DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Li v Chief of Army [2012] ADFDAT 1

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| Citation: | Li v Chief of Army [2012] ADFDAT 1 |
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| Appeal from: | Restricted Court Martial |
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| Parties: | **TING LI v CHIEF OF ARMY** |
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| File number: |  |
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| Judges: |  |
|  |  |
| Date of judgment: | 16 March 2012 |
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| Catchwords: | **MILITARY LAW** – leave to appeal sought - granted – Restricted Court Martial - charges – creating a disturbance by causing a confrontation – service offence – whether charge not known in law – not a service charge – not capable of founding jurisdiction – ground failed – whether conviction bad for duplicity – series of acts may constitute course of conduct – ground failed – whether conviction wrong in law – whether no direction given - whether fault element to charge – physical element - intention – recklessness – direction involved no error – no miscarriage – ground failed – whether requirement for direction as to onus of proof - element of charge – no error – whether erroneous direction as to meaning of “disturbance” – whether disturbance justified by conduct of other officer involved – disturbance correctly characterised – other officer’s conduct not relevant to charge – ground failed – whether first charge oppressive when combined with second charge – charges were preferred in the alternative – not oppressive to prefer charges in the alternative – no exhaustive statement of offences which may be regarded as alternatives under *Defence Force Discipline Appeal Act* - ground failed – whether failure to direct that potential cause of confrontation was a comment made previously by officer involved in confrontation with appellant – whether comment made contrary to *Racial Discrimination Act* – giving rise to consequential right to protest – duty on Commonwealth to prevent such conduct – no consequential right created – no duty imposed on Commonwealth or other person – ground failed - whether evidence should have been called as to cause of confrontation – evidence was before the court at trial – whether evidence incorrectly ruled as irrelevant and inadmissible – whether questions asked by defending officer were irrelevant and should have been disallowed – no substance to grounds – whether defending officer affected by apprehended bias – whether discretion in relation to adjournment application wrongly exercised – whether Judge Advocate should have disqualified himself – complaint amounted to appellant’s dissatisfaction with rulings on adjournment application – no bias discerned – ground failed – whether ruling of inadmissibility with respect to evidence going to credit of officer in error – ruling correct – ground failed – whether error in not providing *Jones v Dunkel* direction in relation to failure to call particular evidence – witness was unavailable – evidence supportive of prosecution – no proper basis to infer otherwise – ground failed – whether remarks made by Judge Advocate gave rise to actual or apprehended bias – no complaint made with respect to bias at trial – no rulings the subject of complaints alleged to be tainted by error – no reasonable observer could have apprehended the Judge Advocate might not bring an impartial mind to the resolution of the issues – ground failed – procedural defect in original charge sheet – said to give rise to want of delegation – no failure to properly exercise power of delegation – did not render trial nullity – ground failed – whether conviction unsafe and unsatisfactory by virtue of all matters raised above – evidence sufficient to conclude beyond reasonable doubt that service offence committed by appellant – ground failed – appeal dismissed  |
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| Legislation: | *Bill of Rights Act* (NZ) s 6*Court Martial and Defence Force Magistrate Rules* rr 8, 9, 12*Criminal Code* (Canada) s 175*Criminal Code Act 1995* (Cth) ss 4.1, 5.2, 5.6*Defence Force Discipline Appeal Act 1982* (Cth) ss 3, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 60, 63, 115, 132, 141A, 142, 188GR*Evidence Act 1995* (Cth) ss 97, 102, 103*Naval Defence Act* *1910* (Cth) s 13*Racial Discrimination Act* *1974* (Cth) ss 18C, 18E, 26*Racial Hatred Act* *1995* (Cth)*Summary Offences Act 1981* (NZ) s 4  |
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| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2010) 187 FCR 293 cited*Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 cited*Benbolt v The Queen* (1993) 60 SASR 7 cited*Brooker v Police* [2007] NZLR 91 discussed*Director of Public Prosecutions v Merriman* [1973] AC 584 cited*Dyers v R* (2002) 210 CLR 285 applied*Eatock v Bolt* (2011) 197 FCR 261 referred to*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 cited, applied*Gas and Fuel Corporation of Victoria v Wood Hall Ltd and Leonard Pipeline Contractors Ltd* [1978] VR 385 referred to*Johnson v Johnson* (2000) 201 CLR 488 cited*Jones v Dunkel* (1959) 101 CLR 298 applied*Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 cited*Livesey v NSW Bar Association* (1983) 151 CLR 288 cited *Low v Chief of Navy* [2011] ADFDAT 3 referred to*M v The Queen* (1984) 181 CLR 487 applied*MFA v The Queen* (2002) 213 CLR 606 applied*Michael Wilson & Partners Limited v Nicholls* (2011) 282 ALR 685 cited*Qantas Airways Limited v Transport Workers Union of Australia* (2011) 280 ALR 503 cited*R v Apostilides* (1984) 154 CLR 563 applied*R v Lohnes* [1992] 1 SCR 167 discussed, compared*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 cited*Re Anning* DFDAT No. 5 of 1989 discussed*Re JRL; Ex parte CJL* (1986) 161 CLR 342 cited*Re Lusink; Ex parte Shaw* (1980) 32 ALR 47 cited*Rogers v Chief of Navy* [2002] ADFDAT 1 discussed*Saraswati v The Queen* (1991) 173 CLR 1 cited, applied*SKA v R* (2011) 243 CLR 400 cited*Tasmania v M* (2008) 184 A Crim R 404 discussed*Vakauta v Kelly* (1989) 167 CLR 568 cited*Webb v The Queen* (1994) 181 CLR 41 cited*X v APRA* [2007] HCA 4; (2007) 226 CLR 630 cited*Cross on Evidence**Discipline Law Manual Summary Authorities and Discipline Officer Proceedings*Macquarie Dictionary (2nd ed.) |
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| Date of hearing: | 15 December 2011 |
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| Place: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 165 |
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| Counsel for the Appellant: | Mr A Street SC, LCDR P W Kerr and Mr N Wyatt |
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| Solicitor for the Appellant: | Wyatt Attorneys |
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| Counsel for the Respondent: | BRIG L McDade and SQNLDR H Abiad |
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| Solicitor for the Respondent: | Director of Military Prosecutions |

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| DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL |  |
|  | DFDAT 2 of 2011 |
| ON APPEAL FROM RESTRICTED COURT MARTIAL |  |

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| BETWEEN: | TING LIAppellant |
| AND: | CHIEF OF ARMYRespondent |

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| JUDGES: | TRACEY J - PRESIDENT, WHITE JA - DEPUTY PRESIDENT & COWDROY J - MEMBER JJ |
| DATE OF ORDER: | 16 MARCH 2012 |
| WHERE MADE: | SYDNEY (HEARD IN CANBERRA) |

THE TRIBUNAL ORDERS THAT:

1. Leave to appeal with respect to Grounds 3 and 4 be granted.
2. The appeal be dismissed.

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| ON APPEAL FROM RESTRICTED COURT MARTIAL |  |

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| --- | --- |
| BETWEEN: | TING LIAppellant |
| AND: | CHIEF OF ARMYRespondent |

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| : |  |
| DATE: | 16 MARCH 2012 |
| PLACE: | SYDNEY (HEARD IN ) |

**REASONS FOR JUDGMENT**

1. On 3 February 2010 at the Campbell Park Offices, Campbell, ACT, an incident occurred involving the appellant. As a result the appellant was charged with creating a disturbance on service land under s 33(b) of the *Defence Force Discipline Act 1982* (Cth) (“the *DFDA*”). The charges were referred to the Director of Military Prosecutions (“the DMP”) on 5 August 2010. She referred the matter for summary dealing.
2. On 10 October 2010 the appellant appeared before a superior summary authority. He elected to have the charge tried by a Court Martial. The proceeding was accordingly referred back to the DMP.
3. In February 2011 the appellant was charged with one count of creating a disturbance on service land (as above). A second charge of assaulting another person on service land pursuant to s 33(a) of the *DFDA*, was also laid against the appellant.
4. On 4 April 2011 a Restricted Court Martial was convened in Canberra. On the first day of the trial the prosecutor sought leave to amend the charge sheet pursuant to s 141A of the *DFDA*: by the addition of further particulars; to withdraw the second charge of assault on service land pursuant to rule 12(a) of the *Court Martial and Defence Force Magistrate Rules*; and to add an alternative charge of prejudicial conduct contrary to s 60 of the *DFDA* with identical particulars to the first charge. The application was opposed by the appellant’s counsel. The Judge Advocate allowed the amendment.
5. On the afternoon of 5 April 2011, after an unsuccessful application by defence counsel that the Judge Advocate disqualify himself for bias, the appellant pleaded not guilty to “Creating a Disturbance on Service Land”, with the particulars:

“Being a Defence member, at Defence Legal Division, Level 4 Campbell Park Offices on 3 February 2010 between approximately 10.30 and 11.00 in the vicinity of the office of Mr Andrew Snashall, created a disturbance by causing a confrontation with Mr Snashall.”

When the charge was read to him by the Judge Advocate it included the further words “contrary to *Defence Force Discipline Act* 1982, section 33(b)” appearing on the Charge Sheet.

1. The appellant pleaded not guilty to this charge.
2. A second charge, which was described as an alternative charge of prejudicial conduct, was also preferred, namely:

“Being a defence member, at Defence Legal Division, Level 4 Campbell Park Offices on 3 February 2010 between approximately 10.30 and 11.00 you acted in a manner likely to bring discredit on the Australian Army by causing a confrontation with Mr Andrew Snashall, while wearing uniform.”

