SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 6 AUGUST 2013

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BUGMY v THE QUEEN (S99/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2012] NSWCCA 223

Date of judgment: 18 October 2012

Special leave granted: 10 May 2013

On 17 May 2011 Mr William Bugmy pleaded guilty to two counts of assault contrary to s 60A(1) of the *Crimes Act* 1900 (NSW) ("the Act"). He also pleaded guilty to one count of causing grievous bodily harm with the intention of causing grievous bodily harm ("Count 3") contrary to s 33(1)(b) of the Act. All of these offences occurred on 8 January 2011 at the Broken Hill Correctional Centre where Mr Bugmy was being held on unrelated offences. All of his victims were Corrections Officers and one officer (Officer Gould) lost an eye in the attack. On 16 February 2012 Acting Judge Lerve sentenced Mr Bugmy to six years and three months imprisonment, with a non-parole period of four years and three months. The Respondent then appealed that sentence on grounds which included:

i) that the sentencing judge failed to properly determine the objective seriousness of the offence; and
ii) manifest inadequacy of the sentence.

On 18 October 2012 the Court of Criminal Appeal (Hoeben JA, Johnson & Schmidt JJ) unanimously upheld the Respondent's appeal. Their Honours then resentenced Mr Bugmy to seven years and six months imprisonment, with a non-parole period of five years. They found that Judge Lerve had failed to properly determine the objective seriousness of the offence contained in Count 3. The Court of Criminal Appeal also found that his Honour had failed to properly acknowledge the aggravating factor of Officer Gould being a serving prison officer.

The Court of Criminal Appeal further held that the weight that Judge Lerve had given Mr Bugmy's subjective case impermissibly ameliorated the appropriate sentence given. Their Honours held that the sentencing Judge had also failed to take into account the absence of any contrition on Mr Bugmy's part. He had further failed to give adequate weight to Mr Bugmy's bad criminal record. The Court of Criminal Appeal additionally held that Judge Lerve had erred in taking into account Mr Bugmy's mental illness. Their Honours found that to the extent that he suffered from any mental illness, it had nothing to do with his offending.

Given that the Respondent's appeal was so comprehensively upheld (therefore requiring resentencing), the Court of Criminal Appeal did not deal with the ground concerning manifest inadequacy.

The grounds of appeal include:

- The Court of Criminal Appeal erred in the application of s 5D(1) *Criminal Appeal Act* 1912 (NSW) by failing to consider the question of manifest inadequacy and the exercise of the residual discretion, both of which are relevant factors to an exercise of jurisdiction on a Crown appeal.

- The Court of Criminal Appeal should have held that the trial judge did not err in taking into account mental illness or disorder as relevant to the sentence to be imposed, including, allowing “some moderation to the weight to be given to general deterrence”.

MUNDA v. THE STATE OF WESTERN AUSTRALIA (P34/2013)

Court appealed from: Court of Criminal Appeal of the Supreme Court of Western Australia [2012] WASCA 164

Date of judgment: 22 August 2012

Date of grant of special leave: 6 June 2013

After a plea of guilty to one count of manslaughter, the appellant was sentenced to five years and three months imprisonment. The appellant beat his spouse to death whilst both were intoxicated. He was 32 years of age, Aboriginal, and with a history of violent offences against his spouse. In mitigation, Commissioner Sleight took into account the early plea of guilty, clear demonstration of remorse and the appellant's isolation from family and friends in his community whilst incarcerated. By way of aggravation, his Honour noted that there was a life violence restraining order preventing the appellant from contacting the victim, that the violence occurred in the context of a domestic relationship and the sustained and violent nature of the assault.

The Crown appealed on the ground that the sentencing Judge had erred in law in imposing a sentence that was so inadequate as to manifest error. On 22 August 2012, the Court of Appeal (McLure P, Buss JA and Mazza JA) allowed the appeal and re-sentenced the appellant to seven years and nine months imprisonment. McLure P, with whom Mazza JA agreed, found that the sentence of five years and three months was manifestly inadequate and failed to give due recognition to the seriousness of the offence, the seriousness of the circumstances in which it was committed and the need for both personal and general deterrence. Buss JA noted comparable sentences and found that the offence was in the upper range of seriousness. His Honour agreed that the sentence was not commensurate with the seriousness of the offence, and failed to recognise the importance of the protection of vulnerable women, personal and general deterrence and the value Parliament placed on human life.

