# HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, BELL AND GAGELER JJ

---

TING LI APPELLANT

AND

CHIEF OF ARMY RESPONDENT

*Li v Chief of Army*
[2013] HCA 49
*27 November 2013*
S162/2013

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Federal Court of Australia made on 26 February 2013 and, in its place, order that:*

   *(a) the appeal to that Court be allowed;*

   *(b) the appellant's conviction be quashed and the sentence imposed on 8 April 2011 be set aside; and*

   *(c) the matter be remitted to the Defence Force Discipline Appeal Tribunal for the making of further orders, if any.*

3. *Set aside the order of the Full Court of the Federal Court made on 19 April 2013 and, in its place, order that the respondent pay the appellant's costs of the appeal to that Court, including the costs of submissions concerning the issue of costs.*

On appeal from the Federal Court of Australia

**Representation**

A W Street SC with A K Flecknoe-Brown for the appellant (instructed by Wyatt Attorneys)

S B Lloyd SC with S G Callan for the respondent (instructed by Clayton Utz)

## CATCHWORDS

### Li v Chief of Army

Defence – Military forces – Discipline – Service offences – Offence of creating a disturbance on service land – Meaning of "disturbance" – Physical and fault elements of "creating" a disturbance – Whether violence or threat of violence necessary to existence of "disturbance" – Whether "creating" a disturbance has one or two physical elements.

Words and phrases – "creating a disturbance", "disturbance".

*Criminal Code* (Cth), Ch 2.
*Defence Force Discipline Act* 1982 (Cth), s 33(b).
*Defence Force Discipline Appeals Act* 1955 (Cth).

FRENCH CJ, CRENNAN, KIEFEL, BELL AND GAGELER JJ.

Introduction

1 Major Ting Li, a member of the Australian Defence Force ("the ADF"), was involved one morning in an incident in the Campbell Park Offices in the Australian Capital Territory. He was subsequently charged before a restricted court martial constituted under the *Defence Force Discipline Act* 1982 (Cth) ("the DFDA") with the service offence of having created a disturbance on service land contrary to s 33(b) of the DFDA and, in the alternative, with the service offence of having acted in a manner likely to bring discredit on the ADF contrary to s 60(1) of the DFDA.

2 The particulars of each charge were identical. They were that Major Li, after entering the office of Mr Snashall, a Commonwealth public servant: refused to leave that office when Mr Snashall requested him to do so; continued speaking to Mr Snashall in a raised voice; followed Mr Snashall and continued the conversation when Mr Snashall walked out of that office; forcefully pushed against the office door placing his head and shoulder in the doorway when Mr Snashall had returned to the office and was inside the office trying to close the door; re-entered the office and again refused to leave when requested to do so; and stood approximately three inches from Mr Snashall's face speaking with a raised voice and in an agitated and aggressive manner. It was not disputed that those particulars were established by the evidence before the court martial. The evidence also established that the incident was witnessed by a number of other public servants and members of the ADF working in the Campbell Park Offices.

3 Major Li's own uncontested evidence before the court martial was that he was attempting on the morning in question to speak with Mr Snashall to raise his concern about statements Mr Snashall had previously made to him which he had found offensive and suspected to have been racially motivated. Major Li said that he did not anticipate that Mr Snashall "would not listen" to him and he "did not mean for the situation to deteriorate to that level and for everyone in the workplace to see that".

4 Major Li was convicted of creating a disturbance on service land. He was sentenced to be severely reprimanded and fined. No finding was made with respect to the alternative charge.