The Judge Advocate added “contrary to *Defence Force Discipline Act 1982* s 60(1)”.

1. The appellant pleaded not guilty to the second charge.
2. The amended particulars subjoined to both charges (which were not read to the appellant) were that the appellant had:

“a. refused to leave Mr Snashall’s office when requested to do so by Mr Snashall and continued speaking to Mr Snashall with a raised voice;

1. followed Mr Snashall and continued the conversation when Mr Snashall left his own office, ostensibly because MAJ Li would not;
2. forcefully pushed against Mr Snashall’s office door placing his head and shoulder in the doorway while Mr Snashall was inside the office trying to close the door;
3. re-entered Mr Snashall’s office and again refused to leave when requested to do so;
4. stood approximately three inches from Mr Snashall’s face speaking with a raised voice and in an agitated and aggressive manner.”
5. The appellant was convicted of the first charge and, because it had been proffered as an alternative charge, no finding was made with respect to the second charge.
6. The Court sentenced the appellant to be severely reprimanded and fined $5,000, suspended as to $3,000.
7. By amended notice of appeal the appellant appeals (and, as necessary, seeks leave to appeal) his conviction.
8. The appellant relies upon numerous grounds of appeal. Leave was granted to the appellant at the commencement of the hearing to rely upon his amended notice. Each ground will be considered after a short summary of the factual background.

# BACKGROUND

1. The appellant was engaged as a legal officer by the ADF and worked in the Campbell Park offices. Mr Andrew Snashall was a Commonwealth public servant holding the position of Director of Special Financial Claims in the ADF and, at all relevant times, was supervising his staff located on a floor above the appellant’s place of work. The appellant joined the ADF in 1995 as a sailor. After discharge he studied law, joined the Army Reserve and, after qualifying as a lawyer, joined the Regular Army as a legal officer. At the time of this incident he was posted to Defence Legal in the office of the Director-General at the Campbell Park offices. Although he had seen the appellant earlier in another building in Canberra, it was not until Defence Legal moved to the Campell Park offices that Mr Snashall met the appellant when he had sought to discuss a financial claim with Mr Snashall’s staff.
2. In about July 2009 Mr Snashall encountered the appellant, his wife and infant child on a visit to the appellant’s workplace and allegedly made a remark: “I see you have been polluting the world with your genes”. The appellant thought this remark to be inappropriate with a racial flavour and offensive, but said nothing.
3. On various occasions through 2009 Mr Snashall observed the appellant talking to staff under Mr Snashall’s supervision. Mr Snashall considered some of the visits and their duration to be a distraction for his staff from their work. He spoke to the appellant on several occasions asking the appellant to cease his interruptions.
4. In the afternoon of 2 February 2010 (the day before the events giving rise to the charge) the appellant was again observed by Mr Snashall talking to an employee who was attending to urgent duties. Mr Snashall asked the appellant to leave and then returned to his office. The appellant went into an empty nearby office to make a private telephone call. Mr Snashall came into the room, queried the appellant’s presence in his Directorate and asked him to leave. Each man contended that the other spoke and acted aggressively. The appellant contended that, in the course of their subsequent conversation, Mr Snashall said words to the effect:“I meant everything I have said to you”, over the past year. This, according to the appellant, revived the comment made in July 2009 and indicated that it was meant offensively. Mr Snashall did not accept that a conversation occurred on 2 February 2010 in these or similar terms. He did make a note of the encounter and asked the appellant’s commanding officer, with whom he was discussing other matters that day, to remove the appellant from the spare office.
5. It was against that background that the appellant said that he returned to Mr Snashall’s office the following morning to seek an explanation for Mr Snashall’s attitude to him.

# THE CIRCUMSTANCES GIVING RISE TO THE CHARGES

1. The events giving rise to the charges took place during the morning of 3 February 2010 on the fourth level of the Campbell Park offices and mostly in and about an office occupied by Mr Snashall. There were conflicting accounts, particularly between the appellant and Mr Snashall of what was said by each of them.
2. The appellant entered Mr Snashall’s office. Mr Snashall was using his telephone. Mr Snashall then observed the appellant leave his office. Mr Snashall was uncertain why the appellant had visited but, in view of the incident that had occurred on the previous evening, he spoke with Mr Mark Smith, who worked in the Special Financial Claims Directorate in an office next to of Mr Snashall’s office and asked him to wait in his (Mr Snashall’s) office. When the appellant did not appear, Mr Smith returned to his own office to work. Mr Snashall also spoke to Ms Donna Webster who worked next door in the Directorate. Mr Smith gave evidence. Ms Webster did not, although she gave two statements. The failure to call her was the subject of a *Jones v Dunkel* application and the failure to give an appropriate direction is a ground of appeal discussed below.
3. Approximately 45 minutes later the appellant returned to Mr Snashall’s office and initiated a conversation which related to the events of the previous day and to other grievances. Mr Snashall suggested that the appellant make a formal complaint and then requested him to leave his office. The appellant did not do so and continued talking. As a consequence, Mr Snashall left his office and commenced to walk along a hallway. The appellant followed and continued to talk to Mr Snashall.
4. Mr Snashall turned in the corridor and, still followed by the appellant, returned to his office. Mr Snashall testified that he attempted to close his office door but the appellant resisted and commenced to push against the door to prevent it closing. Mr Snashall said that after some seconds, he released the door and stepped back. According to Mr Snashall’s testimony the appellant then walked over the threshold into the office, and stood directly in front of and in close proximity to him. The appellant was speaking in a loud voice. Mr Snashall also spoke loudly, demanding that the appellant leave his office.
5. Mr Smith was alerted to the confrontation between Mr Snashall and the appellant by Ms Webster. He had been deep in his work and had heard no raised voices. He then looked into Mr Snashall’s office, heard the appellant ask for an explanation and the argument become more heated. Mr Snashall asked the appellant to leave his office: he did not; Mr Smith heard Mr Snashall say in that event he was leaving; he saw Mr Snashall walk out of his office and down the corridor followed by the appellant. Mr Smith observed Mr Snashall return, enter his office, followed by the appellant. Mr Snashall attempted to close his door; the appellant tried to open it. There was what he described as “a bit of argy-bargy”. Mr Snashall released the door. The argument continued. Mr Smith felt he needed to intervene; tried to step between them and put his hand up. Moments later Ms Bennett intervened. The appellant then became calm and left.
6. Ms Sandra Bennett, the Director of Litigation in Defence Legal, left her office just down from Mr Snashall’s office alarmed at the sound of raised voices. She heard Mr Snashall ask the appellant to leave several times. The voices were getting louder and more aggressive. There were other staff in the vicinity in addition to Mr Smith drawn to the noise. She observed Mr Smith “standing close” to the two men. She asked the appellant to leave. He became quiet, apologised briefly to her and left.
7. Other personnel observed the altercation or were alerted to it. Ms Chloe Librando, the executive assistant to the Head of Defence Legal said she felt “quite uncomfortable and scared that something might happen – between the both of them”.
8. Mr Andrew Towill, a civilian employed in Defence Legal, heard Mr Snashall ask the appellant several times to leave his office and the appellant say that he would not until he received an apology. The voices were angry and loud. He decided to stay in his office but noted other people congregating from different parts of the floor.
9. Mr Omar Khan, who worked in Defence Legal and was occupying an office in the vicinity of Mr Snashall’s, heard raised voices and observed that the appellant was agitated and heard mutual accusations of lack of professionalism. He heard Mr Snashall mention a complaint process but the appellant wanted to be heard then. Mr Snashall left his office followed by the appellant insisting that he be heard. Mr Snashall returned. He heard, but did not see, the incident with the closing door. When the door opened Mr Khan was able to observe the two men face to face and thought the confrontation was “probably getting a bit out of hand” and got up from his desk. He observed Mr Smith’s intervention and then Ms Bennett’s.
10. Mr Matthew Pearson was employed in Defence Legal and on the morning of 3 February was discussing a work matter with Ms Webster whose office joined that of Mr Snashall. At the relevant time he was standing in the corridor near Mr Snashall’s office. He overheard the appellant and Mr Snashall engage in a conversation which became progressively louder and Mr Snashall asking the appellant to leave. He heard the appellant say he would not do so until he received an answer. Mr Pearson saw Mr Snashall leave his office, walk towards him down the corridor and followed by the appellant. He again heard Mr Snashall say the conversation was over and that the appellant should leave him alone. The appellant repeated that he would not do so until he received an answer. Before the two men reached Mr Pearson – some two to three metres away – Mr Snashall turned and attempted to enter his office and close the door. Mr Pearson saw the appellant put his foot in the doorway preventing its closure. He saw the door open and heard the appellant insist on an answer. He said the appellant was speaking “tersely”. Other witnesses had, by now, arrived. Mr Pearson noted the close proximity of the two men and was concerned that matters might escalate to physical contact. Mr Smith intervened and then Ms Bennett told the appellant to leave.
11. The appellant’s version of the critical events was somewhat different from that of Mr Snashall and other witnesses. The appellant acknowledged that he went to speak to Mr Snashall but claimed that Mr Snashall was dismissive of him, stood up from his desk, walked past him and out of the office. The appellant alleged that he was shocked at such behaviour but he followed Mr Snashall saying that Mr Snashall had to listen to him wherever he was and followed him out into the corridor. The appellant said that he continued to ask for an explanation as he followed Mr Snashall down the corridor. When Mr Snashall turned back towards his office facing the appellant, he said that Mr Snashall “had breached [his] personal space”. The appellant accepted that Mr Snashall repeated that the conversation was over and that he should leave the area. The appellant said that he continued to say that he needed an explanation of Mr Snashall’s conduct towards him. By this time Mr Snashall was in his office and he, the appellant, was in the doorway. The appellant said that notwithstanding that Mr Snashall could see that he was in the doorway he continued to shut the door onto him. The appellant raised his right arm to block the door because if he had not done so it would have slammed into his shoulder since he was between the door and the door frame. Again the appellant complained that Mr Snashall ‘deliberately breached [his] distance” and told him again to leave his office. It was then that Mr Smith came in to break up the confrontation.