This appeal concerns the so-called residual discretion. McLure P noted that in a State appeal against sentence, the Court has a residual discretion to decline to allow an appeal against sentence that is erroneously lenient and that "save where parity considerations arise, the residual discretion is only likely to be exercised if the error has not resulted in a manifestly inadequate sentence". However, her Honour further noted this Court's decision in *Green v The Queen* (2011) 86 ALJR 36 that the discretion could be enlivened by circumstances including the creation of unjustifiable disparity between any new sentence and an unchallenged sentence of a co-offender, delay in the determination of the appeal, the imminent or past occurrence of the offender's release and the effect of re-sentencing on the rehabilitation of the offender.

The Court declined to exercise the residual discretion. McLure P found there was nothing in the facts or circumstances of the appeal which would justify its exercise. Buss JA observed that the discretion could be exercised if the interests of justice required it or justified it and that this depended on all the facts and circumstances of a particular case. His Honour referred to the factors relevant to the discretion in *Green v The Queen* and found the arguments advanced by the appellant in favour of the exercise of the residual discretion to be without merit.

The grounds of appeal are:

- The Court of Appeal erred when it set aside the sentence imposed by the trial judge and re-sentenced the appellant.

Particulars

- The Court of Appeal failed to apply the principles that attend the disposition of a State appeal brought on the basis of alleged manifest inadequacy.
- The Court of Appeal erred in principle in determining the scope and regard that should be given to the appellant's antecedents and personal circumstances.
- The Court of Appeal erred in the identification and exercise of its discretion not to set aside the original sentence, even if sufficient error was found.

COMCARE v PVYW (S98/2013)

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 181

Date of judgment: 13 December 2012

Special leave granted: 10 May 2013

In November 2007 the Respondent was injured while having sex, outside normal work hours, on a work trip in rural NSW. She was employed by a Commonwealth Department and she subsequently made a claim for compensation under s 14 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the SRC Act"). Comcare will normally be liable to pay compensation to an employee for an injury arising out of, or in the course of their employment, except when that injury is caused by the serious and willful misconduct of that employee. Comcare initially accepted, then later revoked its acceptance of the Respondent's claim.

The Respondent then sought a review of that decision by the Administrative Appeals Tribunal ("AAT"). On 26 November 2010 the AAT affirmed Comcare's decision, finding that the Respondent's injury was not one suffered in the course of her employment. The Respondent then appealed to the Federal Court pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth). On 19 April 2012 Justice Nicholas upheld that appeal, declaring that the Respondent's injuries were suffered in the course of her employment.

On 13 December 2012 the Full Federal Court (Keane CJ, Buchanan & Bromberg JJ) unanimously dismissed the Appellant's appeal. Their Honours found that the Respondent's injury arose out of, or was in the course of her employment, for the purposes of s 14 of the SRC Act. They held that this Court's decision in *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473 ("*Hatzimanolis")* is authority for the proposition that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer had induced or encouraged the employee to spend that interval or interlude at a particular place *or* in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity, unless the employee was guilty of gross misconduct taking him or her outside the course of employment.

The matter before this Court raises the question as to whether the Full Federal Court erred in finding that it was sufficient that the Respondent was injured at accommodation in which her employer induced or encouraged her to stay and that it was unnecessary for her to demonstrate that the employer encouraged or endorsed her actions. This approach is said to be inconsistent with the decision in *Hatzimanolis,* which the Appellant contends has been subject to different interpretations in lower courts.

The grounds of appeal include:

- The Court erred in concluding that the High Court's decision in *Hatzimanolis* should be interpreted and applied so that any injury which occurs (i) during an interval or interlude within an overall period or episode of work; and (ii) at a place the employer has induced or encouraged the

employee to spend that interval or interlude, will be invariably be within the “course of employment” unless the employer shows that the employee’s conduct is such to take it outside the course of employment by virtue of s 14(2) or (3) of the SRC Act.

DIEHM & ANOR V DIRECTOR OF PUBLIC PROSECUTIONS (NAURU) (B15/2012)

Court appealed from: Supreme Court of Nauru
[2011] NRSC 24

Date of judgment: 29 November 2011

The appellants, who are husband and wife, were charged with rape. At the relevant time they lived in the Married Quarters of the Nauru Phosphate Corporation on Nauru. The husband is of Australian origin. The wife is a Kiribati woman. The complainant, who is a relative by marriage of the wife, was at the time aged 21. She is a native of Tarawa in Kiribati, where her child lives. At the relevant time the complainant was staying with the appellants following a quarrel with her boyfriend.

