



## Australian Government

### Defence Honours and Awards Appeals Tribunal

#### **Silver and the Department of Defence re: Murray [2022] DHAAT 14 (25 October 2022)**

File Number	2021/017
Re	<b>Mrs Lynette Silver on behalf of Private Richard Murray (dec.) Applicant</b>
And	<b>The Department of Defence Respondent</b>
<b>Tribunal</b>	Ms Josephine Lumb (Presiding Member) Rear Admiral Allan du Toit AM RAN (Retd) Major General Mark Kelly AO DSC (Retd)
<b>Appearances</b>	Mrs Lynette Silver AM – Applicant Brigadier Mark Bornholt AM (Retd), Army Historical Honours and Awards Reviewing Officer, Directorate of Honours and Awards, Department of Defence
<b>Hearing Date</b>	21 June 2022

#### **DECISION**

On 25 October 2022, the Tribunal decided to recommend to the Minister that:

- a) the decision of the Director General Army People Capability, Brigadier MJK Patching, not to recommend the late Private Richard Murray for a posthumous gallantry award be rejected; and
- b) the Minister should instead recommend to the Governor-General that the late Private Richard Murray should be posthumously awarded the Commendation for Gallantry.

## **CATCHWORDS**

*DEFENCE HONOUR* – Victoria Cross for Australia – Australian Gallantry Decorations – Far East Prisoner of War

## **LEGISLATION**

*Defence Act 1903* – Part VIIIIC – Sections 110T, 110V(1), 110VB(1), 110VB(6)  
*Defence Regulation 2016* Section 35

### **Victoria Cross for Australia**

Commonwealth of Australia Gazette No. S25 dated 4 February 1991, *Victoria Cross Regulations*

### **Australian Gallantry Decorations**

Commonwealth of Australia Gazette No. S25 dated 4 February 1991, *Gallantry Decorations Regulations*

## Introduction

1. The Applicant, Mrs Lynette Silver AM, seeks review of a decision of the Director General Army People Capability, Brigadier MJK Patching, that the late Private Richard Murray should not be recognised with a posthumous Australian Gallantry Decoration for his service as a Far East Prisoner of War in 1945.<sup>1</sup>

2. On 24 September 2017, Mrs Silver, a military historian with particular expertise in the service of the 8th Australian Division in the Second World War, wrote to the then Chief of Army, Lieutenant General Angus Campbell AO DSC seeking an appropriate (posthumous) gallantry award for Private Murray.<sup>2</sup>

3. In summary, Mrs Silver submitted that on 15 May 1945, while a prisoner of war in Borneo, Private Murray and three fellow prisoners stole food from a Japanese store to sustain an escape attempt. On discovery of the theft on 20 May, the Japanese guards threatened to execute the remaining 30 prisoners unless those responsible confessed. Fully aware that it would cost him his life, Private Murray stepped forward and took the entire blame, an action which duly resulted in him being severely beaten, tied to a tree and later executed.

4. Mrs Silver submitted that, in general, she did *'not support the granting of posthumous awards so many years after the event'*. However, whilst working as a consultant military historian on the Tribunal's Inquiry into *Recognition for Far East Prisoners of War who were Killed While Escaping or Following Recapture* (the FEPOW Inquiry), she *'became increasingly uncomfortable in the knowledge that there were at least two Australians<sup>3</sup> who had displayed extreme courage and gallantry... and for whom there has never been any recognition'*. In relation to Private Murray specifically, Mrs Silver sought consideration of *'an appropriate gallantry award'* for his *'extreme courage and gallantry'*.

## Decision under review

5. On 7 September 2021, some four years after Mrs Silver's initial application, Brigadier Patching provided a one page response advising that Private Murray would not be recommended for a posthumous gallantry award. Brigadier Patching advised that the evidence relied on was anecdotal, and that the source of the evidence, the late Private Keith Botterill, *'has been identified as an identified unreliable source in other official documentation'*. Brigadier Patching went on to state that there was *'no evidence of*

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<sup>1</sup> Application for review, 4 November 2021.