# THE APPEAL

1. The grounds of appeal are numerous. It will be convenient to consider some of them together.

# GROUND 1(a), (b) and (c)

1. The appellant’s first ground of appeal is that the conviction is wrong in law and a substantial miscarriage of justice has occurred. Grounds 1(a) to (c) of the amended Notice of Appeal are:

“(a) the charge on which the appellant was convicted, that he “*created a disturbance by causing a confrontation*” is not an offence known to law;

(b) the charge “*created a disturbance by causing a confrontation*” was not a “*service offence*” within the *Defence Force Discipline Act* 1982;

(c) the charge “*created a disturbance by causing a confrontation*” was not a charge within the jurisdiction of the Restricted Court Martial under s 115 and/or s 132 of the *Defence Force Discipline Act* 1982.”

1. These contentions were not raised below. The amendment to the charge sheet and the addition of further particulars were objected to, but on the basis of lateness and duplicity.
2. Section 33 of the *DFDA* provides:

**“Assault, insulting or provocative words etc.**

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.

Maximum punishment: Imprisonment for 6 months.”

1. Section 3 of the *DFDA* defines “charge” as “a charge of a service offence”; “service offence” is defined in s 3 of the *DFDA* relevantly as:

“An offence against this Act or the regulations; …”

1. The appellant submits that the words “causing a confrontation” – created a charge which was unknown to law. Accordingly, the offence as charged was not a “service charge” within s 33(b) of the *DFDA* and not capable of founding jurisdiction under s 115 and for s 132 of the *DFDA*.
2. The charge was “Creating a Disturbance on Service Land”. The balance of the words on the amended charge sheet were particulars which appraised the appellant fairly of the circumstances in respect of which he came to be charged. The appellant was arraigned on the charge of “Creating a Disturbance on Service Land” and on the alternative charge of “Prejudicial Conduct”. The principal particulars in respect of each as set out above at [5] and [7] were also read to him.
3. Rule 9 of the *Court Martial and Defence Force Magistrate Rules* provides:

“(1) A charge shall state 1 offence only.

(2) A charge shall consist of 2 parts, namely:

(a) a statement of the offence that the accused person is alleged to have committed; and

 (b) particulars of the act or omission constituting the offence.

(3) A statement of an offence shall contain:

(a) in the case of an offence other than an offence against the common law – a reference to the provision of the law creating the offence; and

 (c) in any case – a sufficient statement of the offence.

(4) Without prejudice to any other sufficient manner of setting out the statement of an offence, the statement of an offence shall be sufficient if it is set out in the appropriate form in Schedule 1.

(5) Particulars of an offence shall contain a sufficient statement of the circumstances of the offence to enable the accused person to know what it is intended to prove against that person as constituting the offence.

(6) …”

1. The charges appearing on the Charge Sheet and in respect of which the appellant was arraigned comply with r 9 and plainly were within s 33(b) and s 60(1) of the *DFDA*.
2. The appellant further argues that the first charge was not a charge within the jurisdiction of the Restricted Court Martial under s 115 and/or s 132 of the *DFDA*. Section 115 of the *DFDA* sets out the jurisdiction of a court martial:

“(1) A court martial has, subject to section 63 and to subsection (1A) of this section, jurisdiction to try any charge against any person.

(1A) A court martial does not have jurisdiction to try a charge of a custodial offence.

(2) A court martial has jurisdiction to take action under Part IV in relation to a convicted person if it has been convened under subsection 125(6) or 129A(4) for that purpose.

(3) A court martial, before taking action under subsection (2), shall hear evidence relevant to the determination of what action should be taken.”

1. Section 63 identifies certain serious offences for which the consent of the Director of Public Prosecutions is required before proceedings may be instituted under the *DFDA*. The offences created by s 33 and in particular s 33(b) and s 60 of the *DFDA* are not offences to which that provision applies. Accordingly, and in light of the conclusion with respect to grounds (a) and (b) the charges were within the jurisdiction of the Restricted Court Martial.

# GROUND 1(d)

1. The appellant contended that his conviction was bad for duplicity.
2. As developed in argument this ground also related to the combination of legislative grounds and particulars in the charge as framed. It was submitted that, in combination, the words “by causing a confrontation” and the inclusion of particulars gave rise to both latent and patent duplicity.
3. This ground had its genesis in the application made by the prosecutor to amend the charge sheet pursuant to s 141A of the *DFDA*. The application was made prior to the arraignment of the appellant. The prosecutor sought to add what became paragraphs (c), (d) and (e) and a second charge of prejudicial conduct. That second charge was to be an alternative to the first charge. The same particulars were to be relied on for both charges. They are set out above at [9].
4. The defending officer opposed the prosecutor’s application. He submitted that the first charge, in its original form, was already bad for latent or direct duplicity because the existing particulars ((a) and (b)) could both support a finding of guilt. The adding of three further particulars, each of which might also support a finding of guilt, would merely compound the problem; if there was a finding of guilt, the more particulars which were relied on by the prosecution which could individually support a finding of guilt, the more uncertainty there would be as to which particular or particulars had led to a verdict of guilty. Since the proposed particulars were also to be relied on in relation to the second charge, it suffered from the same deficiencies.
5. The learned Judge Advocate granted the prosecutor’s application. He did not err in doing so.
6. The rule against duplicity is easy to state but often difficult to apply. It requires that only one offence should be charged in any count on an indictment or charge sheet.
7. In analysing the terms of charges which arise out of a course of conduct nice questions can arise as to whether there is a single charge arising from a series of acts which constitute a course of conduct, on the one hand, and whether two or more of the acts might give rise to individual offences.
8. When a complaint of duplicity is raised it is necessary for the court or tribunal to adopt a practical approach: see *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607.
9. In *Tasmania v M* (2008) 184 A Crim R 404 Blow J dealt with an application to quash an indictment for duplicity. The indictment contained charges of ill-treatment of two children. The ill-treatment had, in each case, continued over a number of years. Multiple particulars were provided in respect of each charge. They included assaults, use of abusive language and the making of threats. His Honour rejected the application saying (at 407) that “the fact that ill-treatment and neglect can occur over extended periods, and can involve a variety of acts and omissions, and having regard to the purposes or objects of [the section creating the offence], … a course of conduct over a period of days, weeks, months or years can constitute a single crime for the purposes of that subsection.”
10. In *Rogers v Chief of Navy* [2002] ADFDAT 1 this Tribunal dealt with an appeal from a conviction for prejudicial behaviour under s 60 of the *DFDA*. The appellant had been charged with behaving in a manner likely to prejudice the discipline of the Defence Force by being involved in a sexual relationship with a subordinate. The charge was particularised by reference to a series of assignations which had occurred between the appellant and his subordinate over a period of months. One of the grounds of appeal was that the charge was bad for duplicity. This ground was rejected. The Tribunal held that the offence created by s 60 contemplated that the offence could be committed by more than one act or omission. In these circumstances reliance on a number of particularised acts as constituting a single charge was not duplicitous: see at [21].
11. The charge of creating a disturbance can be established by proof of a series of acts which constitute a course of conduct. A range of different acts performed either simultaneously or closely proximate in time, may create a disturbance. A person may, for example, cause a disturbance by shouting, banging on walls and by playing amplified music at the same time. The events relied upon by the prosecution in the present case occurred in an office and adjacent corridor in the space of a couple of minutes. The course of conduct began and ended in Mr Snashall’s office. At all times the appellant was, in varying ways, seeking to convey to Mr Snashall his objections to what he perceived to be the republication of a racial slur. The particulars relied on by the prosecution each identified different acts by the appellant in the course of his short but rowdy pursuit of Mr Snashall.
12. The first charge, in its amended form, was not bad for duplicity.

# GROUNDS 1(e), (f), (g)

1. The appellant contends that the conviction is wrong in law because

“(e) The charge upon which the appellant was convicted was the subject of a fault element under s 5.6.2 of the *Criminal Code* as to intention or recklessness in creating the result and upon which no direction was given to the Restricted Court Martial;

(f) the charge upon which the appellant was convicted was the subject of an erroneous direction as to a fault element concerning underlying acts or conduct;

(g) the charge upon which the appellant was convicted was the subject of an erroneous direction that the intention to create the result was irrelevant.”

1. These complaints were not raised at the trial. They may conveniently be considered together.
2. Not all offences contain an express fault element. Section 5.6 of the *Criminal Code* (Cth) recognises this. It provides:

“(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.”

1. Section 5.2 concerns “intention”. It provides:

“(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.”

1. The elements of the offence of “Creating a Disturbance on Service Land” as identified by the respondent are:

“(a) that the defendant was a defence member (physical element of conduct);

(b) that the defendant was reckless as to the fact that he was a defence member (default fault element of recklessness noting that recklessness can be established by proving intention, knowledge or recklessness);

(c) that the defendant was on specified land (physical element of conduct);

(d) that the defendant was reckless as to the circumstance in (c) (default fault element of recklessness noting that recklessness can be established by proving intention, knowledge of recklessness);

(e) that the land in (c) was Service land (physical element of circumstance);

(f) that the defendant was reckless as to the circumstance in (e) (default fault element of recklessness noting that recklessness can be established by proving intention, knowledge of recklessness);

(g) that the defendant created a disturbance (physical element of conduct); and

(h) that the defendant’s conduct in (g) was intentional (default element of intention).”