The prosecution alleged that the rape occurred in the early hours of 14 June 2011 and that afterwards, the complainant had telephone contact with her mother, who then called the police. Two police officers, Senior Constable Deireragea and Constable Dillon Harris attended the appellants' residence. The evidence on what was said when they knocked on the door was the subject of dispute between the husband's evidence and that of SC Deireragea. At some point during the conversation the complainant appeared inside the house in plain view of the police officers. The husband was arrested and taken away by the police and about 15 minutes later police returned to arrest the wife. After that the house was searched and photographs were taken, without a warrant ("the first response group"). Later that day another search of the house took place, with a warrant issued after 9.00am.

The Chief Justice found that the first appellant had non-consensual intercourse with the complainant on a mattress on the lounge room floor at the appellants' house and that the second appellant aided and encouraged him to do so, brandishing a knife at time to ensure the complainant complied.

The defence case was that there was no mattress in the lounge room, that no intercourse had taken place on it; that no knife had been used; that there had been prior consensual sex with the husband in the absence of the wife, but that the complainant fabricated the rape claim as she did not get the reward she wanted, namely a return air ticket to Tarawa, to help to get her child back and travel to Australia. The defence also argued that at a time, or times unknown, including during the illegal search, items had been positioned for the purpose of taking photographs.

SC Deireragea gave evidence, but no other officers from the first response group ended up giving evidence. PC Harris was due to be called by the prosecution to give evidence but was not available on the day. The appellants submit that the failure to call PC Harris mattered because his signed formal Police Report differed from the testimony of SC Deireragea as to who opened the front door and what was said at the front door. When SC Deireragea gave evidence it was still expected by the defence that PC Harris would be called. The appellants submit that the account which the prosecution ultimately asked the Court to find in closing submissions was not the account to which SC Deireragea had testified in a number of ways. Further PC Harris had the opportunity to observe the state of the premises, when he took part in the first, illegal search.

The grounds of appeal include:

- The prosecution failed to call material witnesses and to make those persons available for cross examination by the Defence, when the prosecutor's duty of fairness required that to be done and when the said failure resulted in an unfair trial and a miscarriage of justice, the said witnesses being Constable Dillon Harris and the other members of the first response group who performed a search of the house without a warrant.

- His Honour the Chief Justice erred by failing to call Constable Harris of his own motion, giving the Defence leave to cross examine him, pursuant to s100 of the *Criminal Procedure Act* 1972 (Nauru) and/or s48 of the *Courts Act* 1972 (Nauru).

- No adequate notice was given to the Defence of the case which the prosecution ultimately invited the Chief Justice to find, and which his Honour did find, regarding the alleged making of statements by the First Appellant to Acting Sergeant Deireragea and Constable Harris which were said to constitute implied admissions and corroboration of the complainant's testimony, and the Defence was denied a proper opportunity to be heard on that case.

- In all of the circumstances, a reasonable tribunal of fact could not have concluded beyond reasonable doubt that the Appellants were guilty of rape.

WILLMOTT GROWERS GROUP INC v WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS (M99/2012)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 202

Date of judgment: 29 August 2012

Date special leave granted: 10 May 2013

The issue in this appeal is whether a leasehold interest in land is extinguished by the disclaimer of the lease agreement by the liquidator of the lessor, pursuant to s 568(1) of the *Corporations Act* 2001 (Cth) ('the Act').

The first respondent ('WFL') owned, or leased from third parties, certain freehold properties that it leased to lessees pursuant to lease agreements, as part of various managed investment schemes. WFL was placed in liquidation in March 2011 and its liquidators (the second & third respondents) wished to sell its interest in the properties, unencumbered by the leases. As part of any sale, WFL's liquidators proposed to disclaim the lease agreements and they applied to the Supreme Court for the approval of such disclaimers. The appellant (Willmott Growers), representing members of 4 of the partnership schemes and lessees of WFL, intervened in the application. The lessees asserted that disclaimer of the lease agreements would not extinguish their proprietary or leasehold interest in the land. The trial judge (Davies J) determined a preliminary question and held that disclaimer of the lease agreements by the liquidator of the lessor did not have the effect of extinguishing the leasehold interests of the lessees in the land. Her Honour held further that the leasehold interests could not be characterised as liabilities or encumbrances upon the property of the lessor, and it was consequently not necessary to extinguish such interests.