<sup>2</sup> Letter, Mrs Lynette Silver to the Chief of Army, 24 September 2017.

<sup>3</sup> The Tribunal understands that a further application from Mrs Silver on behalf of another Far East Prisoner of War remains before Defence for decision.

*maladministration relating to previous decisions that could be deemed unfair or unreasonable, nor is there authoritative and reliable evidence for the actions described.*<sup>4</sup>

6. On 8 September 2021, Mrs Silver responded to Army refuting the assertion that Private Botterill's evidence was unreliable and seeking review of Brigadier Patching's decision. She also submitted further evidence, in the form of a statement from Lance Bombardier William Moxham sworn on 19 November 1945 which corroborated the account of Murray's theft of food, beating and execution.<sup>5</sup>

7. On 29 September 2021, Mrs Silver applied to the Tribunal seeking review of Brigadier Patching's decision of 7 September 2021.<sup>6</sup>

### **Tribunal jurisdiction**

8. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence honour in response to an application. Regulation 35 of the *Defence Regulation 2016* lists the defence honours that may be the subject of a reviewable decision. The Victoria Cross for Australia and the Australian Gallantry Decorations are included in the defence honours listed in Regulation 35. Therefore, the Tribunal has jurisdiction to review decisions in relation to these defence honours.

9. As required by s110VB(6) of the Act, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision. In accordance with s110VB(1) of the Act, as the Applicant seeks a defence honour, the Tribunal does not have the power to affirm or set aside the decision, but may make any recommendations to the Minister that it considers appropriate.

### **Conduct of the review**

10. In accordance with its Procedural Rules, on 6 November 2021, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mrs Silver's application for review.<sup>7</sup> The Tribunal requested a merits-based assessment of Private Murray's actions against the eligibility criteria for a gallantry award and a report on the material questions of fact and reasons for the decision to refuse the original application. The Tribunal also requested that the Secretary provide copies of documentation relied upon in reaching the decision and any other relevant documents.

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<sup>4</sup> Letter, Brigadier MJK Patching to Mrs Silver.

<sup>5</sup> Email, Mrs Silver to AHQ-DGAPC Registry.

<sup>6</sup> Application for Review.

<sup>7</sup> Letter, Tribunal to Secretary, DHAAT/OUT/2021/513, dated 11 November 2021.

11. On 21 December 2021, the Directorate of Honours and Awards in the Department of Defence provided a submission on behalf of Defence.<sup>8</sup> The Defence submission consisted of a report by the Army Historical Honours and Awards Reviewing Officer, Brigadier Mark Bornholt AM (Retd). While this report provided a merits-based assessment of Private Murray's actions, it did not provide copies of the documentation relied on by either Brigadier Patching or Brigadier Bornholt in arriving at their conclusions and recommendations. These were later sourced by the Tribunal Secretariat.<sup>9</sup>

12. The Defence submission was forwarded to Mrs Silver for comment on 4 February 2022. Mrs Silver responded with her comments on 18 February 2022.<sup>10</sup>

13. Prior to the hearing, the Tribunal also wrote to Mrs Silver drawing her attention to the fact that Brigadier Bornholt had previously been a member of the Tribunal whose tenure overlapped with that of Ms Lumb, and that they have a current professional relationship as members of the Veterans' Review Board. Brigadier Bornholt is also known to Rear Admiral du Toit and Major General Kelly through their shared Australian Defence Force service. Those relationships had been declared to the Chair of the Tribunal, who was satisfied that each member would undertake their Tribunal role uninfluenced by their prior knowledge of Brigadier Bornholt. In response, Mrs Silver indicated that she took no issue with the membership of the constituted Tribunal panel.<sup>11</sup>

14. Following the hearing, the Tribunal wrote to Mrs Silver requesting further information in relation to the question of whether stealing food was a capital offence and whether Private Murray would have known that this was the case when he stepped forward to take the blame.<sup>12</sup> In response, Mrs Silver submitted additional information on 11 July 2022.<sup>13</sup> This further material was also provided to Defence, which on 26 July 2022 advised that it had no further comment.<sup>14</sup>

