he's on the line from Brisbane on the basis that some administrative action may be necessary from the office of the registry. All parties can hear one another and that seems to me to satisfy the technical pre-conditions for the holding of the hearing by audio link. Does anybody want to be heard or is there any objection to that interim direction that I made about the accused being referred to as LTCOL M?

PROSECUTOR: No objection from the prosecution.

DEFENDING OFFICER: The defence has no objection; we support that.

MR BEGBIE: The Commonwealth obviously supports that.

JUDGE ADVOCATE: Thank you. Let me record at the outset that the hearing is taking place by way of an audio telephone link pursuant to a direction given by me under section 148B of the Defence Force Discipline Act and, as you all are aware, the proceedings are being recorded. At the outset I just want to identify the applications that are going to be dealt with today. I don't want to hear from you in connection with them at this stage, I just want to make sure that I understand what they are.

Now, the prosecution, as I understand it, intends to seek leave under rule 12 to withdraw the charge sheet. Is that correct, LTCOL Berkley?

PROSECUTOR: That's correct, sir.

JUDGE ADVOCATE: And that's not opposed, CAPT Hoyle?

DEFENDING OFFICER: No, but I wish to be heard about that.

JUDGE ADVOCATE: Yes. And the Commonwealth has no interest in that application, Mr Begbie?

MR BEGBIE: No, it doesn't.

JUDGE ADVOCATE: The other application of which I've been given advance notice is that the Commonwealth intends to make application for certain protective orders. But I've been provided in advance with some material and it's probably best that I identify that now for the record. I've got a one-page document headed "Protective Orders Sought by the Commonwealth" which lists the orders sought. I'll mark that for identification purposes as MFI 1.

#MFI 1 - ONE-PAGE DOCUMENT HEADED "PROTECTIVE ORDERS SOUGHT BY THE COMMONWEALTH"

5

JUDGE ADVOCATE: I've also received an affidavit by AM Mark Donald Binskin, who's Vice Chief of the Defence Force, which I'll mark for identification purposes as MFI 2.

10

#MFI 2 - AFFIDAVIT BY AM MARK DONALD BINSKIN

15 JUDGE ADVOCATE: Lastly, I've received an 11-page document titled "Commonwealth Submissions in Relation to the Making of Protective Orders" which I'll mark for identification as MFI 3.

20 **#MFI 3 - 11-PAGE DOCUMENT TITLED "COMMONWEALTH SUBMISSIONS IN RELATION TO THE MAKING OF PROTECTIVE ORDERS"**

25 JUDGE ADVOCATE: Now, can prosecution and defence confirm for me that they've also received that material?

PROSECUTOR: Yes, from the prosecution point of view, we've received it, read it and understand it.

30

DEFENDING OFFICER: Thank you very much. The defence also have been supplied that material.

35 JUDGE ADVOCATE: Thank you. Mr Begbie, I understand that another copy of the submissions was made available to the registry late on Friday and I only saw it this morning. I see that it's signed. Does it differ in any way from the material that was received last week?

40 MR BEGBIE: No, it doesn't at all. It's only a signed copy really for the formal records.

45 JUDGE ADVOCATE: It's the signed copy then that I'll mark for identification purposes as MFI 3. Now, there was a matter which I had caused the Registrar to raise in his communications with counsel, and that's the question of the publication of the transcript. That's a matter, as I

said, that I raised of my own volition. When I had given the direction that this hearing take place by way of telephone audio link, it was on the basis that the orders sought were unopposed. But since I made that direction I've been informed that there's a proposal by the prosecution that the orders sought by the Commonwealth extend to no publication of the proceedings. Is that the case, LTCOL Berkley, that the prosecution seeks that?

PROSECUTOR: Yes, it's not something that we're going to get, I suppose, put too heavily. We always had (indistinct) the opinion that most of this was going to be done in camera anyway, that is, the whole proceedings.

JUDGE ADVOCATE: The point is, though, it was your proposal that the Commonwealth's application extend to that. Is that the point you're making?

PROSECUTOR: Yes.

JUDGE ADVOCATE: It's a matter for the Commonwealth of course what orders it seeks. What do you have to say in relation to that, Mr Begbie?