Appeals

5 Major Li appealed against his conviction to the Defence Force Discipline Appeal Tribunal ("the Tribunal") constituted under the *Defence Force Discipline Appeals Act* 1955 (Cth) ("the DFDAA"). The powers of the Tribunal relevantly included a power to quash the conviction if it appeared to the Tribunal "that, as a result of a wrong decision on a question of law ... the conviction ... was wrong in law and that a substantial miscarriage of justice [had] occurred"[1]. If the Tribunal quashed the conviction, the Tribunal had power to order a new trial if it considered it to be "in the interests of justice"[2]. If the Tribunal quashed the conviction without ordering a new trial, Major Li would have been deemed to have been acquitted of the offence of having created a disturbance on service land[3]. If the Tribunal considered that the court martial, by reason of finding Major Li guilty of having created a disturbance on service land, must have been satisfied beyond reasonable doubt of facts which proved that Major Li had acted in a manner likely to bring discredit on the ADF, the Tribunal also had power to substitute a conviction of that other offence[4]. The Tribunal (Tracey J, White JA and Cowdroy J) in fact dismissed the appeal[5].

6 Major Li then pursued a further "appeal" under the DFDAA, to the Full Court of the Federal Court. That further appeal, in truth a proceeding in the original jurisdiction of the Federal Court[6], was limited to an "appeal ... on a question of law involved in [the] decision of the Tribunal"[7]. The Full Court, on hearing and determining the appeal, had power to "make such order as it [thought] appropriate by reason of its decision"[8], including an order affirming or

---

**1** Section 23(1)(b) of the DFDAA.

**2** Section 24 of the DFDAA.

**3** Section 41 of the DFDAA.

**4** Section 26 of the DFDAA.

**5** *Li v Chief of Army* (2012) 261 FLR 226.

**6** *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 653 [31]; [1998] HCA 47.

**7** Section 52(1) of the DFDAA.

**8** Section 52(4) of the DFDAA.

setting aside the decision of the Tribunal or an order remitting the case to be heard and decided again by the Tribunal in accordance with directions of the Full Court[9]. The Full Court (Keane CJ, Jagot and Yates JJ, Dowsett and Logan JJ dissenting) in fact dismissed the appeal[10], and subsequently ordered (unanimously) that Major Li pay the costs of the Chief of Army as respondent to the appeal[11].

Appeal to this Court

7 Major Li's appeal, by special leave, to this Court raises two questions about the service offence of creating a disturbance on service land contrary to s 33(b) of the DFDA of which Major Li was convicted:

(1) Is violence or a threat of violence necessary to the existence of a "disturbance"?

(2) What physical and fault elements are involved in "creating" a disturbance?

8 The Chief of Army faintly pressed a contention that this Court, standing in the shoes of the Full Court of the Federal Court under s 73 of the Constitution and doing again what the Full Court in the appeal ought to have done within its own limited original jurisdiction, is jurisdictionally constrained from determining those questions. The contention is rejected. Each question is plainly a question of law. Each was addressed by the Tribunal as a step in arriving at its decision. Although obscured by the prolixity of the grounds of appeal, each was in substance raised in the appeal to the Full Court of the Federal Court. Each therefore fell within the limited original jurisdiction of the Federal Court. In the event, each was in terms addressed by all members of the Full Court.

Is violence or a threat of violence necessary to the existence of a disturbance?

9 The DFDA, as its long title explains, is "[a]n Act relating to the discipline of the Defence Force". Section 33 is in Div 3 of Pt III of the DFDA. Other

---

**9** Section 52(5)(a) and (b) of the DFDAA.

**10** *Li v Chief of Army* (2013) 210 FCR 299.

**11** *Li v Chief of Army (No 2)* (2013) 210 FCR 356.

sections in that Division create service offences of assaulting a superior officer[12], insubordinate conduct[13], disobeying a lawful command[14], failing to comply with a direction in relation to a ship, aircraft or vehicle[15], failing to comply with a general order[16], assaulting a guard[17], obstructing a police member[18], dereliction in respect of guard duty[19], and assaulting or ill-treating a subordinate[20].