1. The Judge Advocate gave extensive directions to the panel about the elements of the charges. It is necessary only to refer to the first charge. He said:

“Each charge is made up of elements and ingredients that must be proved by the prosecution beyond a reasonable doubt. The elements fall into two categories, called physical and fault elements. The physical elements in this case are conduct and the circumstances. The fault elements are the states of mind accompanying the physical elements …

In the first charge before you, there are physical and fault elements … The first charge, of creating a disturbance, contains three physical elements and three fault elements. The first physical element is circumstance, that, at the time of the offence, the defendant was a Defence member. For our own purposes, the fault element is knowledge, but this particular element of the charges has been admitted.

The second physical element is circumstance; the offence occurred on Service Land. For our purposes the relevant fault element is knowledge of the facts which make it Service Land, and I’ll be explaining, shortly, what I mean by that.

The third physical element is conduct – that is, that the defendant engaged in conduct which created a disturbance – and the accompanying physical element is an intention, that is, he meant to engage in that conduct, not that he intended to create a disturbance, that he intended to engage in the conduct.

Let me say a little more about those elements before I go on to the second charge. Intention: a person has intention with respect to conduct if he means to engage in that conduct. “Creating a disturbance” is not a term or phrase that is defined in the *Defence Force Discipline Act*. I can say that creating a disturbance includes brawling and violent or disorderly disputation.

Here, the prosecution case is that it involved violent or disorderly disputation. The conduct must be such as to be likely to cause a response from anyone present who saw or heard the incident; that response could be to intervene to stop the disturbance, or to report it, or to leave the area because of the unsettling effect of the disturbance. In other words, if you were working in an office and someone was playing loud music nearby, that might disturb you from your work but it wouldn’t be creating a disturbance within the meaning of the Act. There needs to be violent or disorderly disputation, as I say, and there needs to be conduct which must be such as to be likely to cause a response from anyone present who saw or heard the incident.

You must also be satisfied of the fault element, which is intention. That does not mean the prosecution has to prove the defendant intended to create a disturbance. The prosecution has to prove the accused intended to engage in the act that amounted to a disturbance if you find the conduct amounted to a disturbance.

To summarise, has the prosecution proved that the accused engaged in conduct that amounted to a disturbance? If yes, did he intend to engage in that conduct? As I said, the prosecution does not have to prove that the accused set out to create a disturbance; the prosecution has to prove that the conduct of the accused was such as to create a disturbance and he intended to engage in that conduct.”

1. The Judge Advocate continued, referring to the particulars (which the appellant contends were incorrect statements of what had to be proved):

“… the defendant is entitled to know how it is said that he created a disturbance. The prosecution has provided particulars of that. You do not need to be satisfied beyond reasonable doubt that each of the particulars has been proved. What you are required to find is, having regard to the particulars, has the prosecution proved beyond reasonable doubt that the accused created a disturbance by conduct that he intended to engage in at that time. It may be you are satisfied that the accused did behave in the way set out in particular … but not any other particular.

The question then is, are you satisfied beyond reasonable doubt that the accused created a disturbance by that conduct and that he intended to engage in that conduct at that time.”

1. It is the *conduct* of an offender which is the key to the offence. “Conduct” is defined in s 4.1(2) relevantly as “an act”. The plurality in *X v APRA* [2007] HCA 4; (2007) 226 CLR 630 at [51], stated simply:

“A person has intention with respect to conduct if he or she ‘means to engage in the conduct’ (*Criminal Code*, s 5.2(1)).”

 Further elaboration was not required save to exclude somnambulism and the like or accident.

1. It will be a question for the trier of fact as to whether that conduct constitutes or creates a disturbance. Section 33(b) does not require that an offender “intends” to create a *disturbance*. What the prosecution had to prove, consistently with s 5.2(1), beyond reasonable doubt was that the appellant intended to conduct himself as he did. In fact, the appellant did not challenge the essential elements of the particulars. He challenged the prosecution characterisation of that conduct and who was at fault. The directions to the panel were orthodox and involved no error. Even if it were correct, as contended by the appellant, 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.

# GROUNDS 1(h), (i) and (j)

1. These grounds raise similar or overlapping complaints:

“(h) The charge upon which the appellant was convicted was not the subject of any direction to the Restricted Court Martial as to the burden and onus of proving the nature of the alleged offence “*by causing a confrontation*”;

(i) the charge upon which the appellant was convicted was the subject of an erroneous direction as to the meaning of disturbance;

(j) the charge upon which the appellant was convicted should have been the subject of a direction as to the necessity of proof that the appellant created the disturbance and not a combined or equal creation with Mr Snashall.”

1. Ground 1(h) was not the subject of any request for redirections. The words “by causing a confrontation” are not, as is now contended for on behalf of the appellant, an element of the charge requiring that it be proved beyond reasonable doubt. It merely constituted a particular consistently with r 9. It was thus unnecessary to give any direction of the kind sought.
2. In ground 1(i) the appellant contends that “disturbance” was the subject of an erroneous direction as to its meaning. The direction given by the Judge Advocate was consistent with the commentary contained in the *Discipline Law Manual Summary Authority and Discipline Officer Proceedings*, namely,

“Disturbance” This is not defined. This offence is intended for dealing with the more serious disturbances such as fighting or brawling, or violent or disorderly disputation. Charges should not be laid indiscriminately under this paragraph for mere squabbles or other noisy misbehaviour of minor significance.”

1. The Judge Advocate directed:

“Here, the prosecution case is that it involved violent or disorderly disputation. The conduct must be such as to be likely to cause a response from anyone present who saw or heard the incident; that response could be to intervene to stop the disturbance, or to report it, or to leave the area because of the unsettling effect of the disturbance. In other words, if you were working in an office and someone was playing loud music nearby, that might disturb you from your work but it wouldn’t be creating a disturbance within the meaning of the Act. There needs to be violent or disorderly disputation, as I say, and there needs to be conduct which must be such as to be likely to cause a response from anyone present who saw or heard the incident.”

1. Senior counsel for the appellant urged upon the Tribunal the approach of decisions of the Canadian Supreme Court and the Supreme Court of New Zealand to the expression “disturbance” as it appeared in the respective Canadian and New Zealand enactments.
In *R v Lohnes* [1992] 1 SCR 167 McLachlin J (as her Ladyship then was), who gave the judgment of the court, observed (at 171) that:

“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. The question before us is whether all conduct within this broad spectrum elicits criminal liability under s. 175(1), and if not, where the line should be drawn.”

1. The accused in that case had been charged with causing a disturbance by using insulting or obscene language contrary to s 175(1)(a)(i) of the *Criminal Code* (Canada). On two occasions he went to the verandah of his house and shouted obscenities at his neighbour across the street. They had a longstanding dispute about the neighbour’s use of noisy machinery. The neighbour filed a complaint and gave evidence at the trial. The prosecution called no other person who had heard or was disturbed by the accused’s words and manner of saying them. The headnote sufficiently summarizes the conclusion of the court:

“The weight of the authorities, the principles of statutory construction and policy considerations, taken together, lead to the conclusion that the ‘disturbance’ contemplated by s. 175(1)(*a*) is something more than mere emotional upset or annoyance. Before an offence can arise under that section, the enumerated conduct must cause an externally manifested disturbance of the public peace, in the sense of an interference with the ordinary and customary use by the public of the place in question. The interference may be minor but it must be present … The disturbance may consist of the impugned act itself or it may flow as a consequence of the impugned act.”

1. The statutory context and the circumstances in that case were different from the present but, even so, what occurred here fits comfortably within the articulation of “disturbance” in *Lohnes*. If anything, the direction given by the Judge Advocate favoured the appellant. No question arises in this appeal of mere “emotional disturbance”. The charge gives rise to only one issue, namely that there was a “disturbance” created by the appellant. This is solely a question of fact, and the evidence outlined above established that the appellant engaged in conduct which was sufficient to constitute a disturbance.
2. In *Brooker v Police* [2007] 3 NZLR 91 the Supreme Court of New Zealand was required to determine whether “disorderly behaviour” in s 4(1)(a) of the *Summary Offences Act* *1981* (NZ) resulted from the conduct of the accused who stood outside the home of a police constable, displayed a sign, and engaged in singing accompanied by a guitar. Elias CJ, after noting that the meaning of s 4(1) had to be ascertained from its text and in light of its purpose and legislative history and the preference for a meaning consistent with the right to freedom of expression (enshrined in the *Bill of Rights Act* (NZ), s 6), observed at [24]:

“In my view, all suggest that disorderly behaviour under s 4(1)(a) means behaviour seriously disruptive of public order. Simply causing annoyance to someone else, even serious annoyance, is insufficient if public order is not affected.”

Her Honour further observed at [42] “freedom of speech should be restricted for reasons of public order only when there is a clear danger of disruption rising far above annoyance.”