### **Private Murray's service**

15. Private Murray enlisted in the Second Australian Imperial Force in Sydney on 12 August 1940 and, after initial training, was posted in August 1941 to the 8th Australian Division's Mobile Laundry and Forward Decontamination Unit. The following month, the unit sailed for Singapore, arriving on 18 October 1941. On 6 December 1941 Private

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<sup>8</sup> Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2021/0038 dated 21 December 2021

<sup>9</sup> Ibid, Folio 51.

<sup>10</sup> Letter, Mrs Silver to the Tribunal, 18 February 2022.

<sup>11</sup> Telephone conversation, Mrs Silver with Mr Jay Kopplemann, Executive Officer of the Tribunal, 4 June 2022.

<sup>12</sup> Tribunal letter to Mrs Silver dated 4 July 2022.

<sup>13</sup> Letter, Mrs Silver to the Tribunal, 11 July 2022.

<sup>14</sup> Email, Mrs Leigh Rowe on behalf of Defence, 26 July 2022.

Murray was assigned to Headquarters 22nd Infantry Brigade. On the fall of Singapore on 15 February 1942, he became a prisoner of war.<sup>15</sup>

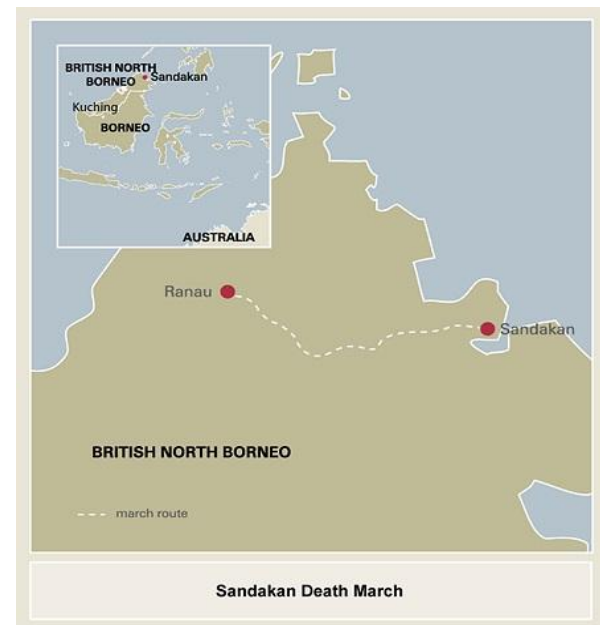
16. Private Murray's service record indicates that he died as a prisoner of war on 20 May 1945 in Borneo.<sup>16</sup> For his service he was posthumously awarded:

- a) the 1939-1945 Star
- b) the Pacific Star
- c) the War Medal 1939-1945; and
- d) the Australia Service Medal 1939-1945.<sup>17</sup>

### **The Sandakan – Ranau death marches**

17. In 1942, prisoners of the Japanese were sent from Singapore to Sandakan in British North Borneo to build an airstrip. The group was known as 'B Force'. In early 1945, with Allied forces advancing towards Borneo, the Japanese sent about 2,000 Australian and British prisoners westward to Ranau, in Borneo's rugged interior, in a series of forced marches.

18. Weak and sick prisoners staggered for about 260 kilometres along jungle tracks. Many died on the way, their bodies never recovered. Those unable to continue were killed; those too weak to march had been left behind in Sandakan, where all died or were killed. Only six prisoners – all Australians – out of about a thousand sent to Ranau survived by escaping into the jungle.



19. The Sandakan death marches remain the greatest single atrocity committed against Australians in war.<sup>18</sup>

<sup>15</sup> Service and Casualty Form, NAA: B883, NX33361, Service Record, Private Richard Murray.

<sup>16</sup> Ibid.

<sup>17</sup> Letter, Central Army Records Office to Mr Frank Murray, 11 November 1993, NAA: B883, NX33361, Service Record, Private Richard Murray.