10 Section 33 provides:

> "A person who is a defence member or a defence civilian is guilty of an offence if the person is on service land, in a service ship, service aircraft or service vehicle or in a public place and the person:
>
> (a) assaults another person; or
>
> (b) creates a disturbance or takes part in creating or continuing a disturbance; or
>
> (c) within the view or hearing of another person, engages in conduct that is obscene; or
>
> (d) uses insulting or provocative words to another person."

The section goes on to prescribe a maximum punishment of imprisonment for six months.

---

**12** Section 25 of the DFDA.

**13** Section 26 of the DFDA.

**14** Section 27 of the DFDA.

**15** Section 28 of the DFDA.

**16** Section 29 of the DFDA.

**17** Section 30 of the DFDA.

**18** Section 31 of the DFDA.

**19** Section 32 of the DFDA.

**20** Section 34 of the DFDA.

11 It has been observed that[21]:

> "The word 'disturbance' encompasses a broad range of meanings. At one extreme, it may be something as innocuous as a false note or a jarring colour; something which disturbs in the sense of annoyance or disruption. At the other end of the spectrum are incidents of violence, inducing disquiet, fear and apprehension for physical safety. Between these extremes lies a vast variety of disruptive conduct."

12 The answer to the first question in the appeal turns on where, within that spectrum, the "disturbance" to which s 33(b) of the DFDA refers is to be located. Major Li would have it at one extreme; the Chief of Army would have it closer to the middle of the range.

13 The judge advocate, whose function was to rule on questions of law arising in the court martial[22], directed the court martial that a disturbance included "disorderly disputation ... such as to be likely to cause a response from anyone present who saw or heard the incident". The Tribunal found no error in that direction, observing the instruction to be supported by "[t]he context of s 33(b) and its overall purpose of regulating discipline in the ADF"[23].

14 Four of the five judges who constituted the Full Court of the Federal Court held the Tribunal in that respect to be correct in law. Keane CJ, Jagot and Yates JJ concluded that s 33(b) was "apt to proscribe the disruption of the orderly conduct of defence personnel in and around defence facilities" and that "conduct which disrupts the orderly performance of their duties by those subject to, or witnessing it, is conduct which creates a disturbance"[24]. Dowsett J concluded that the relevant question, one of fact, was whether Major Li's conduct "interrupted or broke up the settled conditions in which persons employed in the relevant area usually performed their duties"[25].

---

**21** *R v Lohnes* [1992] 1 SCR 167 at 171.

**22** Section 134 of the DFDA.

**23** (2012) 261 FLR 226 at 241 [75].

**24** (2013) 210 FCR 299 at 317 [69].

**25** (2013) 210 FCR 299 at 327 [108].

15 Logan J considered the Tribunal to have been wrong in law in failing to equate "disturbance" in s 33(b) with "a breach of the peace" requiring "some form of actual harm done to a person or his or her property in that person's presence or some other form of violent disorder"[26]. His Honour was persuaded to give the statutory language that narrower construction principally by historical considerations[27], but was also influenced by considerations that "a soldier is gifted with all the rights of other citizens"[28] and that "subject always to express or necessary implication to the contrary, a statute ought not to be construed so as to diminish personal rights and freedoms"[29].

16 The legislative history, to which Logan J referred, need not be repeated in detail. It shows that s 33 of the DFDA was framed by reference to s 13 of the *Naval Discipline Act* 1957 (UK), the antecedents of which can be traced to s 22 of the *Naval Discipline Act* 1661 (13 Car II c 9). Section 22 of the Act of 1661 required "any of the Fleet" with cause for complaint "quietly" to make that known to their superiors, who were in turn "to cause the same to be presently remedied accordingly", but added that "no person upon any such or other pretence shall privately attempt to stirr up any disturbance upon pain of such severe punishment as a Court martiall shall finde meete to inflict". Section 13 of the Act of 1957 made liable to a maximum punishment of imprisonment for two years "[e]very person" who "fights or quarrels with any other person" or "uses threatening, abusive, insulting or provocative words or behaviour likely to cause a disturbance". There appears nothing to suggest that "disturbance" acquired a narrow or technical meaning in the application of the Act of 1957 or its antecedents. Nor does there appear anything to suggest that the word was used to refer only to a breach of the peace, or "disturbance of the publick peace"[30], in the