1. The Supreme Court concluded, by a majority, that the conduct in question was not disorderly because it could not be characterised as disruptive of public order in the particular circumstances of time and place. There had to be anxiety or disturbance beyond what reasonable citizens should, in the circumstances, be expected to bear.
2. The circumstances here would fit comfortably within that statement.
3. The appellant also referred to the dictionary definition of “disturbance”. The Macquarie Dictionary (2nd ed) defines the word relevantly as:

“… the act of disturbing … the state of being disturbed … an instance of this; commotion … something that disturbs … an outbreak of disorder; a breach of public peace …”

1. In *Re Anning* DFDAT No. 5 of 1989, the Tribunal considered the history of s 33 of the *DFDA* noting that it was a peculiarly Naval offence, initially derived from s 13 of the *Naval Defence Act* *1910* (Cth), the previous service law applicable to the Navy. There was then no corresponding Army or Air Force offence. The effect of s 33 in the *DFDA* was to extend the liability to conviction for such an offence to the whole of the ADF and “todefine with more precision the conduct formerly embraced by the wide terms ‘fighting’ and ‘quarrelling’ and to confine the ambit of the offences to Service Land etc and public places.” The Tribunal said (at pp 8 – 9):

“That character [of the impugned conduct] is indicated by the context in which the section appears and by a consideration of the kind of behaviour specifically mentioned, namely assaults, actual disturbances, behaviour within the view or hearing of another person which is offensive to ordinary standards of propriety to a degree more marked than is conveyed by the expression “indecent” … and using insulting words to another. The behaviour described in paras. (a) and (b) of the section connotes actual force or disturbance while that contemplated by paras. (c) and (d) is of a kind likely to cause others to take offence in such a way that the use of force, violence or the creation of disturbance might reasonably be expected to ensue.”

1. Section 33 of the *DFDA* is located in Part III Division 3 which is concerned with insubordination and violence. Offences in that Part include assaulting a superior officer (s 25); insubordinate conduct (s 26); disobeying a lawful command (s 27); failing to comply with a direction in relation to a ship, aircraft or vehicle (s 28); failing to comply with a general order (s 29); assaulting a guard (s 30); obstructing a police member (s 31); dereliction in respect of guard duty (s 32) and assaulting a subordinate including ill-treating that person (s 34).
2. The context of s 33(b) and its overall purpose of regulating discipline in the ADF support the directions given by the Judge Advocate about the meaning of disturbance which he derived from *R v Anning*.
3. There was ample evidence from the witnesses that the confrontation with Mr Snashall instigated by the appellant and persisted in by him, could be characterised as a disturbance within the meaning of the *DFDA* and under any of the approaches urged upon the Tribunal by Senior Counsel. A brief summary will suffice here.
4. Mr Smith was drawn to “raised voices”; Ms Librando: “… felt quite uncomfortable and scared that something might happen …”; Mr Towill was prompted to leave his office because of the noise coming from Mr Snashall’s office and tried to stop people coming down “… and adding to the melee there …”. Ms Bennett heard raised voices which “… got to a point where I thought this is getting a bit aggressive and I think I need to do something about it”; “… the conversations was escalating to the point where I got concerned that it may turn physical”; she noticed other defence legal staff congregating and watching. It was “… a very heated situation”; “… I’d never come across a situation like this in all of my working history”. Even the appellant when he gave evidence thought “… realistically we had lost control of the situation.”
5. By ground 1(j) the appellant complains that the Judge Advocate ought to have given a direction as to the necessity of proof that the appellant created the disturbance and not a combined or equal creation with Mr Snashall. This complaint was not raised at the trial and no direction to this effect was sought. The appellant is now seeking to introduce a justification for his conduct by reference to an alleged “racial slur” which he contended occurred the previous July and which was confirmed by Mr Snashall when he informed the appellant on 2 February 2010 that everything he had said to the appellant in the preceding months he had meant.
6. Senior Counsel for the appellant referred to *Eatock v Bolt* (2011) 197 FCR 261 and especially to [212], [221] and [225] of the decision of Bromberg J where his Honour described the relevant freedom from racial prejudice and intolerance. Counsel referred to Pt IIA inserted into the *Racial Discrimination Act* *1974* (Cth) (“the *RDA*”) by the *Racial Hatred Act* *1995* (Cth) and s 18C which prohibits certain behaviour which is reasonably likely to “offend, insult or humiliate” another done because of race etc.
7. At trial the defence did not allege that Mr Snashall had contravened the *RDA* by infringing any of the freedoms identified by Bromberg J. The words to which the appellant took exception had been said many months previously. They were not expressly or even impliedly referred to by the appellant on 2 February 2010. These contentions are further discussed under Grounds 2(b) and 3.
8. It was the appellant who sought out Mr Snashall. There was evidence apart from that of Mr Snashall that the appellant was informed that there were official channels for a complaint and that he should leave. Indeed, the appellant accepted that he persisted in staying despite being asked to leave on several occasions in order to force an explanation from Mr Snashall.
9. Mr Snashall’s conduct was not relevant to the charge on the uncontested circumstances of this case.

# GROUND 1(k)

1. The appellant contended that the charge on which he was convicted was unfair and oppressive “when combined with the second charge under s 60(1) on identical particulars and allegations ‘by causing a confrontation’”.
2. This ground is difficult to comprehend. The two charges were preferred in the alternative. The appellant was never in jeopardy of being convicted on both charges. In oral argument it was submitted that the prosecution was not entitled to lay the second charge under s 60(1) as “a backup” charge because it was not an alternative offence to that created by s 33(b) within the meaning of s 142 of the *DFDA*. Section 142 was “the exhaustive … foundation for alternative charges.”
3. The same conduct may give rise to multiple criminal offences. In *Saraswati v The Queen* (1991) 172 CLR 1 at 13 Dawson J said that:

“At common law an accused might be convicted of a lesser offence than that charged, provided that the definition of the more serious offence necessarily included the definition of the lesser offence and that both offences were of the same degree, that is to say, were either felonies or misdemeanours.”

1. When an accused pleads not guilty to a charge in a civil criminal court “issue is joined not only as to the allegation of the offence charged but as to the alternatives implicit in the charge”: see *Benbolt v The Queen* (1993) 60 SASR 7 at 19. In such circumstances the jury can be invited to return alternative verdicts. That is, if the more serious charge is not proven beyond reasonable doubt, it may be open to the jury to convict on the lesser charge.
2. The maximum penalty for an offence under s 33(b) of the *DFDA* is imprisonment for six months. Prejudicial conduct, under s 60, attracts a maximum punishment of three months. It is, therefore, a lesser (in the sense of less serious) offence.
3. It is not oppressive for the DMP to prefer alternative charges under the *DFDA*. The accused member is, in such circumstances, only liable to conviction on one of the charges. The prosecutor, in the present trial, made it clear that he only sought a conviction under s 60 if a verdict of not guilty was returned on the charge laid under s 33(b). Once the Court had found that the appellant was guilty of the offence under s 33(b) it did not proceed to make a finding under s 60.
4. There is nothing in s 142 of the *DFDA* which suggests that it is an exhaustive statement of what charges may be regarded as alternatives under the *DFDA*. The prefatory words of s 142(1) are: “For the purposes of this section …”. It provides that certain offences are to be regarded as alternative offences. Those offences are identified in Schedule 6. The section goes on to prescribe certain procedural consequences that are to follow where a member is acquitted of one service offence but is found to have committed an alternative offence or where the member who is charged with a service offence pleads not guilty to one charge but guilty to an alternative offence. There is nothing in s 142 or in the *DFDA*, when read as a whole, which suggests that it is intended to be an exhaustive statement of offences which may be regarded as alternatives. More importantly, however, for present purposes, there is nothing in the section which precludes the DMP from preferring two or more charges of offences under the *DFDA* which arise from the same facts.
5. This ground must fail.

# grounds 2(b) AND 3

1. Under these grounds the appellant alleged that there had been a substantial miscarriage of justice because the Judge Advocate did not direct the Court that the “potential cause” of the confrontation between the appellant and Mr Snashall was Mr Snashall’s comment made in July 2009 and allegedly republished on the day before the incident. Mr Snashall’s statement was, so it was contended, made in contravention of s 18C of the *RDA*. It gave rise, so it was said, to “a consequential right” on the part of the appellant to “confront and protest” Mr Snashall’s conduct. There was also said to be a duty upon the Commonwealth under s 18E of the *RDA* “to prevent that unlawful conduct whereby the charge should be dismissed and/or [Major Li] acquitted.”
2. Ground 3 is related. It is necessary to set it out in full. It read:

“That the conviction is unreasonable and cannot be supported having regard to the evidence of the unlawful conduct by Mr Snashall in July 2009 and on 2 February 2010 within s 18C and s 18E of the *Racial [Discrimination] Act 1995* and having regard to the evidence that was directed to be disregarded and/or prevented from being adduced concerning the witness Mr Snashall and the motive of Mr Snashall.”

1. Sections 18C and 18E of the *RDA* provided:

“18C (1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

***public place*** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

…

18E (1) Subject to subsection (2), if:

(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and

(b) the act would be unlawful under this Part if it were done by the person;

this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.”

1. It is to be observed that s 18C does not create a criminal offence: see *RDA*, s 26. Various remedies are, however, available to a complainant who establishes that he or she has been the victim of a contravention of s 18C.
2. The appellant failed to explain how a contravention of the *RDA* by Mr Snashall (assuming that it occurred) impinged in any way on the prosecution of the charge under s 33 of the *DFDA*. Furthermore he offered no convincing argument to support the claim that evidence relating to Mr Snashall’s motivation in making the remarks which gave rise to offence or the appellant’s motivation for confronting Mr Snashall in order to lodge a protest was admissible at the trial.
3. There is nothing in s 18C of the *RDA* or any ancillary provision which creates or recognises any “consequential right” of the kind asserted by the appellant. Furthermore s 18E deals with vicarious liability for contraventions of the *RDA*. It imposes no duty on the Commonwealth or anyone else.

