SHORT PARTICULARS OF CASES
APPEALS

FEBRUARY/MARCH 2007

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THOMAS v MOWBRAY & ORS (M119/2006)

Date special case referred to Full Court: 2 October 2006

This special case concerns the validity of Division 104 of the *Criminal Code Act 1995* (Cth) ("the Code"), the object of which is stated to be: "to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act".

In March 2001, the plaintiff, an Australian citizen, travelled to Pakistan and Afghanistan, where he undertook paramilitary training at the Al Farooq training camp for three months. He was arrested in Pakistan in January 2003, but returned to Australia on 6 June 2003. In November 2004 the plaintiff was charged with various offences under Part 5.3 of the Code and the *Passports Act 1938* (Cth). He was found guilty in the Supreme Court of Victoria of intentionally receiving funds from a terrorist organisation and of possession of a passport that had been falsified. The Victorian Court of Appeal set aside the convictions on 18 August 2006, but has not yet decided whether to order a retrial.

On 27 August 2006, on the application of the Australian Federal Police ("the AFP"), an interim control order in respect of the plaintiff was made by the Federal Magistrates Court, under Division 104 of the Code. The AFP contended, inter alia, that the plaintiff had received training from Al Qa'ida; he had heard Usama Bin Laden speak at the training camp on several occasions, and he had attempted to join the Taliban after September 11 2001. The plaintiff was not notified of the hearing, which was held on an ex parte basis. The interim control order was served on him on 28 August 2006. On 22 September 2006, the plaintiff filed an application for an order to show cause in this Court, seeking, inter alia, a writ of certiorari to quash the order of the Federal Magistrate, and an injunction restraining the Commonwealth from acting upon the order. The parties have agreed in stating the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court. The Attorneys-General of New South Wales, Western Australia and South Australia have given notice of their intention to intervene in the proceeding.

The special case raises the following issues:

- Is Division 104 of the *Criminal Code Act 1995* (Cth) invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Constitution?

- Is Division 104 invalid because, in so far as it confers judicial power on a federal court, it authorises the exercise of that power in a manner contrary to Chapter III of the Constitution?

- Is Division 104 invalid because it is not supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?

JOHN FAIRFAX PUBLICATIONS PTY LTD & ANOR v GACIC & ORS (S480/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 30 June 2006

Date of grant of special leave: 8 December 2006

On 30 September 2003 the Appellant published an article in the Sydney Morning Herald in which the restaurant, 'Coco Roco', was critically reviewed. The Respondents own that restaurant and they claimed that the article conveyed the following defamatory imputations:

(a) The Respondents sell unpalatable food at Coco Roco.
(b) The Respondents charge excessive prices at Coco Roco.
(c) The Respondents provide some bad service at Coco Roco.
(d) The Respondents are incompetent restaurant owners because they employ a chef at Coco Roco who makes poor quality food.

Following a trial conducted pursuant to section 7A of the *Defamation Act* 1974 (NSW) the jury found that imputations (a) and (c) were conveyed but were not defamatory. The jury also found that imputations (b) and (d) were not conveyed.

Upon appeal, the Respondents submitted that the Appellant's counsel had misled the jury with his statements concerning defamatory meaning. This was in respect of imputations (a) and (c). They also submitted that the trial judge, Justice Bell, had failed to properly direct the jury to overcome this. With respect to imputation (d), the Respondents also claimed that the Appellant's counsel had misled the jury by submitting that it involved an inference upon an inference which did not give rise to a defamatory imputation. They further submitted that Justice Bell had erred in permitting this matter to go to the jury. There was no appeal in respect of imputation (b).

In relation to imputations (a) and (c) the Court of Appeal (Handley, Beazley & Ipp JJA) held that 'business defamation' differed from defamation as it is generally understood. This is because it does not require proof that the defamatory imputation would tend to lower a person's reputation in the minds of right-thinking members of society. It requires only that that person’s reputation in their trade, profession or office be injured. Their Honours found that Justice Bell had failed to adequately direct the jury that 'business defamation' was distinct from defamation in its generally understood sense.

