IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S162 of 2013

BETWEEN:

TING LI
Appellant

and

CHIEF OF ARMY
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. We certify that this reply is in a form suitable for publication on the internet.

PART II: MATTERS FOR REPLY

A. Construction of s 33(b) and elements of the offence

2. As to the proper construction of s 33(b):

   (a) RS paras 52-53 appear to represent a misuse of the Explanatory Memorandum. That document is not to be taken as compelling the conclusion that everything in s 33 literally "spells out" one or the other of "fighting" and "quarrelling". Rather, the EM is consistent with a recognition that s 33 prohibits only conduct at the more serious end of the scale.

   (b) As to RS para 54, it is possible on the appellant's construction for a person to commit the offence under s 33(b) where someone else committed an assault, in the course of the "disturbance" created by the first person.

   (c) As to RS para 55, *Anning* if anything supports the appellant's construction. The expression "actual force or disturbance" is not disjunctive; rather, it is used so as to liken "disturbance" to "actual force".

   (d) As to RS para 58, the contempt provisions referred to are in a substantially different statutory context, and do not fall to be construed here.

3. As to the physical and fault elements of the s 33(b) offence:

   (a) RS paras 69-71 simply restate the error below, and provide no further basis for suggesting that this is a plausible construction of the section.

   (b) RS paras 72-76 are consistent with the appellant's alternative submission that recklessness as to creation of a disturbance is the correct fault element.

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B. Substantial miscarriage of justice

4. The respondent's principal point is that, if recklessness is the correct fault element, there was no substantial miscarriage of justice because the appellant must have been convicted anyway (RS paras 91-92).

5. This argument appears to be premised upon the respondent's primary position about the elements of the offence being correct. That is, it assumes that the requisite element of recklessness would be recklessness as to whether the appellant was engaging in the conduct as particularized in the charge "which" creates a disturbance (and thus would be satisfied by the kind of intention which the respondent says applies).

6. The respondent does not deal at all with the fact that there was no evidence of any advertence by the appellant to the supposedly "disturbing" effect of his actions on the peace of the surrounding environment (however "disturbance" is understood). The summary of the appellant's evidence at RS para 91 does not establish the unaddressed mental element and rises no higher than conjecture.[1] But on any view, a direction that a particular fault element of an offence need not be proved at all plainly goes to the root of the proceedings.

7. *A fortiori*, the respondent's submission would have to be rejected if the appellant's argument that "creates a disturbance" requires an element of violence is correct. It is noted that the respondent makes no submission in relation to the consequences of that argument being correct.

8. As to the statutory provisions dealing with the Tribunal's powers on an appeal from a court martial, RS para 78 misstates the effect of s 23(1) (which provides that the Tribunal *shall* quash conviction if *any* of (a)-(d) are made out).

9. Insofar as the respondent makes submissions about the authorities dealing with the common form "proviso", those submissions should be rejected. So much follows from the reasoning of Gummow and Callinan JJ, with Hayne J's substantial concurrence, in *Hembury*. However, the appellant would succeed even if those authorities are thought to state the applicable principles, for the reasons given in written submissions in chief (paragraphs 92-97).

C. The notice of contention

10. The respondent's submissions on its notice of contention seek to link the jurisdiction of the Federal Court under s 52 of the Appeals Act to the form and manner of expression of the grounds set out in the Amended Notice of Appeal to that Court. The respondent also complains about the emphasis the appellant now places on different aspects of those points, and about the authorities and contextual considerations the appellant now relies upon in advancing the necessary statutory construction analysis.

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[1] The appellant's unchallenged evidence of his state of mind was that "I did not mean for the situation to deteriorate to that level" (AB354.10), "I never even anticipated he would not listen to me" (AB354.32), "needed to put it to him sincerely and calmly" (AB373.21), "I did not create a disturbance" (AB375.4). The context was the "racial slur" (AB73.11; cf AB348.25 "a legal standard that is enforceable": *Racial Discrimination Act 1975* (Cth) ss 18C and 18E) which the appellant had thought was "highly inappropriate" (AB343.38; the prosecution never put to the appellant that it was said in jest), especially since Mr Snashall was a "stranger" (AB366.6), which Mr Snashall later confirmed (AB347.18-.25, 367.20-22, 372.35), and the appellant tried to protest (AB349.10;351.20; 331.2-10;352.25; 373.21).