<sup>18</sup> Website: Australian War Memorial, *Stolen Years: Australian prisoners of war – Sandakan*, accessed 24 March 2022.

## Mrs Silver's submissions

20. As part of her initial application to the Chief of Army received on 26 September 2017, Mrs Silver submitted a case history of Private Murray, in which she described Private Murray's actions in the following terms:

*... In 1941 [Private Murray] sailed for Singapore where he became a prisoner of war on 15 February 1942.*

*In July 1942 he was transferred with B Force to Sandakan, British North Borneo. With him was his mate, the much younger Private Keith Botterill.*

*An excellent boxer, Murray took part in several matches at the camp, until deteriorating conditions and lack of food precluded such activity.*

*On 31 January 1945 Murray and Botterill left Sandakan for Ranau 155 miles (250 kms) distant, with Group 3, on what would later be called the 1st death march.*

*On reaching Mile 84, the group discovered that the only food available to sustain 49 men for four days was four cucumbers and a little tapioca. With the track now traversing difficult mountainous, jungle-covered terrain, Murray emerged as the natural leader of the group, assisting the weak and encouraging the faint hearted. Although several POWs in the party were unable to go on and were shot by the Japanese, Murray and Botterill reached Ranau, and were among 56 still alive at the end of April.*

*On 15 May, in preparation for an escape attempt, Murray, Botterill and two other prisoners stole a bag of rice from a Japanese store. They distributed some to the sick and hid the rest, until an opportune time came for their departure. However, five days later the theft was discovered. On 20 May the guards lined up the 30 remaining prisoners and threatened to kill them all unless the culprits owned up. As every POW knew, stealing food was a capital offence.*

*Fully aware that it would cost him his life, Private Murray stepped forward and took the entire blame. After a terrible beating, he was tied to a tree. About an hour later Botterill observed Murray being moved at bayonet point along a track towards the old POW cemetery.*

*Botterill's worst fears were realized when the guards returned without Murray, wiping the blades of their bayonets on the grass and boasting that they had blooded them on the prisoner. It was not until 1946 that Murray's execution was confirmed, by a 'stool pigeon' placed in a cell with Japanese*

*suspects –he had been bayoneted to death and his body tossed into a bomb crater.*

*In 1996, using this information and excellent records kept by the war graves recovery team, it was possible to trace the lone, unidentified body recovered from the bomb crater in 1946 and reburied in Labuan War Cemetery as ‘unknown’. Private Murray lies in Plot 21, Row E, Grave 7.*

*His epitaph tells the story in just ten words - ‘He stepped forward to sacrifice his life for his mates’.*

*Private Murray was the only prisoner out of the 2,428 who died at Sandakan or on the marches to voluntarily surrender his life. He was 30 years old.*

*His bravery in selflessly and deliberately sacrificing his life for his mates has never been recognized.<sup>19</sup>*

21. On 8 September 2021, Mrs Silver responded to Brigadier Patching’s decision dated 7 September 2021 refuting the assertion that Private Botterill’s evidence was unreliable. She also provided further evidence, in the form of a statement from Lance Bombardier William Moxham sworn on 19 November 1945 which corroborated the account of Murray’s theft of food, beating and execution.

*‘Murray was killed in the camp where the 46 of us were. I saw the Jap guards take him away. The Englishmen were working in the Jap cookhouse – the Jap guards belted Murray in one place, in front of them for half an hour, and then took him before fixed bayonets past the Englishmen, who saw them bayonet him. He was punished for stealing food – he had gone to a rice dump outside the camp. He was one of four who got out of the camp one night to steal the food. The other three kept their stuff outside, but Murray brought his stuff into the camp and put it under the hut, which was raised just one foot or so off the ground.*

*One of the guards saw the white bag in the morning, with biscuits in; the guard picked it up, went and brought another guard, and then they found the rice.*

*Everybody was paraded, and Murray stepped forward and took the whole blame. The same day he was taken away, and it was later that these Englishmen saw him bayoneted.<sup>20</sup>*

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<sup>19</sup> Letter, Mrs Silver to the Chief of Army, undated, received 26 September 2017.