# GROUND 2 (c)

1. As framed this ground complains that the Judge Advocate should have allowed evidence to have been called and cross-examination pursued in relation to what was described as “the cause of the confrontation”. This ground would appear to be related to the previous one.
2. It is not correct to say that the Judge Advocate refused to permit evidence to be called about the statement made by Mr Snashall and its alleged republication. That evidence was before the Court. Mr Snashall admitted having made the original statement.
3. In argument it was submitted that the Judge Advocate had erred when he ruled that certain questions put to the appellant’s wife by counsel appearing for him was inadmissible on the ground of irrelevance. The defending officer sought to lead evidence from Mrs Li about a conversation which she had had with her husband on the evening of 2 February 2010. The conversation related to the comment which Mr Snashall had made in 2009. When the defending officer asked Mrs Li: “Did your husband indicate to you what action he might take, or was there a discussion about that?” the prosecutor objected to the question on the ground of relevance. The Judge Advocate invited the defending officer to explain the relevance of the line of questioning. The defending officer first responded that it was evidence which would, in some unstated way, corroborate the evidence of her husband. The defending officer abandoned this justification when the Judge Advocate pointed out that corroboration could only go to the appellant’s credibility and that Mrs Li was not present on either 2 February or 3 February 2010 when the appellant spoke to Mr Snashall. The defending officer then contended that the questioning was “relevant to a fact in issue as to whether this conversation [between husband and wife on 2 February 2010] took place”. When invited by the Judge Advocate to identify, by reference to the charges, the relevant fact in issue the defending officer responded: “Well, it’s a matter that goes to the intention of MAJ Li in respect of Count 1.” The Judge Advocate then disallowed the question ruling that:

“… the intention in Count 1 goes to his intention to engage in the conduct alleged at the time the accused was engaged in. It has nothing to do with his objective on the evening of 2 February or even what his objective might have been when he attended at the office of Mr Snashall.”

1. The Judge Advocate was correct to rule as he did. There is no substance in this ground.

# GROUNDS 2(d) and (e)

1. The appellant submits that the Judge Advocate erred in failing to grant an adjournment of the trial and to uphold an objection of ostensible bias and to disqualify himself as Judge Advocate. The application to the Judge Advocate to disqualify himself was made on the second day of the trial after the Judge Advocate had refused a series of applications by the defending officer to adjourn the trial for at least a week. The circumstances in which the adjournment and disqualification applications were made are as follows.
2. On 4 April 2011 an application was made by the defending officer for an adjournment of the hearing for one week for the purpose of allowing him to inspect a box of material produced on subpoena. The appellant had sought the issue of a subpoena on 23 March 2011 but, due to certain complications, it was not served until 29 March 2011, being the week preceding commencement of the hearing.
3. The subpoena called for production of a broad range of documents. The first bundle was produced on the first day of the trial, Monday 4 April 2011. On that day the prosecutor stated that production of documentation would be complete by Wednesday 6 April. The appellant’s application was opposed and it became apparent that much of the documentation related to alleged complaints against Mr Snashall. The application for the adjournment for a week was refused but the Judge Advocate agreed to adjourn the proceedings until Tuesday 5 April 2011 at 9.30 am at which time the Judge Advocate indicated that he would hear any further adjournment application. The Restricted Court Martial then adjourned.
4. On Tuesday 5 April 2011 the application for an adjournment was renewed. It was claimed by the defending officer that the documents could be useful in regard to the credibility of Mr Snashall.
5. The prosecution again opposed the adjournment. In reply, the defending officer stated that “I certainly can’t cross-examine Mr Snashall without looking at this material, that would just be totally inappropriate”.
6. The Judge Advocate agreed to stand the proceedings down to 2.15 pm that day, but otherwise refused the adjournment. The Judge Advocate gave short reasons for his ruling and, later in the trial, provided more detailed reasons. The Judge Advocate plainly had reservations about the potential relevance of the material produced under subpoena to the issues arising at trial. He questioned the defending officer about the forensic purpose of inspecting the documents and their potential admissibility. The defending officer responded that the material sought “in essence” only went to the credit of Mr Snashall. The Judge Advocate found these responses to be unsatisfactory and ruled that the interests of justice required that the trial proceed.
7. The questions of whether or not to grant adjournment and, if so, for how long were matters which required the Judge Advocate, as he held, to exercise a discretion in the interests of justice. The appellant has failed to point to any ground on which it might be held that the exercise of the Judge Advocate’s discretion in relation to the adjournment applications miscarried. Ground 2 (d) must, therefore, fail.
8. We would note in passing that the Judge Advocate’s ruling did not have an adverse effect on the conduct of the appellant’s defence. As already noted, the subpoenaed documents related to the prior conduct of Mr Snashall. Mr Snashall was not called to give evidence until the third day of the trial. The defending officer was not called on to cross‑examine him until the fourth day. Before commencing the cross-examination the defending officer advised the Judge Advocate that:

“Might I say, in the absence of the panel, after putting all the documentation together last night and preparing – my cross-examination is not going to take all day. We will probably go into evidence today, Sir.”

1. No other disadvantage to the defence, arising from the rulings on the adjournment applications, were suggested at trial.
2. Following the Judge Advocate’s ruling on 5 April 2011 the defending officer made the application that the defending officer disqualify himself for “ostensible bias”. The defending officer said:

“The basis of the submission, sir, is the manner in which you have dealt with defence counsel, as opposed to the prosecutor, and, ultimately, your rulings with regards to allowing – the rulings that you made this morning with respect to the subpoena, which amounts to preventing, in my respectful submission, the defence adequate time to prepare the cross-examination and, of course, prepare their defence. On the test for ostensible bias, it’s my submission that the objective bystander could not fail to consider that, on that test, there was a prejudging of the issues, sir, by you, and a preference for the prosecution case over the defence. I regret that I’ve had to make this submission.”

1. Although invited to elaborate upon this submission, the Judge Advocate advanced no further arguments in support of his application.
2. The appellant submits that the refusal to grant appropriate time to investigate the records gave rise to ostensible bias. The appellant submits that the prosecution was wrong to suggest that the documents merely went to the credit of Mr Snashall, but even if they did, there was a need to investigate the records.
3. The principles relating to an application for disqualification of a judge on the ground of bias or of the apprehension of bias are well settled. In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, Gleeson CJ, McHugh, Gummow and Hayne JJ said at [6]:

“… [A] judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.” [Footnote omitted]

1. Their Honours at [8] explained the application of the principle of apprehended bias as follows:

“Its application requires two steps. First, it requires the identification of what it is said might lead a judge… to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge… has an “interest” in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated.”

1. Similar principles have been expounded by the High Court in other proceedings: see for example *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488. Numerous other authorities are conveniently referred to in the decision of the New South Wales Court of Appeal in *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 at [12]-[23].
2. In *Re JRL* (at 351), Mason J (as he then was), referring to an application for disqualification of a judge on the ground of apprehended bias, said:

“The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues (*Reg. v Watson; Ex parte Armstrong* (1976) 136 CLR 248, at pp 258-263: *Livesey v. New South Wales Bar Association*; (1983) 151 CLR 288, at pp 293-294). This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. This concern is expressed in the cognate principle that, not only must justice be done, it must be seen to be done.”

1. The fact that a ruling was made which was not favourable to a party does not give rise to an apprehension of bias against that party. In certain instances where repeated and erroneous findings are made in favour of one party such as occurred in proceedings between parties as considered in *Gas and Fuel Corporation of Victoria v Wood Hall Ltd and Leonard Pipeline Contractors Ltd* [1978] VR 385, it is possible that such events may give rise to a valid apprehension of bias. However the refusal of the adjournment in this case does not give rise to such an apprehension of bias.
2. In *Michael Wilson & Partners Limited v Nicholls* (2011) 282 ALR 685 the High Court was called on to consider whether a judge should disqualify himself because of adverse rulings made by him in interlocutory hearings on ex parte applications. At [67] Gummow ACJ, Hayne, Crennan and Bell JJ said:

“As pointed out earlier in these reasons, an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear upon the issues that are to be decided. An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had *in fact* prejudged an issue. To ask whether the reasons for judgment delivered after trial of the action somehow confirm, enhance or diminish the existence of a reasonable apprehension of bias runs at least a serious risk of inverting the proper order of inquiry (by first assuming the existence of a reasonable apprehension). Inquiring whether there has been ‘the crystallisation of that apprehension in a demonstration of actual prejudgment’ impermissibly confuses the different inquiries that the two different allegations (actual bias and apprehended bias) require to be made. And, no less fundamentally, an inquiry of either kind moves perilously close to the fallacious argument that *because* one side lost the litigation the judge was biased, or the equally fallacious argument that making some appealable error, whether by not dealing with all of the losing side's arguments or otherwise, demonstrates prejudgment.” [Footnote omitted]

1. In our view the disqualification application was founded on no more than the appellant’s view that the Judge Advocate’s rulings on the adjournment applications had been wrongly made and, in some way, demonstrated partiality to the prosecution. The complaint amounted to an expression of dissatisfaction that the defending officer’s applications had been refused.
2. The Tribunal is unable to discern any basis whatsoever for the application having been made in respect of the ruling of the Judge Advocate to refuse the requested adjournment. None of the requisites for a successful application existed. Ground 2(e) must fail.

# GROUND 2(f)

1. This ground alleges that the Judge Advocate erred in ruling that the questions asked by the defending officer of Mrs Li were irrelevant and disallowed them.
2. For the reasons we have given in relation to ground 2(c) this ground must also fail.