Their Honours then held that an appellate court may enter a verdict where an imputation is plainly defamatory and no jury, properly directed, could have reasonably reached any other verdict. It was appropriate therefore for the Court to enter a verdict in favour of the Respondents in respect of imputations (a) and (c). This is because these imputations were clearly defamatory and there was no question of community standards nor a suggestion of a compromise verdict.

With repect to imputation (d), Justices Beazley & Handley held that the question of whether an imputation involves an inference on an inference is a matter for determination by a judge and not by the jury. They then held that imputation (d) did not involve an inference upon an inference and this question should not

have been left to the jury.

The grounds of appeal include:

- The Court of Appeal erred in holding, in reliance on section 108(3) of the *Supreme Court Act* 1970 (NSW), that the Respondents were entitled as a matter of law to a verdict on imputations (a) and (c) after a finding by the Court that the jury's answers were unreasonable. The Court should have held that the party carrying the onus is not entitled to an order for a verdict in his or her favour, except in circumstances where there is no remaining factual controversy for the jury to determine, and the uncontroverted facts entitle that party to a verdict as a matter of law.

- The Court of Appeal erred in failing to hold that the question whether a party carrying the onus has discharged that onus, so as to make a contrary finding unreasonable, is a question of fact, not of law, and that section 108(3) had no application.

LOCKWOOD SECURITY PRODUCTS PTY LTD v DORIC PRODUCTS PTY LTD (S226/2006)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 8 December 2005

Date of grant of special leave: 16 June 2006

Lockwood Security Products Pty Ltd ("Lockwood") manufactures and sells door locks. It is the registered proprietor of Australian Patent No. 702534 ("the Patent"). This is in respect of an invention described as a 'key controlled latch'. Doric Products Pty Ltd ("Doric") also carries on business manufacturing and selling door locks. The Patent's invention arose out of a problem with doors that had one lock on the outside and one on the inside. Such doors could not be opened without a key and this was potentially dangerous. The Patent overcame this problem by proposing that the external operation of the key (or other actuator such as a handle) would simultaneously unlock the internal handle.

In October 2000 lawyers for Lockwood sent letters to Doric (and others) in which they asserted that one or more of Doric's products had infringed the Patent. Doric responded by commencing proceedings under section 128 of the *Patents Act* 1990 (Cth) ("the Act") seeking a declaration that such threats were unjustifiable. It also sought injunctive relief and damages. Doric further denied that its products had infringed any valid claim of the Patent.

On 21 December 2001 Justice Hely rejected Doric's submission that the claims of the Patent were invalid due to obviousness. He also rejected their arguments concerning sufficiency, utility and uncertainty. His Honour did however find that each of Lockwood's claims 1 to 32 were invalid on one of two fair basis grounds. This left claim 33 as the only valid claim, but it was not contended that Doric had infringed it. Justice Hely ordered that claims 1 to 32 of the Patent be revoked. He also dismissed Lockwood's cross-claim alleging infringement. His Honour did however grant a stay of that judgment.

The major issue before the Full Federal Court was whether the correct fair basis test pursuant to section 40(3) of the Act had been applied. If Justice Hely's finding was overturned, Doric's products would have infringed Lockwood's claims 13, 14, 15, 20 and 30. On 7 March 2003 the Full Federal Court (Wilcox, Branson & Merkel JJ) upheld Justice Hely's decision that claims 1 to 32 were not fairly based. Their Honours did not disturb Justice Hely's other findings and they offered no view as to obviousness. Following a grant of special leave to appeal to this Court, the Full Court (Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ) upheld Lockwood's appeal on 18 November 2004. Their Honours ordered, inter alia, that Orders 1 and 2 of the Full Federal Court's orders dated 7 March 2003 be set aside. They further declared that claims 1-32 of the Patent were fairly based and that the remainder of the matter be remitted to the Full Federal Court.