<sup>20</sup> Email, Mrs Silver to AHQ-DGAPC Registry.



22. Following the hearing, the Tribunal requested further information from Mrs Silver in relation to whether the theft of food was a capital offence, and whether Private Murray could be assumed to have known this at the time he stepped forward and confessed. In her response dated 11 July 2022, Mrs Silver provided a detailed submission in support of her contention that theft of food was indeed a capital offence and that this fact was well known by prisoners in Ranau, including Private Murray.<sup>21</sup>

### **Defence's submission**

23. Defence's most recent position on this matter is set out in its submission of 21 December 2021. In this submission, Defence acknowledged the corroborating evidence of Lance Bombadier Moxham, submitted by Mrs Silver following receipt of Brigadier Patching's decision, and addressed the issue of the alleged unreliability of Private Botterill's evidence:

*'[Mrs Silver's] account of the execution of Private Murray is consistent with her application and accords with the statement provided by Lance Bombadier Moxham'. 'There is little doubt that she draws heavily on the evidence provided to her by Private Botterill many years later and, in my view and contrary to the reasons given by the decision maker, the evidence as it relates to the execution is reliable, corroborated and cannot be considered to be anecdotal'*<sup>22</sup>

24. Whilst conceding that the evidence specifically as it relates to Private Murray's execution is reliable and corroborated, more broadly in relation to substantive findings of fact, the Defence submission emphasises the significant evidentiary difficulties having regard to the passage of time. In Defence's view, the only relevant findings of fact are as follows:

- a) relying on the service record, and eye witness accounts, Private Murray's official cause of death was 'Executed (Prisoner of War); and
- b) relying on Lance Bombadier Moxham's statement and Private Botterill's evidence, Private Murray was one of four involved in stealing food and accepted responsibility for the theft.<sup>23</sup>

25. Defence submits that the key question in whether the act of accepting responsibility for the theft can be considered to be an act of 'gallantry' is the question of *why* he took the decision to step forward and confess to the stealing of food. According to Defence, this will now never be known.

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<sup>21</sup> Mrs Silver's submission dated 11 July 2022.

<sup>22</sup> Report by Brigadier M.D. Bornholt (Retd).

<sup>23</sup> Ibid.

26. Defence has submitted that Mrs Silver's assertion that Private Murray's confession was made to save his mates is based on speculation and not supported by evidence. Defence further submitted that even if one were to accept the speculation, a question still exists about whether the actions can be considered to be 'gallant'.

27. Having regard to principles previously adopted by the Tribunal in its consideration of gallantry cases (see below), Defence submitted that it could not argue that Murray was doing what was expected of him, nor could it identify that what he did demonstrated a higher standard of conduct than bravery. Defence also submitted that there is no evidence that his actions demonstrated a special and additional element of courage, fearlessness, daring or heroism and that in the absence of evidence, it would be 'purely speculative' to make such a finding.

28. Defence further submitted that to support retrospective recognition of Private Murray, one of hundreds, if not thousands, of prisoners of war executed, killed, or neglected to the point of death, without significant evidence and based predominantly on speculation would undermine the integrity of the honours and awards system, which relies upon consistency and adherence to strong principles in decision making.<sup>24</sup>

### **The Australian Gallantry Decorations**

29. **Contemporary Gallantry Awards.** Australian service personnel received honours and awards under the Imperial system until February 1975 when the Government introduced the Australian system. The two systems – the Imperial and the Australian; then operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards.<sup>25</sup> This means that only contemporary decorations may be considered. The eligibility criteria for gallantry awards in the Australian system are governed by Gallantry Decorations Regulations.<sup>26</sup>

30. The Victoria Cross for Australia was created by Letters Patent signed by The Queen on 15 January 1991 and is the highest award in the Australian honours system. The Victoria Cross for Australia is '*awarded for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice, or extreme devotion to duty in the face of the enemy.*'<sup>27</sup>

31. The *Commonwealth of Australia Gazette* (CAG) No S25 dated 4 February 1991, created the awards of the Star of Gallantry; the Medal for Gallantry; and the

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<sup>24</sup> Ibid.