# GROUND 2(g)

1. The defending officer applied to call a Ms Lindy Baulman to give evidence at the trial. Ms Baulman was an employee of the Department of Defence who had worked with Mr Snashall. The defending officer foreshadowed that Ms Baulman, if called, would give evidence that, on an earlier occasion, Mr Snashall had jumped up from his desk, gone to the door and told her to get out of his office. This was said to be evidence going to the credit of Mr Snashall and as to his “propensity” to act in such a manner.
2. The Judge Advocate ruled that the evidence would be inadmissible. He said that it would be irrelevant given that there was no issue that Mr Snashall had told the appellant to leave his office on 3 February 2010. He ruled that the necessary pre-conditions for the introduction of such evidence, prescribed by s 103(1) of the *Evidence Act 1995* (Cth)(“the *Evidence Act*”), had not been satisfied.
3. The Judge Advocate was correct to so rule. Section 102 of the *Evidence Act* provides that credibility evidence about a witness is not admissible. Section 103 provides for an exception to this general rule. That exception, however, only applies to evidence adduced in cross-examination and then only “if the evidence could substantially affect the assessment of the credibility of the witness.” The exception did not, therefore, apply to the evidence which the defending officer proposed should be led from Ms Baulman.

# GROUND 2(h)

1. The appellant objected that the Judge Advocate had erred by not giving a *Jones v Dunkel* direction in relation to the failure of the prosecution to call a Ms Webster as a witness.
2. Ms Webster had made two statements. She worked in an office next door to that of Mr Snashall. On 3 February 2010 she overheard a number of the exchanges between the appellant and Mr Snashall. She also observed them in Mr Snashall’s office and as they passed in the corridor. She said that the discussion between the appellant and Mr Snashall began quietly but the appellant started to raise his voice. Shortly afterwards Mr Snashall insisted that the appellant leave his office. When the appellant refused to do so Mr Snashall left and the appellant followed him down the corridor. She heard the appellant say “if you go I will go wherever you are and we will have this conversation” or words to that effect. When Mr Snashall returned to his office she heard the appellant yelling and banging on the office door. She said that at this time people had started coming out of their offices to see what was going on. She said that she had remained at her desk because she “believed there were enough people involved and I feared the matter would escalate and did not want to put myself between them.”
3. At the time of the trial Ms Webster was in the Cocos Islands. The prosecutor indicated that he was not able to arrange for her attendance.
4. The defending officer asked the Judge Advocate the Court to give what he described as “a *Jones v Dunkel* direction” because of the prosecution’s failure to call Ms Webster.
5. The Judge Advocate refused to give such a direction. He gave short reasons for so ruling. He referred to the dictum of Hayne and Gaudron JJ in *Dyers v R* (2002) 210 CLR 285 that, as a general rule, a trial judge should not direct a jury in a criminal trial that the prosecution would be expected to call persons to give evidence other than those it did call as witnesses. He also quoted a passage from an authoritative text to the same effect. He said that he had examined Ms Webster’s statements and was persuaded that they could not be said to contain evidence that would not have assisted the prosecution.
6. In *Jones v Dunkel* (1959) 101 CLR 298 at 312 Menzies J said that:

“(i) that the absence of the defendant … as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.”

1. Although Menzies J spoke about the absence of a defendant as a witness the rule has evolved to cover the unexplained absence of witnesses generally. The relevant principle was stated in the 7th Australian edition of *Cross on Evidence* at [1215] in these terms: the “unexplained failure by a party to give evidence, to call witnesses, or to tender documents or other evidence … may, not must, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted that parties’ case.”
2. In *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 124 Wilcox J noted that:

“*Jones v Dunkel* … is often cited for its statements about the effect of a party failing to call a person with knowledge of the relevant facts; the matters discussed in Menzies J’s second and third propositions. People sometimes overlook that these statements were made against the background of findings by all three majority judges that there was material entitling the jury to infer negligence. In that situation the defendant’s failure to [give evidence] could be taken into account in determining whether the inference should in fact be drawn. The statements in *Jones v Dunkel* give no support to the proposition that the failure to call the witness may itself provide the basis for an adverse inference. An inference must be founded in evidence. As Menzies J’s said, the absence of a particular witness ‘cannot be used to make up any deficiency of evidence.’”

See also: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2010) 187 FCR 293 at 300-302 (per Barker J); *Qantas Airways Limited v Transport Workers Union of Australia* (2011) 280 ALR 503 at 511-514 (per Moore J).

1. These observations were made in civil cases. Courts are all the more reluctant to give such a direction in a criminal trial. This is particularly the case where the accused or potential witnesses whom it might be expected would have supported the accused are concerned: see *Dyers* at 291-5. Where potential prosecution witnesses are involved the general rule is that “it is for the prosecution to decide what evidence it will adduce at trial”: see *R v Apostilides* (1984) 154 CLR 563 at 575. In *Dyers* (at 295) Gaudron and Hayne JJ (with whom Kirby J agreed on this issue) explained the approach which should be adopted in the event that the prosecution does not call a particular witness. Their Honours said that:

“The trial judge may, but is not obliged to, question the prosecution in order to discover its reasons for declining to call a particular person, but the trial judge is not called upon to adjudicate the sufficiency of the reasons that the prosecution offers. Only if the trial judge has made such an inquiry and has been *given answers considered by the judge to be unsatisfactory*, would it seem that there would be any sufficient basis for a Judge to tell the jury that it would have been reasonable to expect that the prosecution would call an identified person. There would then be real questions about whether, and how, the jury should be given the information put before the judge and then a further question about what directions the jury should be given in deciding for itself whether the prosecution could reasonably have been expected to call the person. *Only when those questions have been answered* would further directions of the kind contemplated by *Jones v Dunkel* have been open …” (Emphasis added).

1. In the present proceeding the prosecution volunteered the reason for the absence of Ms Webster. The Judge Advocate did not consider that the reason proffered was unsatisfactory. In these circumstances no obligation fell on the Judge Advocate to consider giving a *Jones v Dunkel* direction in relation to the absence of Ms Webster.
2. There was a further reason why it was inappropriate, in the circumstances of this case, for the direction sought by the defence to have been given. Ms Webster’s statement was substantially consistent with the account of relevant events which had been given by other prosecution witnesses who had been in the vicinity of Mr Snashall’s office on the morning of 3 February 2010. Her evidence supported significant aspects of the prosecution case. Any suggestion to the Court Martial that a proper basis existed for them to infer that her evidence would not have assisted the prosecution, would have been wrong and misleading.
3. The Judge Advocate did not err by failing to give the directions sought by the defence.
4. This ground fails.

# GROUND 2(i)

1. Under this ground the appellant complains that the Judge Advocate “entered the arena” by:

“(i) the comments made in front of the Panel as to Ms Britton and Ms Webster;

(ii) the intervention made in front of the Panel in the cross examination, examination and proposed examination by the defending officer.”

thereby giving rise to “ostensible bias”.

1. The appellant sought to support his allegation by reference to a number of exchanges which passed between the Judge Advocate and counsel and statements made, in the course of the hearing, by the Judge Advocate. Those exchanges and statements are set out below.
2. The comments made relating to Ms Britton and Ms Webster were:

“JUDGE ADVOCATE: Mr Prosecutor, is it the case that Ms Amanda Britton, also known as picker, was unable to give evidence in these proceedings because of medical reasons?

PROSECUTOR: Yes, sir, I was provided with a medical certificate from her practitioner to that effect.

JUDGE ADVOCATE: Is it the case that Ms Donna Webster was unable to give evidence because she is presently in the Cocos Island?

PROSECUTOR: That’s the information I received, sir, yes.”

1. The appellant submitted that the Judge Advocate “entered the arena” by commenting upon the absences of these witnesses when there was no evidence before the Court as to the reason for their non-appearance as witnesses.
2. The various interventions to which the appellant drew attention were:
* At the conclusion of the prosecution’s case on 7 April 2011 the following exchange occurred:

“JUDGE ADVOCATE: Is the defence ready to proceed, commander?

DEFENDING OFFICER: Yes, sir. I have a no case submission to make.

JUDGE ADVOCATE: It’s going to be one of those days, Mr President. I’m sorry, but you’ll have to retire while I consider this submission.”

* On 6 April 2011, during the cross-examination of Mr Matthew Pearson by the defending officer, the defending officer asked:

“Did you have any conversation with Mr Snashall, post-fact, about this incident?---I would say, yes. I would say the conversation regarded – as to if and/or when a trial may or may not be heard.

Is that all?---No specific details, sir. I keep my record to myself.

What you’re saying is, “Look, I could have spoken to him, I just don’t recollect it, about the facts”?---No, no, no.

JUDGE ADVOCATE: That wasn’t his answer.

DEFENDING OFFICER: No, I’m putting it to him, sir.

JUDGE ADVOCATE: You were putting to him what he was saying and what you put to him was not what he was saying.

DEFENDING OFFICER: No, I agree with that. I’m putting it to him as a separate proposition.”

* Later, the defending officer said to Mr Pearson:

“I’ll make it more clear to you. You say in this statement – I withdraw that and say this. You agree that your evidence is today that you did not witness the pushing of the door incident, as you’ve described it, correct.

JUDGE ADVOCATE: He didn’t see it, I think, is his evidence.

PROSECUTOR: Yes. You didn’t see it, you heard it?---That is correct.”

* Still later the Judge Advocate asked:

JUDGE ADVOCATE: Is it in issue that MAJ Li entered Mr Snashall’s office?

DEFENDING OFFICER: No, sir.

