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A Duty to Obey: Australia Trial of David McBride, Whistleblowing and Following Orders

By Dr. Binoy Kampmark
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*The unpardonable, outrageous trial of Australian whistleblower **David McBride** was a brief affair. On November 13, it did not take long for the brutal power of the Commonwealth to become evident. McBride, having disclosed material that formed the Australian public about alleged war crimes by special forces in Afghanistan, was going to be made an example of.*

McBride served as a major in the British army before becoming a lawyer for the Australian Defence Force, serving two tours in Afghanistan over 2011 and 2013. During that time, he gathered material about the culture and operations of Australia's special forces that would ultimately pique the interest of investigators and lead to the Brereton Inquiry which, in 2020, made 36 referrals to the Australian Federal Police related to alleged war crimes.

McBride was subsequently charged with five national security offences. He was also denied immunity from prosecution under the near-unworkable provisions of the *Public Interest Disclosure Act 2013* (Cth).

A central contention of the Crown was that McBride had, first and foremost, a duty to follow orders as a military lawyer. Such a duty flows on from the oath sworn to the sovereign, and no public interest could trump that undertaking. "A soldier," contended Trish McDonald in her astonishing submission, "does not serve the sovereign by promising to do whatever the soldier thinks is in the public interest, even if contrary to the laws made by parliament."

Even a layperson's reading of the oath would surely make a nonsense of this view, but **Justice David Mossop** was in little mood to suggest otherwise. "There is no aspect of duty that allows the accused to act in the public interest contrary to a lawful order." It was a point he would be putting to the jury, effectively excluding any broader public interest considerations that might be at play in disobeying a military order.

For anybody vaguely familiar with military law since the Nuremberg trials of Nazi leaders in 1945, such orders are never absolute, nor to be obeyed without qualification. Following

orders without question or demur in all cases went out – or so the 1945 trials suggested – with Nazi officialdom and the Third Reich. There are cases when a soldier is under a positive duty to *disobey* certain orders. But McDonald was trapped in a fusty pre-Nuremberg world, evidenced by her use of a 19th century authority on military justice that would have sat well with the German defence team: "There is nothing so dangerous to the civil establishment of the state as an undisciplined or reactionary army."

Chief counsel representing McBride, **Stephen Odgers**, hoped to drag Australian military justice into the twenty-first century, reaffirming the wisdom of Nuremberg: there are times when a public duty supersedes and transcends the narrow demands of authority, notably when it comes to the commission or concealment of crimes. The oath McBride swore as a member of the ADF to serve the sovereign comprised an element to act in the public interest, even when opposed to a lawful order.

There being no direct Australian decision on the subject (in itself, a startling fact) McBride's legal team took the matter of duty to the Court of Appeal of the Australian Capital Territory on November 16, hoping to delay the trial and argue the point. **Chief Justice Lucy McCallum** heard the following submission:

> "His only real argument is that what he did was the right thing. There was an order: don't disclose this stuff, but he bled, and did the right thing, to use his language, and the question is does the fact that he's in breach of orders mean that he's in breach of his duty, so that he's got no defence?"

If such an approach was adopted, Odgers went on to state, it "may well mean that the consequence is that he's got no real alternative but to enter pleas of guilty and that would obviously shorten things but he seeks an opportunity to have that critical issue determined by the court of appeal." Were the jury to understand that a public interest test applied in certain cases, they would then work on the "basis that there is a powerful public interest that members of the defence force do obey orders, but circumstances might arise in which that is not in the public interest."

What Justice Mossop was essentially saying was "not that orders are relevant to the question of duty but rather that they trump anything else, so that you must obey". This was irrespective of "how unreasonable or in breach of fundamental principles of justice they may be, and will commit criminal offence if he does not".

Odgers suggested an example elementary but salient. Picture a junior officer, being given a supposedly lawful order to commit what would be seen as a war crime. "Is that junior officer necessarily in breach of his duty? And there's no way that a jury can say no he didn't have a duty to obey that order? That's the implications we say of his honour's decision."

Unfortunately for McBride, McCallum would not be swayed. Mossop's ruling was "not obviously wrong." She did not feel "that there is sufficient doubt about his honour's ruling on either issue to warrant interrupting the trial."

With the trial resuming on November 17, Mossop issued another stinging order: that the Attorney-General's office remove classified documents in McBride's possession that could be presented to the jury at trial. As one of the defence team, Mark Davis, told reporters,

> "We received the decision just this afternoon, which was in essence to remove evidence from the defence." In doing so, "The Crown, the government, was given the authority to bundle up evidence and run out the backdoor with it."

With such gloomy prospects, McBride requested a new indictment on lesser charges, to which he pleaded guilty. Facing sentencing in the new year, he may be eligible to serve time outside carceral conditions, though a decade long stint is also in the offing.

> "The result of today's outcome," wrote transparency advocate and former Senator **Rex Patrick**, "is one brave whistleblower likely behind bars and thousands of prospective whistleblowers lost from the community."

In June this year, Australian **Attorney-General Mark Dreyfus** proudly claimed that

> "the Albanese government has delivered on our promise to the Australian people to strengthen protections for public sector whistleblowers."

Hardly. While modest amendments were made to the unspeakably clumsy *Public Interest Disclosure Act*, including the establishment of a National Anti-Corruption Commission, McBride had little reason to cheer. Dreyfus refused to use Section 71 of the *Judiciary Act 1903* (Cth), which gives the country's chief lawmaker to drop prosecutions against individuals charged with "an indictable offence against the laws of the Commonwealth".

Dreyfus, however, did discontinue the obscene prosecution of former ACT attorney-general Bernard Collaery under that same provision but refrained from exercising that same power regarding McBride and the Australian Tax Office whistleblower, **Richard Boyle**. His reasoning proved strikingly inconsistent: only in "very unusual and exceptional circumstances" could Dreyfus use such discretion. We are on slippery terrain when revealing alleged war crimes is a matter usual and unexceptional.

In McBride's understandably distressed reading of the result, he warned that, in joining the Australian military, you were not "joining a noble profession, just a criminal gang like any other criminal gang: silence and complicity are the touchstones. A judge has made that clear." And, sadly, more besides.

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Dr. Binoy Kampmark *was a Commonwealth Scholar at Selwyn College, Cambridge. He currently lectures at RMIT University. He is a regular contributor to Global Research and Asia-Pacific Research. Email: bkampmark@gmail.com*

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