MR BEGBIE: We certainly do not seek an order of that kind. The only orders we seek are those set out in MFI 1. I haven't heard from the prosecution as to the basis for a broad protective order keeping the entirety of the directions hearing confidential, but I can say that, from the Commonwealth's point of view, there is no defence or security reason why the transcript of these proceedings ought not be made public.

JUDGE ADVOCATE: Was your proposal, LTCOL Berkley, on the basis of national defence or security interest?

PROSECUTOR: Indirectly. The basis of the proposal is simply this: that we will be applying – and I take it there'll be no objection to it – to withdraw the charge sheet. In other words, the proceedings will be finished in their entirety. And that one way to protect the identity – we say that these proceedings, because there's nothing substantial going to be done in them, is just to order that they not be disclosed. It's a simple matter that we thought would be the easiest way that covers the Commonwealth's concerns and, in any event, wouldn't affect anyone. So that's the only reason.

JUDGE ADVOCATE: It seems to me that your proposal is based on defence and security interests.

PROSECUTOR: There's (indistinct) more as a practical matter incidental to those interests. I mean, the Commonwealth has identified the defence and security interests; we offer no objection to it. We just say well, why
5 not make the entire proceedings, since they are interlocutory or ancillary proceedings at the most, just prevent the publication of any part of it.

JUDGE ADVOCATE: The Commonwealth of course being separately represented, I expect it's open for any party to raise issues of defence or
10 security interests. Where the Commonwealth is separately represented and the Commonwealth does not pursue that, it's fatal to any application, LTCOL Berkley, is it not?

PROSECUTOR: Yes, if the court pleases. This is an indication we made.
15 You've raised it. I hadn't raised it in the first instance - it hadn't been raised. There was an indication that we would consent to it and we can't see a reason why any of the proceedings should be published. That's as far as it went. So to that extent, if you rule against me, so be it.

JUDGE ADVOCATE: You've heard my view in relation to it.
20

PROSECUTOR: Yes, sir.

JUDGE ADVOCATE: You've got no other formal application to make in
25 connection with that?

PROSECUTOR: No, sir, that's right.

JUDGE ADVOCATE: Now, I'll indicate to counsel what I had in mind
30 in relation to publication and I'll invite your submissions on it. By way of background, I'm aware that Defence has appointed COL Coward into a role in connection with these proceedings which includes media liaison. So the direction on which I'll seek submissions is a direction that the Registrar arrange via COL Coward for the publication of a transcript of
35 this telephone audio link hearing, such transcript to be redacted to give effect to any pseudonym and protected identity orders which may be made.

So when I hear from you in relation to the Commonwealth's application,
40 I'd also like to hear from you in relation to that proposal for that direction. Might I say also that I'd like to hear from you on whether the direction should be extended to include the material filed by the Commonwealth, including the affidavit of AM Binskin. I notice that no security classification attaches to that. So I'd like to hear from you in connection
45 with that as well. Are they the only applications that I have before me for

the hearing today?

PROSECUTOR: As far as I'm concerned, yes, sir.

5 DEFENDING OFFICER: As far as we're aware from the defence, we're not aware of any other applications.

MR BEGBIE: We certainly have no others from the Commonwealth's side.

10 JUDGE ADVOCATE: I'll deal then with the Commonwealth's application for the protective orders. As I said, I'd like to hear from you in relation to the proposed direction about publications and then I'll deal with the leave to withdraw. So your application, Mr Begbie, you formally
15 tender that affidavit by VCDF?

MR BEGBIE: Yes, that's so.

JUDGE ADVOCATE: No objection to that, gentlemen?
20

PROSECUTOR: No objection from the prosecution.

DEFENDING OFFICER: No objection.

25 JUDGE ADVOCATE: The affidavit of AM Mark Donald Binskin then becomes exhibit A.

30 **#EXHIBIT A - AFFIDAVIT OF AM MARK DONALD BINSKIN**

JUDGE ADVOCATE: Is there any other evidence from the Commonwealth, Mr Begbie?

35 MR BEGBIE: No, there's not, sir.

JUDGE ADVOCATE: No evidence put before me by either prosecution or defence?

40 PROSECUTOR: Nothing from the prosecution.

DEFENDING OFFICER: None from the defence.