On 8 December 2005 a differently constituted Full Federal Court (Heerey, Sundberg & Bennett JJ) dismissed the remainder of Lockwood's appeal.

Their Honours ordered that, pursuant to Order 1 made by Justice Hely on 19 March 2002, only claims 1-6, 12 & 31-32 of the Patent were revoked due to a

lack of novelty. They also ordered that claims 1-6, 12-15, 20-21 & 30-32 of the Patent be revoked for a lack of an inventive step. The Full Federal Court also stayed the operation of these orders, a stay that has been extended by this Court until further order.

The grounds of appeal include:

- The Full Court erred in finding that claims 1-6, 12-15, 20, 21, 30, 31 and 32 of the Patent lacked an inventive step.

- The Full Court erred in finding that claim 1 (and dependent claims) lacked an inventive step on the basis of an implied corollary admission said to have been made in the specification of the Patent and without evidence in support of such a finding.

- In finding that claims 1-6, 12-15, 20, 21, 30, 31, and 32 of the Patent lacked an inventive step, the Full Court erred by failing to distinguish between the distinct grounds of invalidity of lack of inventive step (which had been pleaded) and lack of manner of manufacture (which had not been pleaded).

Judgment in this appeal was reserved on 7 September 2006. In December 2006 the Court invited the parties to file further written submissions and the appeal is re-listed for further hearing.

CLARKE v THE QUEEN (M147/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 15 June 2004 of murdering a six-year old child, Bonnie Clarke. Bonnie was strangled and stabbed in her bed at her home in Northcote, on 21 December 1982. The appellant, who had been a boarder at the home until September 1982, was spoken to by the police in the months following the murder, but was never formally interviewed.

In February 2001 the Homicide Squad re-commenced its enquiries into the death of Bonnie Clarke. It set up an undercover operation whereby members of the Covert Investigation Unit of the Victoria Police impersonated a criminal gang, one member of which (known as "Terry") established a friendship with the appellant. Terry offered him the possibility of becoming a member of the gang, if he were approved by the boss ("Mark"). The appellant was told repeatedly that the gang relied upon a relationship of trust, loyalty and honesty between its members and Mark had to know the full truth about anything in the past which might bring police attention to the gang. On 3 June 2002 a member of the Homicide Squad ("Iddles") visited the appellant's home and left a message that he wished to speak to him. When the appellant rang Iddles two days later he was told that he would be required to provide a DNA sample and undergo a polygraph test. At his next meeting with Terry, the appellant was told that Mark could "fix" the lie detector and change the DNA sample, but only if he was "110% truthful" in "a job interview" that had been arranged with Mark later in the week.

On 6 June 2002 the appellant was taken by Terry to a city hotel to meet Mark. He was shown a document which purported to be a "progress report re investigation" signed by Iddles. It contained a conclusion that the appellant was the only suspect for the murder of Bonnie Clarke. Mark then said, "What do you want to do about it? Because I'm telling ya this is not going to go away... I can't have you hanging around with us." The appellant then told Mark that he had killed Bonnie Clarke, and described the circumstances in which she had died. Soon after the discussion with Mark, the appellant was taken by Terry to the offices of the Homicide Squad where he was arrested and a record of interview, in which he made relatively detailed admissions regarding the murder, was conducted. At his trial, his counsel's submission that the admissions he made to Mark, and the admissions in the record of interview, should be excluded, was rejected by the trial judge.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary, as unreliable, or as contrary to the general discretion. The Court found that the trial judge's conclusion that the appellant did not make the admissions in circumstances in which his will was overborne, was open on the evidence. With respect to the appellant's contention that the admissions were made in circumstances that rendered them inherently unreliable, the court found that there was much material to support the appellant's admissions and his Honour was correct in rejecting the

submission that the evidence should be excluded on that basis. The appellant's argument that he must have suffered severe forensic disadvantage as the evidence of the circumstances in which his statements were made involved the implication that he had serious criminal propensities, was rejected on the basis that the trial judge's approach involved a careful balance of the relevant considerations such as an assessment of the probative value of the evidence; some editing of the material to confine it to what was really required for the proper presentation of the prosecution case; and the provision of clear instructions to the jury as to the use to which the evidence could properly be put.