<sup>25</sup> Prime Minister of Australia Media Release 111/92 dated 5 October 1992.

<sup>26</sup> *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991.

<sup>27</sup> Website, Victoria Cross for Australia, Defence Honours and Awards, [www.defence.gov.au/medals/Hon-Decs/Gall-Dist/Victoria-Cross.asp](http://www.defence.gov.au/medals/Hon-Decs/Gall-Dist/Victoria-Cross.asp), accessed 26 July 2017.

Commendation for Gallantry by Letters Patent, which provide recognition for members of the Defence Force and certain other persons who perform acts of gallantry in action. The eligibility criteria for these awards are set out in the *Gallantry Decorations Regulations 1991* (the Regulations). The Regulations were amended in *CAG No. S420*, dated 6 November 1996, to add Regulation 3(3A).

32. The Regulations as amended, set out the following eligibility criteria for the decorations at Regulation 3:

*(1) The Star of Gallantry (SG) shall be awarded only for acts of great heroism or conspicuous gallantry in action in circumstances of great peril.*

*(2) The Medal for Gallantry (MG) shall be awarded only for acts of gallantry in action in hazardous circumstances.*

*(3) The Commendation for Gallantry (CG) may be awarded for other acts of gallantry in action which are considered worthy of recognition.*

*(3A) A decoration referred to in regulation 3 may be awarded for an act of a kind mentioned in relation to the particular decoration, although the act did not occur in action, if it occurred in circumstances similar to armed combat or actual operations and those concerned were deployed under military command.*

### **Tribunal consideration of Mrs Silver's application**

33. **Evidentiary difficulties given the passage of time.** We acknowledge upfront the significant evidentiary difficulties attached to this case. The challenge of assessing events that took place more than 75 years ago is compounded by the fact that only six prisoners survived the atrocities of the Sandakan death marches. This sobering reality, combined with the haphazard nature of record keeping in the Japanese camps, means that the availability of contemporaneous evidence is necessarily very limited in this case.

34. We note that such evidentiary challenges mirror those faced by an earlier Tribunal Inquiry panel whilst conducting the FEPOW Inquiry in 2017. That Tribunal Inquiry Report relevantly stated that:

*“The evidentiary difficulty ... led the Tribunal to the view that a point has already, or will soon been reached where it is unlikely that further reliable contemporaneous evidence in respect of any veterans of the Second World War will become available; it became increasingly clear to the Tribunal that further medallic recognition for veterans of the Second World War is unlikely to be achieved.*

*The Tribunal notes that the cessation of hostilities was now over 70 years ago and the official end of the Second World War was nearly 70 years ago. The*

*youngest living operational veteran of the Second World War would be aged at least 90. For these reasons the Tribunal decided to recommend that Section 110V(2) of the Defence Act 1903 be amended to preclude further applications for medallic recognition for veterans of the Second World War.*

*The recommendation is to the effect that a limitation period be introduced for claims for medallic recognition with respect to veterans of the Second World War with effect from 3 September 2020, that is, 75 years after the cessation of hostilities in the Second World War: ”<sup>28</sup>*

35. We understand that while this recommendation was accepted by Government some time ago, such reforms have not yet been progressed to draft legislation. In line with our observations above in relation to the significant evidentiary difficulties presented by this case, we can only endorse the Tribunal’s FEPOW Inquiry comments and recommendation above and encourage a timely resolution of this issue.