The liquidators sought to appeal to the Court of Appeal and were successful. The Court (Warren CJ, Redlich JA and Sifris AJA) considered that the continuing and prospective obligation of WFL, to provide possession and quiet enjoyment of the land to the lessees, was not a fully accrued obligation or liability that could not be terminated. The context of the word 'liability' in s 568D(1) of the Act suggested that it should be given the widest possible meaning and include the obligation to provide possession and quiet enjoyment. The section was specifically designed to enable a liquidator '*to cease performing obligations ... [and] to achieve a release of the company in liquidation from its obligations*'. If WFL was to be relieved of its obligation to provide quiet enjoyment, the interest of the lessee so far as tenure is concerned was directly related to and underpinned such liability. The tenure therefore had to go. It was necessary to affect the lessees' rights (tenure) in order to release WFL from its liability (possession and quiet enjoyment).

The remaining question was whether, notwithstanding the termination of the interests of the lessee under the disclaimed contract, the asserted leasehold interest remained. The Court held that if the contract was disclaimed, the leasehold interest was also extinguished. Any leasehold interest was governed by the contract of lease. It was the contract that regulated the substance and termination of the leasehold interest. Although the event bringing about the termination of the contract of lease (and as a consequence, any leasehold interest) was a repudiation accepted by the non-defaulting party, it was the

consequences of such termination, (namely termination of the leasehold interest) however brought about, that were relevant. The lease agreement was at an end and what followed was a matter of law, namely termination of the leasehold interest, that did not depend in any way on the reason for such termination. The notion that a commercial lease was a demise that conferred an interest in land and survived the termination of the contract creating the demise was to ignore recent, significant developments in the law that clearly suggested otherwise.

The ground of appeal is:

- The Court of Appeal erred in finding that the liquidator of a land-owning company to have power under s 568(1) of the *Corporations Act* 2001 (Cth) to extinguish the property rights of the company's tenant?

CLARK v MACOURT (S95/2013)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 367

Dates of judgment: 9 November 2012 & 13 December 2012

Special leave granted: 10 May 2013

Prior to 2002 Dr Anne Clark conducted an Assisted Reproductive Technology ("ART") practice, as did the St George Fertility Centre Pty Limited (In Liq) ("St George"). At all material times, Dr David Macourt was the sole director and controller of St George. An ART provides treatments aimed at procuring pregnancy other than by sexual intercourse. Donor sperm is used in those treatments.

In early 2002 Dr Clark and St George entered into a Deed ("the Deed") to which Dr Macourt was also a party (as guarantor of St George's obligations). Pursuant to that Deed, Dr Clark agreed to purchase St George's "Assets" for $386,950.91. Those "Assets" included, but were not limited to, St George's stocks of donor sperm. Dr Clark was then supplied with 3513 "straws" of donor sperm by St George, of which only 504 turned out to be useable. (In 2005 she ascertained that the remaining 3009 "straws" were not.) This forced Dr Clark to source donor sperm from an alternative supplier, the US-based Xytex Corporation ("Xytex").

In March 2006 St George (which was not then in liquidation) sued Dr Clark for the balance of the purchase price, being $219,950.91. Dr Clark then cross-claimed against St George and Dr Macourt, claiming damages for breach of various warranties relating to the sperm comprising the Assets. On 9 June 2010 Macready AsJ found for Dr Clark, with damages to be assessed at a later date. On 8 November 2011 Justice Gzell awarded Dr Clark damages of $1,246,025.01. (This amount was calculated pursuant to a formula based on the total number of usable "straws" delivered, less the number of "straws" actually used.) As St George was in liquidation by this stage, only Dr Macourt appealed against those orders. Dr Clark however filed both a Notice of Cross-Appeal and a Notice of Contention.

The Court of Appeal (Beazley & Barrett JJA, Tobias AJA) unanimously upheld Dr Macourt's appeal and set aside the lower Court's award of damages. Their Honours found that Justice Gzell had mischaracterised the Deed as one for the sale of goods, as opposed to one for the sale of the goodwill and assets of a business. The question of damages therefore could not be assessed as if there had been a simple contract for the sale of goods. The Court of Appeal also found therefore that Justice Gzell had erred in finding that Dr Clark had suffered a loss for the amount paid under the Deed for the St George sperm. Their Honours noted that Dr Clark had successfully mitigated that loss by recovering the full cost of acquiring the replacement Xytex sperm from her patients. The Court of Appeal found therefore that St George was entitled to judgment in the sum of $219,950.91, to be set-off against a small amount awarded to Dr Clark on her cross-claim.

The grounds of appeal include:

- The Court of Appeal erred in holding that because the Deed between St George, Dr Clark and Dr Macourt entered into in early 2002 did not apportion to particular Assets the consideration payable by Dr Clark thereunder, Dr Clark was unable to demonstrate the loss sustained by her by reason of the fact that 1996 of the semen “straws” forming part of the Assets were unusable.