The grounds of appeal are:

- The Court of Appeal of the Supreme Court of Victoria erred in law in finding that the admissions made by the appellant to covert operative "M" on 6 June 2002 were voluntary.

TOFILAU v THE QUEEN (M144/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 16 October 2003 of murdering Belinda Romeo, a woman with whom he had had a sexual relationship. Ms Romeo's body was found by her mother in the bedroom of her flat on 29 June 1999. An autopsy revealed that she had died several days earlier, the cause of death being ligature strangulation. The appellant was interviewed by police on 14 July 1999. He told them he had last seen Ms Romeo at a hotel in the early hours of Sunday 20 June 1999.

In November 2001 the police set up "Operation Pink" which involved a series of 16 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a supposed code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that declaring any criminal activity would enable the boss of the gang to use corrupt contacts within the police force to "fix" any police investigations. On 17 March 2002 the appellant made admissions regarding the murder of Ms Romeo to one of the police operatives ("P"). On the same day, he was taken to Crown Casino to meet "the boss", to whom he made a detailed statement regarding the circumstances of the murder.

On the following day, the appellant was arrested and interviewed. He denied murdering Ms Romeo, and when the tape of his conversation with "the boss" was played to him, he said that he had pretended that he had committed a murder so that he could join the gang and he had fabricated what he told them. At his trial, the appellant's counsel submitted that admissions he made to "the boss" and other police operatives, and the record of interview of 18 March 2002, should be excluded. The trial judge (Osborn J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary or as contrary to the general discretion. The appellant relied on the common law principle that a confessional statement is not admissible if it has been preceded by an inducement held out by a person in authority. The Court found that the trial judge was correct in finding that the operatives to whom the admissions were made were not "persons in authority" because such persons must possess, by reason of some lawfully held or conferred status or relationship with the maker of the statement, the capacity to influence the course of the prosecution, or the manner in which he is treated in respect of it. In this case, the appellant believed he was dealing with a criminal gang acting outside and contrary to the interests of any legitimate authority.

The appellant also contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that they had been secured by

trickery and other conduct that effectively denied him the ability to exercise a choice to speak or remain silent. The Court of Appeal found the trial judge's conclusion that despite the fact that the appellant was fundamentally misled as to the context in which his confessional statements were made, he was not compelled to make them or threatened in such a way that it could be concluded that his will was overborne, was open on the material before him.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in:
  (a) not ruling as inadmissible the evidence of that which the Crown asserted were confessional statements made by the appellant to -
    (i) covert police operative "Pat Austinn" on 17 March 2002;
    (ii) covert police operative "Mark Butcher" on 17 March 2002-
  on the basis of involuntariness; and as a consequence,
  (b) not ruling as inadmissible
    (i) the evidence of the [second] record of interview conducted with the appellant on 18 March 2002;
    (ii) the evidence concerning the conduct of the covert police operatives with respect to carrying out the various "scenarios", including the evidence of the Crown witness Detective Senior Sergeant Mark Robert Caulfield; and
    (ii) the evidence of the covert police operatives carrying out the various (16) "scenarios" with the appellant and the conversations with the appellant whilst carrying out these scenarios.

HILL v THE QUEEN (M146/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 6 August 2004 of murdering his step-brother, Craig Reynolds. At the time of his death, the victim was sharing a house with the appellant. They were both heroin users. The appellant claimed that he arrived home at 9.00 pm on 17 February 2002 to find Reynolds lying on his back on the lounge room floor, covered in blood. Reynolds died in hospital 5 days later from multiple skull fractures and traumatic brain damage. The appellant's brother told police that the appellant had confessed to him that he killed Reynolds by repeatedly striking him with a house brick.