36. **Findings of fact in relation to Private Murray’s actions.** Having made the above observations, in discharging the Tribunal’s current statutory obligation in relation to Mrs Silver’s application, we have carefully reviewed the evidence available to us, and agree with the Defence submission that only the following facts can be established to the Tribunal’s reasonable satisfaction:

- a) relying on the service record, and eye witness accounts, Private Murray’s official cause of death was ‘Executed (Prisoner of War)’; and
- b) relying on Lance Bombardier Moxham’s statement and Private Botterill’s evidence, Private Murray was one of four involved in stealing food and accepted responsibility for the theft.<sup>29</sup>

37. Having established the relevant actions of Private Murray to its reasonable satisfaction, the Tribunal then turned to consider whether or not those actions constituted an act, or acts, of gallantry.

### **Consideration against the criteria for the Australian Gallantry Decorations**

38. **Was Private Murray ‘in action’?** As a threshold consideration, to be eligible for an Australian gallantry award, Private Murray’s actions would need to demonstrate that he had performed ‘acts of gallantry in action’.<sup>30</sup> ‘In action’ is usually a relatively straight

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<sup>28</sup> Report of the *Inquiry into unresolved recognition for Far East Prisoners of War Killed while escaping or following recapture*, Defence Honours and Awards Appeals Tribunal, 2017, p.10.

<sup>29</sup> Defence Assessment – Actions of Private Richard Murray – 20 May 1945, p.5.

<sup>30</sup> *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991.

forward concept involving armed conflict in close proximity to or under the fire of an adversary. However, the Defence Report posits that the amendment to create Regulation 3A of the Australian Gallantry Decorations regulations allows for consideration when an individual is ‘on operations’ which Private Murray undeniably satisfies.<sup>31</sup> We agree with this submission.

39. **What is gallantry?** The Tribunal has previously noted that all the gallantry decorations accord recognition for individuals ‘who perform acts of gallantry in action’. Whilst ‘in action’ is a relatively straight forward concept as canvassed above, ‘gallantry’ is an abstract term, which is not defined in the Regulations. Various dictionary definitions such as ‘dashing courage; heroic bravery’;<sup>32</sup> and ‘courageous behaviour, especially in battle’;<sup>33</sup> are largely circuitous and unhelpful. Some countries have attempted to differentiate between ‘bravery’ and ‘gallantry’; defining the later as recognition of military personnel who carry out acts which put their lives at risk while involved in operational service; whilst ‘bravery’ is defined as saving or attempting to save the life of another person in the course of which they place their own life at risk.<sup>34</sup> Again this is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

40. The Tribunal has previously observed that there is an expectation that all soldiers in battle conducting themselves in accordance with their training, will be acting bravely. The Tribunal has also observed that gallantry requires a higher standard of conduct than bravery and usually a special and additional element of courage, fearlessness, daring or heroism will have been demonstrated, and that what amounts to an ‘act of gallantry’, necessarily varies according to the individual circumstances of each action, and depending on many factors, including the level of threat, the person’s training, role and responsibility, the risk to the individual and/or the group, and the consequences of undertaking, or not undertaking, the particular act.

41. The Tribunal has previously stated that the concept of gallantry is greater than collective or individual acts of bravery and above and beyond what was expected of an individual or group who were bravely doing what they were trained to do or expected to do as part of a role, rank or responsibility.

42. **Was Private Murray gallant?** We considered that the guidance developed by the Tribunal in recent years (as referenced by Defence in its submission and summarised above) constituted a useful framework against which to assess Private Murray’s actions.

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<sup>31</sup> Report by Brigadier Bornholt, Folio 34.

<sup>32</sup> The Macquarie Dictionary on-line accessed 8 August 2020.

<sup>33</sup> The Oxford Dictionary on-line accessed 8 August 2020.

<sup>34</sup> <http://medals.nzdf.mil.nz/category/d/index.html>.

