SHORT PARTICULARS OF CASES

DECEMBER 2016

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PRIOR v MOLE (D5/2016)

Court appealed from: Court of Appeal of the Northern Territory [2016] NTCA 2

Date of judgment: 3 March 2016

Date special leave granted: 1 September 2016

On New Year's Day 2013 the appellant was drinking red wine outside the Stuart Park shops in Darwin. He was intoxicated. As a police car drove past, the appellant gestured to the police officers and shouted abuse at them. The police car did a U-turn and parked in front of the shops. The police asked the appellant to speak to them and he walked to the police car. He smelled strongly of liquor, his eyes were bloodshot and he was very dishevelled. When he spoke to police, he was belligerent and aggressive and he was slurring his words. Constable Blansjaar told the appellant he was being placed in protective custody. He became more abusive and Constable Blansjaar called for another police unit in a motor vehicle that had a cage on the back. Constable Mole and Sergeant O'Donnell then arrived in the caged vehicle. Constable Blansjaar told the appellant that he would be taken to the police station in the cage, and asked him to hand over his mobile phone. The appellant objected and became more aggressive. Sergeant O'Donnell forcibly took the phone from the appellant and assisted him into the cage. While the appellant was being placed in the cage, he spat on Sergeant O'Donnell twice. He was then placed under arrest for assaulting Sergeant O'Donnell in the course of his duty.

Sergeant O'Donnell and Constable Mole drove off in the caged vehicle and Constables Blansjaar and Fuss followed in their police car. While the vehicles were stopped at traffic lights the appellant stood up, undid the zipper of his jeans, and attempted to urinate on the police car. As a result of these events, the appellant was charged with the offences of behaving in a disorderly manner in a public place contrary to s 47(a) of the *Summary Offences Act 1923* (NT) (count 1); unlawfully assaulting a police officer whilst in the execution of his duty contrary to s 189A of the *Criminal Code 1983* (NT) (count 2); and behaving in an indecent matter in a public place contrary to s 47(a) of the *Summary Offences Act* (count 3).

The charges were heard before the Court of Summary Jurisdiction on 14 May 2014. The magistrate found the appellant guilty of counts 2 and 3 but not guilty of count 1. The appellant appealed to the Supreme Court against his convictions. The two main issues in the appeal were: (1) whether the appellant was lawfully apprehended under the *Police Administration Act 1979* (NT) ("PAA") s 128; and (2) if lawfully apprehended, whether the evidence concerning counts 2 and 3 should nonetheless have been excluded in the exercise of the discretion under the *Evidence (National Uniform Legislation) Act 2011* (NT) ("UEA") s 138 because the conduct of the police in apprehending the appellant failed to comply with minimum standards of police conduct.

Southwood J found that although the appellant was lawfully apprehended, the evidence concerning counts 2 and 3 was obtained in consequence of an impropriety because the apprehension of the appellant was contrary to the proper standards of conduct expected of the police officers in the circumstances of the case, as the apprehension was unnecessary. The appellant's convictions on counts 2 and 3 were set aside and he was acquitted of those counts.

The respondent's appeal to the Court of Appeal (Riley CJ, Kelly and Hiley JJ) was successful. The Court did not agree with the appellant's contention that in each and every situation where the conditions for taking a person into protective custody have been satisfied, a police officer must necessarily turn his or her mind to what alternatives there may be and that it is an error of principle not to take some other course of action less restrictive of the person's liberty. The Court held that although a police officer contemplating placing someone into protective custody must keep firmly in mind that that should only be done as a last resort, and it is plainly desirable, where it is practicable, for police to actively consider possible alternatives, it is not a pre-condition for the exercise of the power that in every case the police officer must turn his or her mind to what alternatives may exist. The circumstances are almost infinitely variable and sometimes an experienced police officer will know from the person's behaviour and other surrounding circumstances, that protective custody is the only available option. In this case, it would probably have been desirable for the police officers to have asked the appellant where he lived and if someone could come and get him. On the other hand, they had been subjected to swearing, abuse and aggressive behaviour from the beginning of their dealings with the appellant. They may well have formed the view that such questions would have been futile, given the nature of the answers they had received to the questions they had already asked. The Court found that Southwood J was in error in determining that the evidence relating to counts 2 and 3 should have been excluded under UEA s 138, and the appeal was allowed.