45 JUDGE ADVOCATE: Mr Begbie, when I looked at the order that was actually being sought – this is in relation to the second order, the protected

identity order – it struck me that the order sought didn't actually follow the wording of the legislation; the wording of section 140 I'm talking about there. This point I'm about to make occurred to me when I looked at quite what meaning might be given to the words "in the proceedings" in the order that you seek.

But in the course of that it occurred to me that the order might be better structured in this way: that is, by saying that there be no publication of any report of or relating to the proceedings which (a) reveals the name and (b) otherwise permits identification. Do you see the change that I'm suggesting there?

MR BEGBIE: Yes, I do.

JUDGE ADVOCATE: That would have the effect of following the terms of the statute, of section 140.

MR BEGBIE: That's so, and we would not object to that change. It would be a slightly broader order than the one we sought. Just to explain the thinking behind the wording which we proposed, we were endeavouring to confine the order to as narrow a scope as was necessary to protect the interests outlined in the VCDF's affidavit. But certainly the order which you now propose, Judge Advocate, would be in accordance with section 140 and would allay any concerns.

JUDGE ADVOCATE: I raise it because when I looked at the order that was sought a question mark rose in my mind as to what meaning was to be attached to the term "information in the proceedings." I thought that any uncertainty about that was perhaps best removed by simply following the wording of section 140.

MR BEGBIE: We're certainly comfortable with that.

JUDGE ADVOCATE: Now, do you have any submissions to make in addition to what's contained in the affidavit, exhibit A?

MR BEGBIE: No, we don't. Of course, if there are submissions from other people, we may seek to respond to those but certainly the submissions in-chief, as it were, are those set out in our written outline.

JUDGE ADVOCATE: You raise in your submissions an interesting question I think in relation to section 140 and section 148. When I've dealt with these applications before the legislative basis relied upon has only ever been section 140. I noticed when I look to section 148 that it appears to impose a different test to that imposed by section 140.

MR BEGBIE: Yes.

5 JUDGE ADVOCATE: It uses the expression where the decision-maker considers that a publication would be inappropriate as opposed to the test of necessity which appears in section 140. What do you say in relation to that? Do you say it is a different test with an apparently lower threshold?

10 MR BEGBIE: It's difficult to read the legislation in any other way we say. So yes, it would appear to be a lower threshold. The way in which we think those two sections might be reconciled is that section 140 is primarily directed to the conduct of hearings in public, whereas the record itself may encompass in some cases the same things as what happens in public, it may also have some different things. So as soon as you're
15 talking about a part of the proceedings which would be expected to be in public by reason of section 140(1), the stricter test applies, whereas section 148 does have an easier test, if you like. But the subject matter to which it's applied may not always be the same as the subject matter to which section 140(2) is applied. That may not be a perfect reconciliation
20 of the provisions, but - - -

JUDGE ADVOCATE: It's difficult to see how they could be read together otherwise, isn't it?

25 MR BEGBIE: Yes, that's right, and they are certainly quite different tests to be applied. I mean, inappropriate is quite clearly a more relaxed test from the necessary test in 140. That's why our submissions have proceeded, as it were, on the basis that we would seek to satisfy you that the stronger test of necessity, whether it be referable to section 140 or
30 referable to the implied power, that test is satisfied.

JUDGE ADVOCATE: What do you have to say about publication of the transcript and, in particular, any publication order extending to the material which you have filed, including the affidavit by AM Binskin?
35

MR BEGBIE: In relation to the transcript, we have no objection at all to the direction as by you a short time ago, Judge Advocate. We anticipate that it would be most unlikely we would seek to redact anything given that the hearing is conducted on an open telephone line and the direction has
40 already been made with respect to using LTCOL M to describe the accused. So we've got no objection at all to that direction.

Similarly, in relation to the publication of the material we have relied upon, we very much proceeded on the expectation that that material would
45 be made public. So we have no objection to that direction either.

JUDGE ADVOCATE: Thank you for that. Nothing further then, Mr Begbie?

5 MR BEGBIE: No, thank you.

JUDGE ADVOCATE: LTCOL Berkley.

10 PROSECUTOR: No, sir, you've ruled against me already. So I've got nothing further to say.

JUDGE ADVOCATE: CAPT Hoyle?

15 DEFENDING OFFICER: Mr Judge Advocate, we support the Commonwealth's proposed orders, given the amendment that has been suggested, including that amendment, and don't wish to argue to the contrary.