On 19 June 2013 the Respondent filed a summons, seeking leave to file a notice of contention out of time. The ground in that notice of contention is:

- If Dr Clark were entitled to damages assessed by reference to the loss of the value of the contract sperm, then the cost of the acquisition of replacement Xytex sperm was not an approximate proxy of that value.

WINGFOOT AUSTRALIA PARTNERS PTY LTD & ANOR v KOCAK & ORS (M52/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 259

Date of judgment: 23 October 2012

Date special leave granted: 10 May 2013

The first respondent (Kocak) was employed by the appellants as a tyre builder. On 16 October 1996 he suffered a neck injury when pulling a heavy spool of rubber towards him, and he was put onto light duties for about three months. Due to a lower back injury sustained in May 2000, Kocak has not worked since March 2001. In March 2009, he developed more significant symptoms in his neck than he had previously experienced, and his neurosurgeon recommended neck surgery. In May 2009, he submitted a WorkCover claim to the effect that his current neck condition was related to the neck injury which he suffered on 16 October 1996. Liability was denied.

On 2 November 2009, Kocak instituted a proceeding in the County Court, pursuant to s 135A(4)(b) of the *Accident Compensation Act* 1985 (Vic) ("the Act"), for leave to bring proceedings against the employer for common law damages in respect of the neck injury. On 11 November 2009, he issued a further proceeding in that Court for a declaration of entitlement to medical or like expenses under s 99 of the Act in relation to his neck condition. This proceeding was later transferred to the Magistrates' Court and, on 8 June 2010, that Court referred three medical questions for determination by a Medical Panel pursuant to s 45(1)(b) of the Act. The Medical Panel gave written notice of its opinion and a statement of reasons in August 2010, concluding that Kocak's current neck condition did not result from, nor was it materially contributed to, by his neck injury of 16 October 1996. Subsequently orders were made by consent in the Magistrates Court, inter alia, "*That the Court adopt and apply the opinion of the Medical Panel*".

Kocak filed proceedings in the Supreme Court of Victoria, seeking certiorari to quash the Medical Panel opinion on the basis, inter alia, that the Panel had erred in law by failing to give any, or adequate, reasons for their opinion. Cavanough J found that the Medical Panel's reasons were adequate to meet the requirements of s 68(2) of the Act, and dismissed the proceeding.

Kocak's appeal to the Court of Appeal (Nettle and Osborn JJA, and Davies AJA) was successful. The Court could see no reason to accept that a Medical Panel's reasons should not meet the standard required of any other statutory decision-maker exercising a comparable quasi-adjudicative/investigative function. The Panel's reasons thus should include: a statement of findings on material questions of fact; some sort of identification of the evidence or other material upon which those finding are based; and, an intelligible explanation of the process of reasoning that has led the Panel from the evidence to the findings and from the findings to its ultimate conclusion. In particular, if a party to a dispute relies on expert medical opinion in support of the conclusion for which that party contends, and the Medical Panel forms an opinion which is inconsistent with that expert opinion, it is not enough for the Medical Panel simply to state that it rejects the expert opinion. The Panel must provide a comprehensible explanation for the rejection of the expert medical opinion or for preferring one or more expert medical opinions over others. In this case the

Panel had failed to adequately explain why it had concluded that the injury suffered on 16 October 1996 was merely a soft tissue injury, not a bony injury as Kocak contended; why it did not consider that the injury had had any effect on the progression of degenerative changes and, therefore, why Kocak's employment with the employer on 16 October 1996 could not possibly have been a significant contributing factor to the recurrence of his pre-existing neck condition; and why the Panel rejected the expert opinions of other medical specialists to the contrary. It was therefore not possible to say, as opposed to guess, why the Panel rejected Kocak's claim.

The Court of Appeal held that inadequacy of reasons may constitute an error of law on the face of the record (whether or not it also establishes jurisdictional error) and that such error will, subject to the exercise of the Court's discretion, justify a grant of relief in the nature of certiorari. The Court allowed the appeal and made an order in the nature of certiorari quashing the Medical Panel's opinion and directing that the questions the subject of opinion be referred to a differently constituted Medical Panel for re-determination.

The grounds of appeal include:

- The Court of Appeal erred in holding that medical panel opinions were, by force of s68(4) of the *Accident Compensation Act* 1985 (Vic), binding on a court hearing an application by a worker for leave to commence a damages proceeding.

- The Court of Appeal erred in holding that the reasons given by the medical panel were inadequate.

- The Court of Appeal erred in holding that the failure to give adequate reasons constituted an error of law on the face of the record, in consequence of which the opinion of the medical panel should be quashed.