11. As to s 52 of the Appeals Act, the respondent says that subsection (1) of s 52 "defines" or "sets" the jurisdiction of the Federal Court (RS paras 15, 17). However, it is subsection (3) which provides (under ss 76(ii) and 77(i) of the Constitution) that the Federal Court "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".

12. In that context it may be accepted that s 52(1) limits that jurisdiction, insofar as the appeal must be "on a question of law involved in a decision of the Tribunal in respect of an appeal under this Act". However, the respondent's submissions appear to go further, suggesting that the Federal Court's jurisdiction to consider a "question of law" can go no further than to consider the precise form of legal reasoning which the Tribunal explicitly engaged in.

13. That argument is made in spite of the respondent's reference to authorities which hold that a question of law may arise even where it was implicit in the decision under appeal, or where the decision depended expressly upon a matter of law even if the issue had not been argued before the decision-maker in those terms (in particular, *Walker Corporation* [2009] NSWCA 178, cited at RS paras 19-20, which refers to *Director-General, Department of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102 at [28] per Hodgson JA, and at [70]-[71] per Basten JA; *Grygiel v Baine* [2005] NSWCA 218 at [29] per Basten JA).

14. Authorities such as *Birdseye v Australian Securities and Investments Commission* (2003) 38 AAR 55 at 59-62 [11]-[29] do not support any formal attack upon the drafting of the Amended Notice of Appeal. The point in *Birdseye* was whether the appeal in that case raised a question of law or merely questions of fact or mixed law and fact (as it so often is, in cases involving a statutory formula such as "question of law"). The notice of appeal there was expressed in terms of contentions of fact prefaced with the empty formulary of "erred in law" (cf at 59-60 [13]-[15]). At 62 [29] Branson and Stone JJ said that in considering whether jurisdiction had been properly invoked, "form cannot prevail over substance".

15. That is consistent with the purpose of the limitation in s 52(1) to appeals "on a question of law involved in a decision of the Tribunal". As the respondent says at RS paras 30-31, the availability of an "appeal" to a Chapter III court does not mean that the workings of the self-contained military justice system should be wholly open to review. However, the terms of s 52(1) and (3), and the contrast between s 52 and s 51 (reference of questions of law), makes plain that it is the "matter ... with respect to which" such an appeal is instituted which the Federal Court may "hear and determine".

16. Thus, the Court is not limited to answering abstract questions of law posed to it, but may grant final relief in respect of the Tribunal's decision, the scope of such possible relief being indicated by s 52(5); cf *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 417 [87]-[88]. The "matter" is whether the appellant is entitled to relief because the decision of the Tribunal was wrong on account of the question of law. It is for the Federal Court to determine whether, on the correct answer to that question, the Tribunal ought to have held that the court martial's decision was wrong in law and a substantial miscarriage of justice resulted, such as to quash the conviction (as this Court did in *Hembury*). So conclusions which follow from the correct view of the law in the circumstances of the case are within the Federal Court's jurisdiction.

17. There is no contention in this case that the grounds the appellant relied upon in the Federal Court constituted mere questions of fact or mixed law and fact. It has always been clear that the Judge Advocate's directions to the court martial panel explicitly addressed two points of law, each of which the Tribunal considered. One concerned what comprised "creat[ing] a disturbance". The other concerned what fault element attached to that physical element of the offence under s 33(b).

18. Nothing in s 52 requires that the questions of law so raised be expressed in any particular way, although they may be understood at a number of levels of generality (cf *Kostas* at 402 [34]). In an open form, the questions would be "what does creates a disturbance mean?" and "what is the fault element corresponding to that physical element?" In a closed and summary form, they are "does creates a disturbance require an element of violence?" and "is the corresponding fault element recklessness or intention?" The latter necessarily embraces a more particular question about the content of that "intention", with reference to the distinction the Judge Advocate repeatedly drew, and which the Tribunal and Full Court explicitly endorsed, between an intention to engage in the particularized acts and an intention to create a disturbance. The Tribunal's decision could not have been reached without rejecting each of the constructions of s 33(b) and Ch 2 of the *Criminal Code* the appellant puts forward.