---

**26** (2013) 210 FCR 299 at 342 [169], 350 [190].

**27** (2013) 210 FCR 299 at 338-341 [149]-[160].

**28** (2013) 210 FCR 299 at 341 [165], quoting *Burdett v Abbot* (1812) 4 Taunt 401 at 449 [128 ER 384 at 403].

**29** (2013) 210 FCR 299 at 342 [165], citing *Coco v The Queen* (1994) 179 CLR 427 at 436-438; [1994] HCA 15.

**30** *The Riot Act* 1714 (1 Geo I stat 2 c 5), s 4.

sense understood to be a circumstance justifying military aid to the civil power[31]. Section 33 was explained in the explanatory memorandum to the DFDA as "spell[ing] out the elements of reprehensible conduct embraced by fighting and quarrelling" as prohibited by s 13 of the Act of 1957 as well as "confin[ing] the ambit of the offences to service land, etc, and public places"[32].

17 The legislative history suggests that the mischief to which s 33 of the DFDA is addressed is appropriately identified broadly as the maintenance of order and discipline rather than narrowly as the elimination of violence. What is "reprehensible" about the conduct prohibited by each of the paragraphs of s 33 is the likely disruptive effect of that conduct on others in or in the vicinity of the place where that conduct occurs. The confining of the service offences created by s 33 to conduct only on service land, in a service ship, aircraft or vehicle, or in a public place also tells against preferring a narrower construction of the conduct prohibited by each of those paragraphs merely because that narrower construction would least diminish the personal rights and freedoms of those defence members and defence civilians whose conduct is governed by the section.

18 The better construction of s 33(b) of the DFDA is that preferred by the other four of the five judges who constituted the Full Court of the Federal Court. A disturbance is a non-trivial interruption of order. Violence or a threat of violence is not necessary to the existence of a disturbance. Quarrelling may, in a particular factual context, be enough.

What physical and fault elements are involved in creating a disturbance?

19 The DFDA applies Ch 2 of the *Criminal Code* (Cth) to all of the service offences it creates[33]. The relevant effect of Ch 2 of the *Criminal Code* so applying can be summarised as follows.

---

**31** Cf *Li v Chief of Army* (2013) 210 FCR 299 at 340 [157], referring to Clode, *The Military Forces of the Crown; their administration and government*, (1869), vol 2 at 649-650.

**32** Australia, House of Representatives, Defence Force Discipline Bill 1982, Explanatory Memorandum at 89 [354].

**33** Section 10 of the DFDA.

20 To establish guilt of a service offence, the prosecution must prove each physical element of the offence as well as a fault element for each physical element[34]. A particular physical element may be: conduct (which may itself be an act, an omission to perform an act or a state of affairs); or a result of conduct; or a circumstance in which conduct, or a result of conduct, occurs[35]. A fault element for a particular physical element may be: intention; or knowledge; or recklessness; or negligence[36].

21 The fault element for a physical element that consists only of conduct is intention[37]. A person has intention with respect to conduct if the person means to engage in that conduct[38].

22 The fault element for a physical element that consists of a circumstance or a result is recklessness[39], although proof of intention will also satisfy that fault element[40]. A person has intention with respect to a circumstance if the person believes that the circumstance exists or will exist[41], and has intention with respect to a result if the person means to bring that result about or is aware that it will occur in the ordinary course of events[42]. A person is reckless with respect to a circumstance or a result if the person is aware of a substantial risk that the circumstance exists or will exist, or that the result will occur, and, having regard to the circumstances known to the person, it is unjustifiable to take that risk[43].