43. In Private Murray's case we considered, in particular, factors surrounding '*the risk to the individual and/or the group, and the consequences of undertaking, or not undertaking, the particular act*'. In circumstances where it was well known in the Ranau camp that stealing food was a capital offence, the risk to Private Murray and the consequences of him stepping forward to take the blame could not be graver. On this point, we considered the detailed submission provided by Mrs Silver post hearing in relation to the theft of food being a capital offence and were reasonably satisfied that this was the case.<sup>35</sup>

44. We note that Defence in its submission posits that the '*key question to answer is why Private Murray took the decision to step forward and confess to the stealing of food*'. We do not agree that this is the key question in determining whether or not Private Murray was 'gallant' for the purposes of the Regulations. Whilst we agree that any theories put forward as to Private Murray's intent at the time he stepped forward are necessarily speculative in nature, we do not agree that this element of speculation is fatal to this application. The eligibility criteria as set out in the Regulations do not dictate that a particular mental element or intent be established in order for that action to be considered 'gallant' for the purposes of medallic recognition. Nor does the Tribunal consider there to be any cogent reason to introduce it as an additional requirement.

45. In our view, it is sufficient that the established facts show an individual who voluntarily stepped forward and took sole responsibility for a known capital offence, thus deflecting attention from the others involved, knowing full well that this confession would lead to his death. On balance, we are reasonably satisfied that the available evidence, while essentially limited in nature, is sufficient to make a finding as to Private Murray's gallantry.

46. As noted above, there is an inherent challenge in discharging the Tribunal's statutory obligation and thereby assessing the actions of a prisoner of war that occurred over 75 years ago, where the very circumstances of the conflict dictate that contemporaneous documentary evidence is limited, and where it is not possible to seek further evidence or clarification from witnesses. That should not mean that limited evidence, if reliable and corroborated, as is the case here, can never support the case for appropriate recognition.

47. Having determined that, on balance, Private Murray's actions were indeed 'gallant' for the purposes of the relevant Regulations, the Tribunal then turned to consider Private Murray's actions against the eligibility criteria for the various available gallantry awards (as set out in paragraphs 29-32 above).

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<sup>35</sup> Emails from Mrs Silver to the Tribunal, 13 and 14 July 2022.

48. **Appropriate gallantry award.** We were obliged to consider the merits of Private Murray's relevant conduct vis-à-vis the eligibility criteria for the relevant honours. All honours in the Gallantry suite require an act of gallantry, as discussed above. The Medal for Gallantry requires that the act of gallantry occur in '*hazardous circumstances*' whereas the Star of Gallantry is limited to an act of '*great heroism*' or '*conspicuous gallantry...in circumstances of great peril*', while The Victoria Cross for Australia is '*awarded for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice, or extreme devotion to duty*'. None of these additional terms is defined.

49. As canvassed above, the circumstances of this case dictate that it is not possible for us to investigate further, to ask questions of and tease out further detail from witnesses and so on, as would normally occur in merits review processes dealing with cases from more recent conflicts. Having carefully considered all the material before us, we consider that the paucity of evidence does not permit us to be reasonably satisfied that the additional criteria for the higher honours are met in Private Murray's case.

50. The Commendation for Gallantry may be awarded for 'other' acts of gallantry in action which are considered 'worthy of recognition'. In this context we do not consider that the use of the phrase 'worthy of recognition', imposes an additional criterion for determination of eligibility for a Commendation for Gallantry. The Tribunal considers that the phrase is properly read with 'other' to distinguish the conduct for the Commendation for Gallantry from the higher honours. Consequently, the Tribunal did not consider 'worthiness' to be a concept relevant to its consideration of the eligibility criteria. We were therefore reasonably satisfied that Private Murray meets the criteria to be eligible for the award of the Commendation for Gallantry for the reasons set out above.

## **Conclusion**

51. The Tribunal determined that the actions of Private Richard Murray during his service as a Far East Prisoner of War in 1945 meet the criteria for the award of a posthumous Commendation for Gallantry.

## **TRIBUNAL DECISION**

52. On 24 October 2022, the Tribunal decided to recommend to the Minister that:

- a) the decision of the Director General Army People Capability Brigadier MJK Patching not to recommend the late Private Richard Murray for a posthumous gallantry award be rejected; and

- b) the Minister should instead recommend to the Governor-General that the late Private Richard Murray should be posthumously awarded the Commendation for Gallantry.