DO YOUNG (aka JASON) LEE v THE QUEEN (S313/2013)
SEONG WON LEE v THE QUEEN (S314/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 68

Date of judgment: 3 April 2013

Special leave granted: 13 December 2013

In late November and early December 2009 Mr Jason Lee ("Jason") was compulsorily examined by the New South Wales Crime Commission ("the Crime Commission"). At that time, Jason already faced drug possession and money laundering charges (which remained outstanding at the time of writing).

On 7 December 2009 police searched the apartment in which Jason lived with his son, Mr Seong Won Lee ("Seong Won"). During that search the police discovered two firearms, quantities of white powder, more than $1.1 million cash and various documents in Jason's name. Both Jason and Seong Won were then charged with firearms offences. On 16 December 2009 Seong Won was also examined by the Crime Commission. In May 2010 both Jason and Seong Won were further charged with supplying pseudoephedrine, after testing had confirmed that the seized powder contained that prohibited drug.

In July 2010 the Director of Public Prosecutions ("DPP") obtained the transcripts of both Jason's and Seong Won's examination from the Crime Commission. Those transcripts were later included in the DPP's brief of evidence. That brief of evidence also included witness statements that had been obtained by the Crime Commission. Those witness statements referred both to answers given by Jason during his examination and to documents that had been compulsorily produced to the Crime Commission.

Following a joint trial, a jury found Jason and Seong Wong each guilty of several offences (and acquitted them of several others) in March 2011. Judge Solomon then sentenced both men to imprisonment, Jason for 13½ years with a non-parole period of 9½ years, Seong Won to 8½ years, with a non-parole period of 5½ years. Each man appealed against his conviction.

During the joint appeals, the DPP accepted that both Jason's and Seong Won's examination transcripts had been provided to it unlawfully. The DPP also accepted that contents of documents produced to the Crime Commission had been unlawfully provided to the DPP. On 3 April 2013 however the Court of Criminal Appeal (Basten JA, Hall & Beech-Jones JJ) unanimously dismissed both men's appeals, finding that no miscarriage of justice had occurred. In respect of Jason, their Honours found that nothing in the examination transcripts was relevant to the trial as it in fact ran. They further found that the use of information from documents produced to the Crime Commission had not deprived Jason's defence counsel of any available strategy, and that similar versions of those documents, differently sourced, were in any event available to be tendered. The Court of Criminal Appeal also found that the provision of the

examination transcripts to the DPP had given rise to no unfairness in the conduct of the trial in respect of Seong Won.

In each appeal, the grounds of appeal are:

- The Court of Criminal appeal erred in its application of the "miscarriage of justice" limb of s 6(1) of the *Criminal Appeal Act* 1912 (NSW) by:
    a) imposing a requirement that as a matter of necessity "a causal connection" be established between an irregularity and the conviction at trial; and/or
    b) conflating the questions of miscarriage of justice and the application of the proviso, thereby casting the onus on the appellant in relation to both issues.

- The Court of Criminal failed to properly assess the illegality and/or the impropriety of the Crime Commission and the prosecuting authorities and to take this relevant consideration into account when determining whether there had been a miscarriage of justice in the sense of a failure of adversarial process.