19. Those two points arose on the face of the each of the Amended Notice of Appeal to the Tribunal and the Amended Notice of Appeal to the Federal Court. They were clear on the face of the reasons for the Tribunal's decision and the Judge Advocate's directions. The respondent cannot claim denial of procedural fairness. The grounds set out in each of the Amended Notices of Appeal were identical in terms, save for prefatory words which were intended to refer to the provisions conferring jurisdiction on each body (ss 23(1) and 20(1), and s 52 of the Appeals Act respectively). In each Amended Notice of Appeal, para 1(e) extended to "intention or recklessness" (and see AB663, para 19 of the written submissions to the Full Court); para 1(g) concerned an "erroneous direction that the intention to create the result was irrelevant"; para 1(h) raised an "erroneous direction as to the meaning of disturbance" (AB463-464, AB645-646).

20. On their face, these grounds raised questions of law. The manner of their expression may be criticized, but that did not avoid or limit the Federal Court's jurisdiction. Nor was the Full Court required to consider only the same authorities, or the same aspects of the statutory context, which were referred to in connection with these legal arguments in the Tribunal. Nor is this Court.

21. In the Full Court, the respondent produced an aide-memoire which *summarized* the appellant's grounds of appeal. While it was said to be an effective *summary*, that did not mean that it supplanted the Amended Notice of Appeal. That the scope of the appellant's contentions was known to be broader is apparent from the approach of Dowsett and Logan JJ. As Dowsett J said at [123] (AB820-821), the appellant never abandoned any aspect of his grounds of appeal.

22. For those reasons the respondent's submissions on its notice of contention should not be accepted.

D. Relief

23. As to RS paras 93-96, the appellant submits that Logan J was correct to say, at [214] (AB852), that it is not now possible for the Tribunal to entertain a submission that a conviction on the alternative charge should be substituted.

24. The point was not taken in the Tribunal. It may be asked whether, if the Tribunal had rejected the arguments which *were* put to it by the respondent, it would have proceeded to enter an alternative conviction and sentence. Inevitably one answers that question "no", because no submissions were made, and it would have been a denial of procedural fairness to do so.

25. The essential reason why it is not now open to the respondent to go back to the Tribunal and try to procure that outcome is that, subject to an appeal on a question of law to the Federal Court, the Tribunal's decision must be considered final. It is not part of the Ch III judicial system administering the law of the land (*R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23). It is, rather, at the apex of the distinct military justice system operating under legislation authorized by s 51(vi). In *Lane v Morrison* (2009) 239 CLR 230 at 238 [12] French CJ and Gummow J said that the defining feature of that system is that: "Within that command structure, and in contrast to the operation of the civilian justice system, the sentences of courts-martial required confirmation by a superior officer and that confirmation in turn might be quashed upon petition to higher levels of the chain of command." The Tribunal is effectively at the top of that chain of command, if not above it, which underlines the need for finality in its decisions.

26. Indeed, the respondent itself says that "An appeal under s 52 is not available to run new points in civil courts, which points were not relied upon or advanced within the military justice system" (RS para 30). (The respondent's complete failure to propose substitution of a conviction for the s 60(1) offence below is to be contrasted with the fact that, as submitted above, each of the points raised by the appellant in this Court was fairly before the Tribunal and the Full Court.)

27. Since no consideration was given to the alternative charge in either the Tribunal or the Full Court, this Court can only take that charge to have been abandoned below. As to RS paras 95-96, the absence of consideration by the Tribunal and Full Court means that it is not possible for this Court to give adequate consideration to how the elements of the s 60 offence[2] could apply. In these racially charged circumstances, with what appears to be identical deficient particulars, the appropriate order is simply to quash the conviction.

Dated: 23 October 2013

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[2] See generally *Mocicka v Chief of Army* (2003) 175 FLR 476 at 478-480.