JUDGE ADVOCATE: Is there an issue that there was a conversation there after Mr Snashall - - -

DEFENDING OFFICER: The conversation is in issue.

* A ruling made by the Judge Advocate, in the presence of the panel, that a line of questioning being pursued by the defending officer was irrelevant.
* A question by the Judge Advocate as to whether a matter, raised by the defending officer, during cross-examination of Mr Snashall was relevant to any issue in the trial.
* An intervention by the Judge Advocate during the defending officer’s cross examination of Mr Snashall:

“Did you ever formally complain to MAJ Li’s chain of command?---In relation to interruptions, yes, of sorts. I spoke to WGCDR Crookes-Byrnes in relation to an incident that occurred in December 2009 where MAJ Li had made – used inappropriate language in the corridor of such volume that it interrupted a telephone conversation of mine. The person on the other end of the call asked me what on earth was going on in my office, I put them on hold, I walked down the corridor to where MAJ Li was.

I asked you in relation to the dropping in is this the only time you made a formal complaint?

JUDGE ADVOCATE: You asked him whether he ever made a complaint about the defendant’s interruptions, the witness is answering.

DEFENDING OFFICER: The witness is now going on to say he made a formal complaint about inappropriate language, not dropping in; there’s a distinction.”

* A further query relating to the cross-examination of Mr Snashall:

“JUDGE ADVOCATE: What’s the relevance?

DEFENDING OFFICER: Of this line of cross-examination or that? Sir, the continuous derogatory and sarcastic statements made to MAJ Li by this man which amounts, at the end of the day, to bullying.

JUDGE ADVOCATE: Were you putting to this witness that the incident didn’t occur?

DEFENDING OFFICER: Yes, and I put my instructions to him since it was raised.

JUDGE ADVOCATE: I will remind counsel again about section 103. Can we have the witness back?”

* A comment made by the Judge Advocate about whether part of the cross-examination was helpful:

“JUDGE ADVOCATE: I don’t know that that’s helpful, commander.

DEFENDING OFFICER: All right. Thank you, sir.”

* A further exchange during the cross-examination of Mr Snashall:

“JUDGE ADVOCATE: Commander - - -

DEFENDING OFFICER: I’ll withdraw the question, sir, and rephrase it.

JUDGE ADVOCATE: Yes.”

* An intervention by the Judge Advocate:

“After the phone call MAJ Li went to your office?---He approached my office, yes. He didn’t come in.

He wanted to indicate to you why he needed to use the phone?

JUDGE ADVOCATE: He wanted to or he did?

DEFENDING OFFICER: He started to indicate to you why he needed to use the phone in that office; correct?---Yes, with aggression.”

* An observation of the Judge Advocate after a question to Mr Snashall: ‘I don’t think the witness would be privy to the contents of a summons, commander’.
* A question by the Judge Advocate about whether a matter had been put to another witness.
* A query by the Judge Advocate:

“JUDGE ADVOCATE: I thought the witness had said earlier that he delivered a hard copy on the evening of 2 February.

Is that right?---Yes, that’s correct.”

* The observation by the Judge Advocate that he was “a little confused” concerning the evidence then being adduced.
* A request by the Judge Advocate to the defending officer that the witness be allowed to finish his answer.
* A request by the Judge Advocate to identify which statement was being relied upon.
* The observation of the Judge Advocate that there was ‘some ambiguity’ in the evidence.
* A query by the Judge Advocate as to which remark was being referred to.
* The caution given by the Judge Advocate to the defending officer concerning his attempts to put to a witness the testimony of another person.
* A ruling by the Judge Advocate against the appellant in respect of his attempt to rely upon witnesses called for the sole purpose of testifying as to the credibility of the prosecution’s witness, having regard to the threshold test provided by s 103(1) of the *Evidence Act*.
* The Judge Advocate’s ruling under s 97 of the *Evidence Act* to exclude tendency evidence sought to be led by the appellant to discredit Mr Snashall; and to the rejection by the Judge Advocate of a question concerning prior animosity existing between Mr Snashall and the appellant.
* The refusal of the Judge Advocate to admit evidence about certain prior conduct of Mr Snashall on the ground that it was not probative.
* The refusal by the Judge Advocate to reverse his ruling concerning the admissibility of the evidence of Ms Bulman whose testimony was solely directed to the credit of Mr Snashall.
* The observation by the Judge Advocate that the evidence of Mrs Li was straying and that it needed to be relevant.
* The ruling by the Judge Advocate as to the inadmissibility of the evidence of Mrs Li which was led for the purpose of supporting the credibility of the appellant.
1. We have considered each of these matters to determine whether individually or collectively they are sufficient to support an allegation of apprehended or ostensible bias, in accordance with the authorities to which we have referred when considering grounds 2(d) and (e).
2. No complaint was made, at trial about any of the rulings, questions or observations asked or made by the Judge Advocate. Nor has the appellant alleged that any of the rulings (apart from those relating to evidence going to the credibility of Mr Snashall and the admissibility of some of the evidence of Mrs Li) was tainted by error.
3. It was the duty of the Judge Advocate to ensure that the trial was conducted according to law. To this end he was entitled to raise issues with counsel about the relevance of lines of questioning and obliged to make rulings to ensure that inadmissible evidence was not placed before the court. This is what he did.
4. In these circumstances the reasonable observer would not have apprehended that the Judge Advocate might not bring an impartial mind to the resolution of the various procedural issues which it fell to him to determine.
5. We do not consider that any of the rulings was errant.
6. We reject this ground of appeal.

# GROUND 2(j)

1. This ground arises from a failure to place a date on the original charge sheet.
2. The appellant submitted that this constituted a failure to comply with r 8(1) of the *Court Martial and Defence Force Magistrate Rules* and exposed a want of compliance with the power of delegation conferred by s 188GR of the *DFDA*.
3. Rule 8(1) provides that a charge sheet must be “signed and dated by the Director of Military Prosecutions.”
4. Section 188GR empowers the DMP to delegate all or any of her powers to a defence legal officer.
5. The original charge sheet was signed by a delegate of the DMP. Under the signature block appeared the words “February 2011”. There was a gap before the word “February” which appeared to have been left for the insertion of a number which would have identified the day in February on which the delegate had signed the charge sheet.
6. As has already been noted, an application was made by the prosecution, at the commencement of the trial, to amend the charge sheet pursuant to s 141A of the *DFDA*. That application was granted. Although the defending officer opposed the application on various grounds he did not do so on the basis of any alleged defect in the original charge sheet. The form of the substituted charge sheet was determined, not by the delegate of the DMP, but by the Judge Advocate: see s 141A(1)(c). Once leave to amend had been granted the appellant was arraigned on the charges appearing on that amended sheet, not on the charge sheet signed by the DMP’s delegate.
7. In these circumstances, the appellant’s submission that the failure to place a number adjacent to the word “February” in the original charge sheet cannot and does not render the trial a nullity. Nor is it indicative of a want of proper exercise of the power of delegation under s 188GR of the *DFDA*.

# GROUND 4: CONVICTION IS UNSAFE AND/OR UNSATISFACTORY

1. The appellant submits that by virtue of all the matters raised in his earlier grounds of appeal, the conviction is unsafe or unsatisfactory and should be quashed.
2. The approach of an appellate court to a complaint that a verdict is “unsafe or unsatisfactory” or “unreasonable” is as set out in *MFA v The Queen* (2002) 213 CLR 606 at 623-624 per McHugh, Gummow and Kirby JJ. That decision adopted the approach in *M v The Queen* (1984) 181 CLR 487 and in particular the passage in the joint judgment of Mason CJ, Deane, Dawson and Toohey JJ at 494-5:

“… [W]here the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.”

1. More recently, in *SKA v R* (2011) 243 CLR 400, French CJ, Gummow and Kiefel JJ stressed (at 406) that:

“By applying the test set down in *M* and restated in *MFA*, the court is to make ‘an independent assessment of the evidence, both as to its sufficiency and its quality.’”

1. The appellate court:

“… was required to determine whether the evidence was such that it was open to a jury to conclude beyond reasonable doubt that the applicant was guilty of the offences with which he was charged.” [at 409]

1. These authorities were considered and applied by this Tribunal in *Low v Chief of Navy* [2011] ADFDAT 3 at [71] and following.
2. The evidence of Mr Smith, Ms Librando, Ms Bennett, Mr Khan and Mr Pearson described the events relating to the appellant’s conduct. Much of that evidence is set out above. Their accounts might be described as “objective” although there was some cross‑examination that a particular witness did not “like” the appellant. That body of evidence amply supported the charge. Mr Snashall’s evidence about these events was not seriously challenged – rather it focussed on a range of matters which went to his style of administration, not readily relevant. Importantly, the appellant himself gave evidence that he entered Mr Snashall’s office with the express intention of getting an explanation from him. He heard Mr Snashall request him to leave. He determined to follow him about until he gave an explanation. He persisted in attempting to re-engage after Mr Snashall returned to his office, pushed against the door and continued the confrontation with a raised voice in circumstances where other personnel were drawn to what was happening.
3. When regard is had to that evidence, the evidence to which counsel particularly referred, and when the evidence and process of the trial is considered as a whole, the evidence is sufficient as to extent and quality to conclude beyond reasonable doubt that the offence of creating a disturbance on service land was committed by the appellant.
4. This ground of appeal is not made out.

# ORDERS

1. The appellant should be granted leave to appeal but the appeal should be dismissed.

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| I certify that the preceding one hundred and sixty-five (165) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey - President, White - Deputy President & Cowdroy - Member. |

Associate:

Dated: 16 March 2012