---

**34** Section 3.2 of the *Criminal Code*.

**35** Section 4.1 of the *Criminal Code*.

**36** Section 5.1 of the *Criminal Code*.

**37** Section 5.6(1) of the *Criminal Code*.

**38** Section 5.2(1) of the *Criminal Code*.

**39** Section 5.6(2) of the *Criminal Code*.

**40** Section 5.4(4) of the *Criminal Code*.

**41** Section 5.2(2) of the *Criminal Code*.

**42** Section 5.2(3) of the *Criminal Code*.

**43** Section 5.4(1) and (2) of the *Criminal Code*.

23 The judge advocate, the Tribunal and all of the five judges who constituted the Full Court of the Federal Court proceeded on the basis that the phrase "creates a disturbance" in s 33(b) of the DFDA refers to only one physical element, being conduct, in respect of which the fault element was therefore intention. The difference between the judge advocate, the Tribunal and the majority in the Full Court (on the one hand) and the minority in the Full Court (on the other hand) concerned the nature of the requisite intention.

24 The judge advocate directed the court martial that the prosecution did not need to prove that Major Li intended to create a disturbance, but instead needed to prove only that Major Li "intended to engage in the acts that amounted to a disturbance". The Tribunal found that direction to be orthodox and to involve no error, saying that what the prosecution had to prove was not that Major Li intended "to create a *disturbance*" (emphasis in original) but that Major Li "intended to conduct himself as he did"[44]. Keane CJ, Jagot and Yates JJ concluded that the Tribunal did not err in that regard, the relevant intention being "the intention to engage in the conduct alleged in the particulars" and there being "no issue as to whether that conduct was intentional"[45]. Dowsett and Logan JJ each concluded that the Tribunal had erred in that it was incumbent on the prosecution to prove not merely that Major Li intended to engage in conduct that amounted to a disturbance but that Major Li intended by engaging in that conduct to create a disturbance[46].

25 Major Li challenges the common understanding of the judge advocate, the Tribunal and the Full Court that the phrase "creates a disturbance" in s 33(b) of the DFDA refers only to one physical element, which is properly classified as conduct. He presents alternative arguments. One is that the phrase refers to one physical element, which is properly classified as conduct consisting of both an act and a state of affairs. Another is that the phrase refers to two physical elements, one of which is properly characterised as conduct consisting of an act and the other of which is properly characterised as the result of that conduct, being a disturbance. The second of those alternative constructions is to be preferred.

---

**44** (2012) 261 FLR 226 at 238 [61].

**45** (2013) 210 FCR 299 at 314 [57].

**46** (2013) 210 FCR 299 at 332-333 [122], 351-352 [199], 355 [216].

26 Those who framed the *Criminal Code*[47] recognised the difficulty of distinguishing between an act and the circumstances or results of an act[48]. They foresaw that the difficulty would be addressed in appropriate cases by reference to principles expounded and applied in *R v Falconer*[49]. There the word "act" as appearing in the *Criminal Code* (WA) was described as a "bodily action" as distinct from a "consequence caused by it"[50]. In the circumstances of that case, where the accused was charged with the wilful murder of her husband, who died as a result of a shotgun blast fired by her, the relevant act was held to be limited to the discharging of the loaded gun. The act did not extend to the fatal wounding of the husband[51].

27 In the context of the overall reference in s 33(b) of the DFDA to a person who "creates a disturbance or takes part in creating or continuing a disturbance", it is apparent that the disturbance, whether created or continuing, is something which extends beyond the mere bodily action of the person who commits the offence. The words "creates a disturbance" are naturally read as referring to the doing of an act which results in a disturbance. To create is to bring something new into existence. To create a disturbance – an interruption of order – is to do an act which results in an interruption of order.