20 JUDGE ADVOCATE: And nothing to say about the publication extending to the material filed on behalf of the Commonwealth?

PROSECUTOR: Not me, sir, no.

25 DEFENDING OFFICER: I'm sorry, Mr Judge Advocate, I was distracted there.

JUDGE ADVOCATE: And nothing to say in particular about that direction on publication extending to the material filed on behalf of the Commonwealth.

30 DEFENDING OFFICER: No, sir.

JUDGE ADVOCATE: I've concluded that the orders sought should be made subject to the amendment which I have suggested to the Commonwealth and I'll give my reasons for that.

40 The application that has been made is for a pseudonym order for the accused and for an order that there be no publication of identifying information in relation to him and I'll refer to the second of those things as the protected identity order. Counsel for the accused consents to the making of the orders sought and the prosecutor does not oppose the making of them.

45 Orders in the nature of those sought are no mere formality. They involve consideration of competing public interest. I am conscious that this

hearing is being conducted by way of telephone audio link and that there has been limited opportunity for appearance by any contradictor. I have been careful, therefore, to closely scrutinise the Commonwealth's submissions and supporting evidence. I have had the advantage of being
5 in possession of the material relied upon by the Commonwealth since Wednesday of last week, for which I am grateful to you, Mr Begbie, and the other members of the Commonwealth team.

10 Section 140 of the DFDA provides that orders may be made excluding members of the public during proceedings. It also provides that an order may be made that no report be published of or relating to the whole or a specified part of the proceedings. Section 148 goes on to provide that an order may be made that the whole or a specified part of a record of proceedings not be published. Both section 140 and section 148 give the
15 power to make the orders referred to in them to the President of a court martial. Those powers can be exercised by me under section 135 when sitting without the members of the court martial, to the extent that it is necessary to do so to perform my duties.

20 The test to be applied before an order may be made differs as between section 140 and section 148. Section 140 requires that an order be necessary in the interests of the security or defence of Australia for proper administration of justice or public morals. Section 148, on the other hand, requires that the decision-maker considers publication would be
25 inappropriate, taking into account the interests of the security or defence of Australia, the proper administration of justice, public morals or any other matter considered relevant.

30 On the face of the matter the threshold for making of an order under section 148 is lower and that gives rise to a question as to how section 140 and section 148 are to be read together. Nothing turns on that for present purposes given the conclusions that I have reached.

35 Whilst the making of the non-publication order is expressly authorised under section 140 or under section 148, there is no express statutory authority for the making of a pseudonym order, however, the existence of an implied power to do so is not controversial. It arises by implication because the grant of the express power to try service offences, carries with it everything necessary for the proper exercise of that power.
40

In the circumstances here I have concluded that there is no relevant difference between the test to be applied to the exercise of the implied power to make a pseudonym order and that for the exercise for the express power under section 140.
45

I am satisfied that no question arises as to whether the accused can receive a fair trial if the orders sought are made and my considerations are limited to balancing the principles of open justice against the defence and security interests which I have already mentioned.

5

There is a public interest in both of those things - that is to say, a public interest in favour of disclosure on the basis of open justice and a public interest in favour of non-disclosure on the basis of the security and defence of Australia.

10

The principle of open justice is recognised as fundamentally important in the administration of justice and is not lightly interfered with.

15

Putting aside for one moment the question of whether section 148 imposes some different test, the making of the pseudonym order and the protected identity order both require the applicant to satisfy me that such an order is necessary in the interests of the security or the defence of Australia.

20

In support of this application, the Commonwealth has filed an affidavit by AM Mark Binskin, the Vice Chief of the Defence Force. In his affidavit the VCDF refers to the arrangements in place within Defence to protect the identity of all members of Special Forces. He goes on to express the view that the public disclosure of identifying information in relation to the accused would give rise to a real risk of serious prejudice to defence and security. The affidavit is unclassified and, as a result, is limited in its details but nothing turns on that given the conclusion I have reached on what it does contain.

25

30

The risks identified by the VCDF can be summarised as follows. First: the risk of harm to the accused and to his family. This is said to arise both generally because members of Special Forces are known to be at the forefront of activities against extremism and also specifically in the case of this accused because of the publicity surrounding his association with an incident in Afghanistan resulting in civilian deaths.