In June 2002 the police set up "Operation Exode" which involved a series of 19 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a supposed code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that declaring any criminal activity would enable the boss of the gang to use corrupt contacts within the police force to "fix" any police investigations. Ultimately, on 6 August 2002, a meeting took place between the appellant and "the boss" of the gang, who obtained admissions from him regarding the death of Reynolds.

Three days later the appellant was arrested and interviewed. He said he and Reynolds had an argument and he lost his temper. He couldn't remember anything that had occurred, but when he "snapped out of it" he saw Reynolds on the floor with blood all over his head, and a house brick lying next to him. At his trial, the appellant's counsel submitted that admissions he made to "the boss" and other undercover police, which contradicted his assertion that he couldn't remember hitting Reynolds with the brick, should be excluded. The trial judge (Bongiorno J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary, as unreliable, or as contrary to the general discretion. The Court found that the operatives to whom the admissions were made were not "persons in authority" for the purposes of the exclusionary rule. The appellant contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that his will was overborne by a combination of promises and tactics of bullying, haranguing and cajoling. The Court of Appeal found the trial judge's conclusion that at all times the conversations between the appellant and the police operatives were voluntary and made by him in a free exercise of his will to speak or not speak, was well supported by the evidence.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in failing to find that both covert police operative "Pat Austinn" and covert police operative "Mark Butcher" were persons in authority;

- the Court below erred in failing to determine that the learned trial judge had erred in:
  (a) not ruling as inadmissible on the basis of involuntariness the evidence of that which the Crown asserted were confessional statements made by the appellant to -
    (i) covert police operative "Pat Austinn" on 6 August 2002;
    (ii) covert police operative "Mark Butcher" on 6 August 2002.

  (b) not ruling as inadmissible
    (i) the evidence of that portion of the record of interview conducted with the appellant on 9 August 2002 concerning what the Crown asserted were confessional statements; and
    (ii) the evidence of the covert police operatives carrying out the various (19) "scenarios" with the appellant between 18 June 2002 and 6 August 2002 and the conversations with the appellant whilst carrying out these scenarios.

MARKS v THE QUEEN (M145/2006)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 21 April 2006

Date special leave granted: 10 November 2006

The appellant was convicted on 15 October 2004 of murdering his great aunt, Margaret O'Toole. The victim's body was found in the lounge room of her home by her brother on 17 April 2002. She had suffered trauma to the left side of her face, and had been dead for some time. Circumstantial evidence suggested that she had died on or about 7 April 2002, and an autopsy revealed she had suffered multiple skull fractures, probably caused by 15 to 20 blows with a hard blunt instrument such as a hammer. The appellant came under suspicion because he was one of the few people who visited the victim regularly, and he had recently borrowed money from her. He was interviewed by police on 6 May 2002. He admitted that he had a gambling problem and was heavily in debt, but he denied murdering Ms O'Toole.

In September 2002 the police set up "Operation Satchel" which involved a series of 16 "scenarios" in which undercover operatives, posing as members of an organised criminal gang, approached the appellant and induced him to believe that they wanted him to join the gang. The process included emphasis being placed on a code of truth, honesty and loyalty between all gang members, and the necessity for full disclosure of any past crimes which the police might still be investigating. He was also told that background checks had to be made before he could be accepted into the gang. Ultimately, on 27 November 2002, a meeting took place between the appellant and the "boss" of the gang. The boss said that his inquiries had revealed that the appellant was a suspect in a murder, and he needed to know what had happened so that the situation could be handled. The appellant then made detailed admissions regarding the death of Ms O'Toole.

