

LI v CHIEF OF ARMY (S162/2013)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 20 and [2013] FCAFC 40

Dates of judgment: 26 February 2013 and 19 April 2013

Special leave granted: 16 August 2013

Major Ting Li is a legal officer with the Australian Defence Force. On 3 February 2010 he had an altercation with Mr Andrew Snashall, Director of Special Financial Claims, who worked in the same building. Mr Snashall had allegedly once (in about July 2009) made a comment which Major Li believed was a racial slur. On several subsequent occasions Mr Snashall had asked Major Li not to interrupt his staff by chatting with them. On 2 February 2010 one such occasion was immediately followed by a heated exchange between the men. The next morning, Major Li visited Mr Snashall in his office and began airing grievances with him. After Major Li then refused a request by Mr Snashall to leave his office, Mr Snashall walked out. Major Li followed him as he walked into the hallway and then back to the office. Major Li then prevented Mr Snashall from closing his office door. Staff nearby gathered as the two men's voices grew louder and more aggressive. Major Li then left the scene after two staff members had intervened.

Major Li was later charged with having "created a disturbance by causing a confrontation with Mr Snashall." Section 33(b) of the *Defence Force Discipline Act 1982* (Cth) ("the Act") provides that a Defence member is guilty of an offence if he or she creates a disturbance on service land. After pleading not guilty, Major Li was tried and convicted by a Court Martial. He was severely reprimanded and fined \$5,000, suspended as to \$3,000.

After the Defence Force Discipline Appeal Tribunal ("the Tribunal") dismissed an appeal against his conviction, Major Li appealed to the Federal Court.

On 26 February 2013 a majority of the Full Court (Keane CJ, Jagot & Yates JJ; Dowsett & Logan JJ dissenting) dismissed Major Li's appeal. The majority held that, in light of ss 3, 4 and 5 of the *Criminal Code* (Cth), the relevant physical element of the charged offence was "conduct" rather than a circumstance or a result. The fault element was therefore an intention to engage in the conduct alleged in the particulars to the charge. The majority found that the Judge Advocate had not erred by directing the Court Martial panel to determine any intention of Major Li's to engage in the alleged conduct, rather than any intention to create a disturbance. Justices Dowsett and Logan however each held that the Court Martial panel should have been directed to find whether Major Li had intended the relevant physical element of the offence, which was to "create a disturbance". Justice Dowsett found that the Judge Advocate's misdirection had given rise to a miscarriage of justice, as Major Li had been deprived of the opportunity to have the correct question of his intention decided by the panel. Justice Logan also found a miscarriage of justice, on the basis that the evidence before the Court Martial could not demonstrate that Major Li had created a "disturbance" (as his Honour had construed that word).

The grounds of appeal include:

- The majority erred in law by failing to hold that an intention to create a disturbance was a necessary mental element in the offence under s 33(b) of the Act.
- The majority erred in law by failing to hold that the Judge Advocate erred in law in the direction that an intention to create a disturbance was not necessary.

On 6 September 2013 a notice of contention was filed, the sole ground of which is:

- To the extent, if at all, that Major Li did not abandon the questions of law posed in his amended notice of appeal and adopt the questions stated at [38] of reasons of the court below, the Full Court of the Federal Court failed to decide the Chief of Army's Notice of Objection to Competency. The questions identified in the amended notice of appeal in the court below were not "questions of law involved in a decision of the Tribunal", as a result of which that court did not have jurisdiction under s 53 of the Act.