35

40

The latter is said to increase the risk of retributive action against the accused by extremist sympathisers. In support of this assertion, VCDF deposes as to certain incidents of harassment and intimidation directed to the families of members of Special Forces who have been killed in the line of duty in Afghanistan.

45

Secondly, VCDF deposes as to a risk of compromise of sensitive information. This is said to arise because members of Special Forces, by virtue of their positions, have an understanding of and access to sensitive information and that a risk of disclosure would flow from disclosure of

their identities. There is nothing in the affidavit directed specifically to the situation of the accused.

5 Further, there is said to be a risk of what is described as the loss of ongoing capacity. It is said to arise because if there is publication of the identity of Special Forces personnel, they would no longer be able to perform certain duties. I assume that to be a reference to some forms of undercover operations but I stress that I draw that inference only from my reading of the affidavit and not from any special knowledge I have of the activities of Special Forces.

10 Again, nothing in the affidavit is directed specifically to the situation of the accused.

15 In accordance with settled legal principles I am required to, and I have given, significant weight to the views expressed by the Vice Chief of the Defence Force as to what is required in the interests of defence and security because of his experience and position. Of course, that is not something unique to Defence; the same principles apply in civilian courts to an opinion expressed by a senior civilian security executive.

20 Having regard to the evidence in the affidavit of the VCDF and, in particular, what is said about the risk of harm to the accused and his family, I have concluded that it is necessary in the interests of the security or defence of Australia to make the orders sought. That conclusion requires me to find that it is necessary in the interests of the security or defence of Australia to reduce the risk of harm to the accused and to his family by making the orders sought, and I so find.

25 In reaching that conclusion I am conscious of the fact that, whilst the public interest in the identification of an accused is generally seen as greater than that in the identification of, for example, a witness, it would be unrealistic for me not to take into account that an unopposed application to withdraw the charge sheet is to be made. If that application is granted there are no charges against the accused and in my opinion the weight attached to consideration of the public's right to know the identity of an accused is much lessened in the circumstances where withdrawal of all charges is contemplated.

30 I also recognise that the orders sought are of a type described as amounting to a minimalist interference with the principle of open justice. That description has been applied because in most cases the making of pseudonym and protected identity orders still leaves what takes place in court open to public scrutiny. In this case I am mindful that these proceedings are taking place by way of telephone audio link and that has

influenced the conclusion I have reached in relation to the publication of the transcript of the proceeding which is something that I will come back to shortly.

5 The orders that I make on the Commonwealth's application are as follows: first, for the purposes of the proceedings, the accused be referred to as LTCOL M; secondly, that there be no publication of any report of or relating to the proceeding which (a) reveals the name or contact details of
10 LTCOL M, or (b) may otherwise permit the identification of LTCOL M.

10 That takes me back to the issue of the publication of the transcript of the proceedings. No application is before me about publication but I indicated to counsel that I was minded of my own volition to consider publication of it. I made that suggestion mindful of the open justice principle and the
15 fact that the hearing is being conducted by way of telephone audio link.

The direction on which I sought submissions is to the effect that I direct the Registrar to arrange, via COL Coward, for the publication and the transcript of this telephone audio link hearing; such transcript to be
20 redacted if necessary to give effect to the pseudonym and non-publication orders which have been made. I am mindful of the fact that the conduct of the hearing by telephone audio link, by its very nature, limits public scrutiny.

25 I am aware that the accused had originally expressed a preference to have the matter dealt with by way of an in-person hearing and that he sought to be excused from attendance at the in-person hearing. He was advised by the Registrar that there was no power to excuse his attendance because of the mandatory provisions of section 139 of the Act.

30 I have some sympathy for the position of the accused about that. I would also prefer that the Act allow greater flexibility in those matters but it appears that that flexibility would need to be provided by legislative amendment.

35 The making of pseudonym-type orders are generally regarded as having a minimalist effect on the principle of open justice because public scrutiny is still possible.

40 Because these proceedings are being conducted by telephone audio link, it is appropriate that I order publication of the transcript and I give the direction referred to earlier, and on which the parties made submissions, and I further direct that the publication extend to the materials filed on behalf of the Commonwealth; that is, the notice of application, the written

submissions made by the Commonwealth and the affidavit of AM Mark Donald Binskin, Vice Chief of the Defence Force.

