



HIGH COURT OF AUSTRALIA

9 September 2020

PRIVATE R v BRIGADIER MICHAEL COWEN & ANOR
[2020] HCA 31

Today the High Court unanimously dismissed an application which challenged the jurisdiction of a Defence Force magistrate to try a charge against a member of the Australian Defence Force ("ADF"). The application concerned the extent to which the defence power conferred on the Commonwealth Parliament by s 51(vi) of the *Constitution* supports the conferral of jurisdiction by the *Defence Force Discipline Act 1982* (Cth) ("the Act") upon military service tribunals to hear and determine charges relating to conduct that also constitutes an offence under ordinary criminal law and that is committed in a time of peace when civil courts are reasonably available.

On 12 June 2019, the plaintiff was charged by the Director of Military Prosecutions ("DMP") with one count of assault occasioning actual bodily harm against a woman with whom he had previously been in an intimate relationship. The alleged offending occurred after a birthday party in Fortitude Valley, Brisbane. It was alleged that, throughout the night, the plaintiff had made unwanted advances towards the complainant. At the end of the evening in a hotel room, the plaintiff, who was intoxicated and angry, allegedly threw the complainant's phone across the room, grabbed her by the throat and pushed her against the wall, shaking her and yelling at her. After the complainant broke free, the plaintiff tackled her to the ground, placed his knees on her chest and choked her until two security guards entered the room. The plaintiff was and is a member of the ADF and the complainant, at the time of the alleged assault, was a member of the ADF. Neither was on duty or in uniform at the time of the alleged offending.

On 26 August 2019, the plaintiff appeared before a Defence Force magistrate on a charge under s 61(3) of the Act, which provides that a defence member is guilty of an offence if the person engages in conduct outside the Jervis Bay Territory and that conduct would be an offence if it took place in the Jervis Bay Territory. Assault occasioning actual bodily harm is an offence under s 61(3) by reason of s 24 of the *Crimes Act 1900* (ACT). The plaintiff objected to the Defence Force magistrate's jurisdiction to hear the charge. The Defence Force magistrate dismissed the objection on the basis that it is sufficient to confer jurisdiction on a service tribunal that the accused was a member of the armed forces when the charged offence was allegedly committed.

The plaintiff commenced proceedings in the original jurisdiction of the High Court seeking prohibition to prevent the Defence Force magistrate hearing the charge against him. The Court unanimously held that the Defence Force magistrate had jurisdiction to hear the charge. Five Justices of the Court held that s 61(3) of the Act, in obliging defence members to obey the law of the land, is, in all its applications, a valid exercise of the defence power. Two Justices of the Court held that s 61(3) is valid only in its application to offences which, because of their nature or circumstances of commission, have a proven connection with defence force discipline, and that such a threshold was satisfied in the present case.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*