The appellant was then driven to St Kilda Road Police Complex where he was arrested and interviewed. He maintained that he had nothing to add to what he had said in the interview on 6 May 2002, in which he had denied committing the murder. At his trial, the appellant's counsel submitted that admissions he made to "the boss" should be excluded. The trial judge (Coldrey J) rejected that submission.

The appellant appealed against his conviction to the Court of Appeal (Callaway, Buchanan and Vincent JJA), on the grounds that the trial judge erred in failing to exclude the admissions as involuntary or unreliable. It was also argued that the trial judge erred in finding that the probative value of the statements made by the appellant outweighed any prejudicial effect. The Court found that the operatives to whom the admissions were made were not "persons in authority" for the purposes of the exclusionary rule. The appellant contented that his statements were inadmissible as they were involuntary in a basal sense, that is, that his will was overborne by a combination of promises and tactics of bullying, haranguing and cajoling. The Court of Appeal found the trial judge's conclusion that there was no evidence that the will of the appellant was overborne, was open to him in the circumstances.

The grounds of appeal are:

- the Court below erred in failing to determine that the learned trial judge had erred in failing to find that both covert police operative "Rick Baxter" and covert police operative "Gary Butcher" were persons in authority;

- the Court below erred in failing to determine that the learned trial judge had erred in:
  (a) not ruling as inadmissible on the basis of involuntariness the evidence of that which the Crown asserted were confessional statements made by the appellant to -
    (i) covert police operative "Rick Baxter" on 27 November 2002;
    (ii) covert police operative "Gary Butcher" on 27 November 2002.

  (b) not ruling as inadmissible
    (i) the evidence concerning the conduct of the covert police operatives with respect to the carrying out of the various "scenarios", including the evidence of the Crown witness Detective Sergeant Stephen Cody; and
    (ii) the evidence of the covert police operatives carrying out the various (16) "scenarios" with the appellant and the conversations with the appellant whilst carrying out these scenarios.

SZBYR & ANOR v MINISTER FOR IMMIGRATION AND INDIGENOUS AFFAIRS & ANOR (S3/2007)

Court appealed from: Federal Court of Australia

Date of judgment: 22 November 2005

Date of grant of special leave: 8 December 2006

The appellants, who are husband and wife, are Indian nationals who arrived in Australia on 2 October 2002. They lodged an application for protection visas with the Department of Immigration and Multicultural Affairs.

Their application was based primarily upon an assertion that the male appellant had a "well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group or political opinion" within the meaning of Article 1a(2) of the *Refugees Convention.* The female appellant's claim was based upon her membership of her husband's family unit.

The application was refused by a delegate of the first respondent.

The appellants then applied to the Refugee Review Tribunal ("RRT") for a review of that decision. According to the RRT the appellants' claim was based principally upon the following matters. The male appellant had previously been married to a woman known as Salima. The male appellant was not acceptable to Salima's family. Salima's family resented the male appellant because of his religion and social status. Motivated by that animus, Salima's family procured the male appellant's arrest and imprisonment on false charges by the police on four occasions. On one of these occasions the female appellant was also arrested and charged.

The RRT refused the judicial review application on 14 October 2003. It found that the appellant husband was not a reliable witness. It also held that he had not been frank concerning his past difficulties. The RRT further noted inconsistencies between his written claims and his oral evidence, along with other implausibilities. In addition the RRT found that the appellants had left India on their own passports, notwithstanding the existence of supposedly outstanding charges against them. It found this to be inconsistent with the independent evidence which indicated that no one 'of interest' would be able to leave India travelling on a passport in their own name. Furthermore, the RRT was not satisfied that the appellants were being persecuted for a Convention reason. It did not accept their submission that religion or social status were in any way factors in the harm that they feared. The RRT found that theirs was essentially a private dispute.