No clarification required in relation to those things, gentlemen?

5

PROSECUTOR: No, sir.

DEFENDING OFFICER: No, sir.

10 MR BEGBIE: From the Commonwealth's point of view there was one
minor matter if I could raise it, with respect. I'm conscious that the
reasons that have just been given will probably simply be given by way of
the transcript. There was just one point where you referred, Judge
Advocate, to the power when sitting without the members of the court
15 martial to make orders.

JUDGE ADVOCATE: Yes.

20 MR BEGBIE: You referred to section 135 which I took to be an intended
reference to section 134(5)?

JUDGE ADVOCATE: Yes, I think that's correct. If I said that I think
that is what - an example of what would be described in the United States
as mis-speaking, Mr Begbie.

25

MR BEGBIE: Precisely.

JUDGE ADVOCATE: The section is 134(5); thank you for that.

30 MR BEGBIE: Thank you.

JUDGE ADVOCATE: Can I move to the application to withdraw the
charge sheet, LTCOL Berkley?

35 PROSECUTOR: Yes, sir. The application is made and it's unopposed. If
you want to hear me further on it I am prepared to make the application on
the basis that there is further evidence received; some different evidence
received. The Director has now reviewed the decision to prosecute in
light of her policy and has requested me to apply that the charge sheet be
40 withdrawn.

JUDGE ADVOCATE: All right. The defence position in relation to that,
CAPT Hoyle?

5 DEFENDING OFFICER: Judge Advocate, we submit that this is a proper application which is substantiated by evidence from senior operational commanders with national and ISAF experience, who have opined that the planning approvals for the operation complied with international and domestic military law; therefore, the accused does not oppose the application and submits it ought to be granted.

10 JUDGE ADVOCATE: The Commonwealth has no interest in this application, Mr Begbie?

MR BEGBIE: No.

15 JUDGE ADVOCATE: Rule 12 of the Court Martial and Defence Force Magistrates Rules deals with withdrawal before arraignment. Withdrawal may be of a charge or of a charge sheet. It requires the permission of the court martial. Again, under section DFDA 134(5) a judge advocate, when sitting without members of the court, may exercise the powers of the court martial.

20 Rule 12 does not specify any criteria to be applied in determining how the decision-making discretion conferred by it is to be exercised. The process in a civilian jurisdiction which is equivalent to the withdrawal of charges is that of the entry by the Crown Prosecutor of a nolle prosequi. In those civilian jurisdictions where the entry of a nolle prosequi may be refused by the court, the authorities are to the effect that the proffer of a nolle prosequi is only refused in exceptional cases.

30 In the present case the accused is represented by experienced counsel who informs me that the accused does not oppose the making of the application. In the circumstances there is no call for me to enquire beyond the making of the application and the advice that it is not opposed.

35 I grant the application and allow the withdrawal of the charge sheet under rule 12.

40 I will just address a comment to LTCOL M. Lieutenant Colonel, the result of the permission I've just given is that the charge sheet against you is withdrawn so that there are now no longer any charges against you. Do you understand that?

ACCUSED: Yes, I do.

45 JUDGE ADVOCATE: What follows from the withdrawal of the charge sheet would normally just be dealt with administratively by the Registrar. The court martial is not assembled and so there's no question of any order

being made to dissolve it. The convening order was made by the Registrar and the administrative processes from here are that it's the Registrar who would normally revoke that order.

5 I would have the power to formally vacate the hearing date which has been set and I should probably do that immediately to enable arrangements to be made to call off the formal trial proceedings. Do any of you have anything to say about that or anything further to be dealt with before I close the hearing?

10 PROSECUTOR: Only that it is appropriate to vacate the hearing date.

JUDGE ADVOCATE: Yes. CAPT Hoyle?

15 DEFENDING OFFICER: We have nothing useful to say.

JUDGE ADVOCATE: Mr Begbie?

20 MR BEGBIE: Yes, nothing from us, sir.

JUDGE ADVOCATE: I formally vacate the hearing date and I formally close this hearing. Good morning.

25 PROSECUTOR: Good morning.

ADJOURNED INDEFINITELY

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