28 The service offence created by s 33(b) of the DFDA is therefore best construed as relevantly having two physical elements, to each of which the *Criminal Code* attaches a distinct fault element. The first physical element is conduct, for which the fault element is intention: it must be proved that the defence member or defence civilian charged did the act, and meant to do the act. The second physical element is the result of that conduct, for which the fault element is recklessness: it must be proved that the act resulted in a disturbance

---

**47** See generally *R v LK* (2010) 241 CLR 177 at 220-223 [99]-[102]; [2010] HCA 17.

**48** Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report, (December 1992) at 9-13.

**49** (1990) 171 CLR 30; [1990] HCA 49.

**50** (1990) 171 CLR 30 at 38, adopting *Vallance v The Queen* (1961) 108 CLR 56 at 64; [1961] HCA 42 and *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231, 241; [1973] HCA 35.

**51** (1990) 171 CLR 30 at 39.

(being a non-trivial interruption of order), and that the defence member or defence civilian charged either believed that the act would result in a disturbance or was aware of a substantial risk that the act would result in a disturbance and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk.

29 The judge advocate did not direct the court martial in those terms. The Tribunal was therefore wrong to find that the direction given by the judge advocate involved no error. The Full Court ought to have held that for the Tribunal so to find was wrong in law.

Was the Tribunal's error of law material?

30 The Chief of Army argues that the legal error of the Tribunal was immaterial given that the Tribunal, having found the judge advocate's direction to be orthodox and to involve no error, went on without elaboration to express the opinion that "[e]ven if it were correct, as contended by [Major Li], that the physical element of the offence consists of a circumstance or a result, failure to direct on 'recklessness' did not give rise to any miscarriage of justice"[52].

31 There are two answers to that argument. First, it is impossible to be satisfied that the Tribunal's further unelaborated expression of opinion was unaffected by the error involved in its acceptance of the correctness of the judge advocate's direction[53].

32 Secondly, it was not in any event open to the Tribunal to conclude that the misdirection by the judge advocate did not give rise to "a substantial miscarriage of justice" within the meaning of the DFDAA. Contrary to the premise on which the argument of the Chief of Army proceeded[54], the identity of that statutory language with the language of the common form "criminal proviso" deriving from the *Criminal Appeal Act* 1907 (UK) does not import an identity between the approach to be adopted by the Tribunal and the approach to be adopted by a

---

**52** (2012) 261 FLR 226 at 238 [61].

**53** Cf *Samad v District Court of New South Wales* (2002) 209 CLR 140 at 155-156 [44]-[45]; [2002] HCA 24.

**54** Relying on *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.

Court of Criminal Appeal[55]. It was enough to establish "a substantial miscarriage of justice" within the meaning of the DFDAA that there was a real risk that the court martial was influenced in its finding of guilt by the misdirection[56]. In circumstances where the misdirection treated as irrelevant a critical fault element of the offence – recklessness as to the result of intentional acts – it is impossible to conclude that such a risk did not exist.

Conclusion

33 The Full Court of the Federal Court ought to have found that the Tribunal made a material error of law in finding that the direction given by the judge advocate involved no error. The appropriate order for the Full Court to have made was to quash the conviction and to remit the case to the Tribunal to allow the Tribunal to consider what, if any, further order should be made. The fact that the Tribunal was not previously asked to consider making further orders in the event that it quashed the conviction is a consideration to be weighed by the Tribunal in considering whether any further order should be now made but is insufficient to preclude remitter.

34 The appeal is to be allowed. The orders of the Full Court of the Federal Court are to be set aside. In place of those orders, it is to be ordered that Major Li's appeal to that Court be allowed, his conviction quashed and the case remitted to the Tribunal for the making of further orders, if any. The Chief of Army is to pay Major Li's costs in this Court and in the Full Court of the Federal Court.

---

**55** *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 656-657 [41], 673-674 [84].

**56** *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 656 [38]-[40], 673-674 [84]; *Jones v Chief of Navy* (2012) 205 FCR 458 at 471 [54].