On 5 August 2005 Magistrate Raphael dismissed the appellants' application for judicial review. His Honour held that the essential reason for the RRT dismissing their application was the absence of any Convention nexus. He noted that for the purposes of section 424A of the *Migration Act* 1958 ("the Act"), not all "information" relied on by the RRT was relevant, only that forming part of the decision. As the absence of a Convention-reason was the essential part of the RRT's reasons, it did not have to notify the appellants that the country information indicated that it was implausible that someone was able to leave India undetected when there were outstanding charges against them.

On 22 November 2005 Justice Madgwick dismissed the appellants' appeal. His Honour rejected their submission that the Federal Magistrate had erred in failing to grant the appellants an adjournment. He further held that there was nothing to show that the RRT had fallen into error. Justice Madgwick also found that the RRT's decision was unaffected by any information to which section 424A of the Act may have applied.

The grounds of appeal include:

- His Honour erred in holding that there was no error in the decision below, or in failing to find whether or not there was an error in the decision below.

- His Honour erred in finding that the RRT's decision "was unaffected by any information to which s 424A might have applied".

- His Honour should have found that section 424A was not complied with, because the RRT did not provide particulars in writing of information that it considered would form part of the reason for affirming the decision under review.

LIBKE v THE QUEEN (B1/2007)

Court appealed from: Court of Appeal, Supreme Court of Queensland

Date of judgment: 23 June 2006

Date of grant of special leave: 20 December 2006

The appellant, Justin Patrick Libke, was convicted after a trial in the District Court of one count of rape, two counts of unlawful carnal knowledge of an intellectually impaired person, one count of wilful and unlawful exposure of an intellectually impaired person to an indecent act, and one count of unlawful and indecent dealing with an intellectually impaired person. He was sentenced to eight years' imprisonment for each of the first three counts, three years' imprisonment on the fourth count, and five years' imprisonment on the last count, all sentences to be served concurrently.

The appellant had met the complainant at a public park where, after talking for a short while, he inserted his finger into her vagina. The complainant then gave the appellant her address and arranged for him to visit. When the appellant visited the complainant at her home, at a time she arranged in order that her parents and siblings would not be present, the complainant let him into the house where the complainant then removed her clothing and the appellant inserted his penis in her vagina and her anus and masturbated himself. The complainant, who attended a "special school" and was considered to be intellectually impaired by her parents and her teachers, subsequently became concerned that she may have been exposed to pregnancy or a sexually transmitted disease, and wrote a letter to a teacher at her school seeking advice.

The appellant appealed against his conviction and sought leave to appeal against the sentences imposed. The Court of Appeal (Williams JA and Mullin J; Chesterman J in dissent) dismissed the appeal against conviction but granted leave to appeal against sentence and reduced the eight-year sentences to five years' imprisonment. The majority held that there was sufficient evidence for the jury to convict on the basis that the complainant did not have sufficient cognitive capacity to consent to sexual contact with the appellant or that the appellant did not have an honest and reasonable, but mistaken, belief that the complainant had such cognitive capacity. A further ground of appeal, that the cross-examination of the appellant by the prosecution counsel was so unfair as to have had a significantly negative effect on his credit, was rejected.

Chesterman J would have allowed the appeal against conviction on the count of rape and ordered a new trial. His Honour concluded that even if the evidence of the complainant was accepted and that of the appellant rejected, there was insufficient evidence for the jury to be satisfied that the complainant had not consented to the sexual activity or that the appellant could not have honestly and reasonably believed that she had consented.

At the hearing of the special leave application, leave was granted to amend the draft notice of appeal to clarify the grounds and to raise additional grounds of appeal concerning the trial judge's directions to the jury.

The grounds of appeal include:

- Whether the verdicts of the jury on all counts, or on the rape count, were not reasonable or unsafe and unsatisfactory;

- Whether by reason of the cross-examination of the appellant at trial there was a miscarriage of justice;

- Whether the trial judge adequately directed the jury (including by use of a flow chart) on consent, particularly as it related to cognitive capacity, and on the several defences of mistake as to consent.