The grounds of appeal include:

- The Court of Appeal erred in failing to dismiss the appeal on the basis that Southwood J should have been satisfied on the balance of probabilities that the appellant was apprehended in contravention of an Australian law, within the meaning of s 138(1) of the *Evidence (National Uniform Legislation)* Act NT, because:

  (a) the precondition in s 128(1)(c) of the *Police Administration Act* 1979 (NT) was not met before Constable Blansjaar apprehended the appellant, purportedly under s 128(1) of that Act; or, alternatively

  (b) if the precondition in s 128(1) of that Act was met, Constable Blansjaar's apprehension of the appellant nevertheless exceeded the limits of the discretion conferred by s 128(1).

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR RODNEY NORMAN CULLETON (C15/2016)

Date referred to a Full Court: 21 November 2016

On 21 November 2016 Chief Justice French, sitting as the Court of Disputed Returns, referred to a Full Court, pursuant to s 18 of the *Judiciary Act* 1903 (Cth) the following questions which were transmitted by the Senate on Tuesday, 8 November 2016 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(ii) of the Constitution there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton was returned;
(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;
(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
(d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice French made orders that Senator Culleton and the Attorney-General of the Commonwealth be allowed to be heard on the hearing of the reference and shall be deemed to be parties to the reference pursuant to s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

The following facts are agreed between the parties for the purposes of the hearing of the reference:

1. On 2 March 2016, Senator Rodney Norman Culleton ("Senator Culleton") was convicted in his absence by the Local Court of New South Wales at Armidale ("Local Court") for an offence of larceny, property value less than $2,000. However the Magistrate in convicting Senator Culleton as an absent offender was precluded by s 25 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) from making an order for a sentence of imprisonment.

2. The offence of larceny of which Senator Culleton was convicted was punishable under s 117 of the *Crimes Act* 1900 (NSW) as affected by s 268(1A) and (2)(b)(ii) and item 3 of Pt 2 of Table 2 in Sched 1 of the *Criminal Procedure Act* 1986 (NSW).

3. On 2 March 2016, the Local Court issued a warrant for Senator Culleton's arrest under s 25(2) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

4. On 16 May 2016, the Governor of Western Australia issued a writ for the election of Senators for Western Australia. The writ specified, among other things, that nominations of candidates for the Senate election would close on 9 June 2016.

5. On 7 June 2016, the Australian Electoral Officer for Western Australia received a group nomination for Pauline Hansons's One Nation party which included a nomination by Senator Culleton as a Senate candidate.

6. The polling day for the election was 2 July 2016.

7. On 2 August 2016, the poll for the Senate for Western Australia was declared and the writ returned. Senator Culleton was certified as duly elected as the eleventh out of twelve senators for Western Australia.

8. On 8 August 2016, the warrant issued by the Local Court on 2 March 2016 was executed.

9. On 8 August 2016, the Local Court granted an annulment of the conviction of 2 March 2016 pursuant to s 8 of the *Crimes (Appeal and Review) Act* 2001 (NSW).

10. At no time was Senator Culleton sentenced in respect of the conviction.

11. As a result of the annulment granted on 8 August 2016, the Local Court proceeded to deal with the matter afresh in accordance with s 9 of the *Crimes (Appeal and Review) Act* 2001 (NSW).

12. On 25 October 2016, Senator Culleton pleaded guilty in the Local Court to the offence of larceny. Without proceeding to conviction, the Court dismissed the matter pursuant to s 10(1)(a) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

The Attorney-General of the Commonwealth has filed a notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v KUMAR & ORS (P49/2016)

Court appealed from: Federal Court of Australia
[2016] FCA 177

Date of judgment: 23 February 2016

Date special leave granted: 2 September 2016

The first respondent held a Subclass 485 (Temporary Graduate) visa which was due to expire on Sunday, 12 January 2014. On Friday, 10 January 2014, he lodged an application for a Student (Temporary) (Class TU) Subclass 572 (Vocational Education and Training Sector) visa by post and it was received by the Department of Immigration and Border Protection on Monday, 13 January 2014. The relevant criterion stipulated in cl.572.211(2)(d) of Schedule 2 to the *Migration Regulations* 1994 (Cth) (the Regulations) for the first respondent to obtain a 572 visa was that he was the holder of a 485 visa at the time of application. The Migration Review Tribunal, affirming the delegate's decision not to grant a 572 visa, held that the first respondent did not satisfy the requirement in cl.572.211(2)(d) and consequently could not be a granted a 572 visa. The first respondent applied to the Federal Circuit Court for a review of the decision of the Tribunal on the ground that the Tribunal made a jurisdictional error by failing to apply s 36(2) of the *Acts Interpretation Act* 1901(Cth) which provides:

If: (a) an Act requires or allows a thing to be done; and
(b) the last day for doing the thing is a Saturday, a Sunday or a holiday; then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.

The primary judge (Judge Street) rejected this argument on the ground that cl.572.211(2) does not, in express terms or in its effect, prescribe or allow anything to be done on a particular day. He found that cl.572.211(2) identifies a state of affairs that must exist as part of the criteria for the making of a valid application and, accordingly, s 36(2) of the *Acts Interpretation Act* had no application. In reaching this conclusion, his Honour relied on the majority judgment of Neaves and Beazley JJ in *Zangzinchai v Milanta* (1994) 53 FCR 35.

The first respondent's appeal to the Federal Court (North J) was successful. North J held that where s 45 of the *Migration Act* allows a person to apply for a visa, the Act allows a thing to be done within the meaning of s 36(2)(a) of the *Acts Interpretation Act*. In the present case, the last day for the first respondent to apply for the 572 visa was Sunday, 12 January 2014. Section 36(2) of the *Acts Interpretation Act* then operated to allow the thing to be done on the next day which was not a Saturday, a Sunday, or a holiday. In this case that allowed the application for the 572 visa to be made when it was made on Monday, 13 January 2014.

North J noted that *Zangzinchai* was decided in 1994 and dealt with the previous form of s 36(2) of the *Acts Interpretation Act*. The Act was amended to its current form with effect from 27 December 2011. The previous version of the section operated on a period prescribed, or allowed, by an Act, whereas the current version operates on a broader set of circumstances where an Act requires or

allows a thing to be done. His Honour held that he views of the majority in *Zangzinchai*, on the earlier version of the section, did not apply to the different text of the amended version.

The ground of appeal is:

- The Federal Court erred in concluding that s 36(2) of the *Acts Interpretation Act* 1901 (Cth) had the effect that the first respondent's application for a Student (Temporary) (Class TU) Subclass 572 (Vocational Education and Training Sector) visa was to be assessed as if that application had been made before the expiry of his Skilled (Provisional) (Class VC) Subclass 485 (Temporary Graduate) visa.

BONDELMONTE v BONDELMONTE & ANOR (S247/2016)

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

Date of judgment: 8 April 2016

Special leave granted: 14 October 2016

This matter concerns the living arrangements of two teenage sons ("the Boys") of the Appellant Father ("the Father") and the Respondent Mother ("the Mother"). The Boys currently live with the Father in New York. Until mid-January 2016 however they lived with the Father in Australia, while their sister lived with the Mother in Australia. The elder of the Boys is completely estranged from the Mother, while the younger remains in regular contact. All of the children of the former marriage however are the subject of parenting orders dated 25 June 2014 ("the parenting orders"), Order 2 of which enables each child to decide with whom they would like to live.

With the consent of the Mother, the Father arranged for the Boys to join him on a two week holiday to New York in mid-January 2016. On 29 January 2016 however the Father's solicitor informed the Mother that the Father had decided to remain in the USA indefinitely and, as the Boys had elected to remain with him, they would not be returning to Australia in accordance with the parties' agreement. Shortly thereafter the Mother filed an urgent application in the Family Court for orders to have the Boys returned to Australia and that pending further order, they live with her.

On 8 March 2016 Justice Watts made orders that required, inter alia, that the Boys be returned to Australia. Those orders also envisaged a scenario whereby the Boys would be accommodated with family friends ("the benevolent volunteers option"). This would be in circumstances whereby either or neither of the Boys wished to live with the Mother upon their return, and, whereby the Father decided to stay in New York. The benevolent volunteers option was first raised by the Mother at the hearing before Justice Watts.

On 8 April 2016 the Full Court of the Family Court of Australia (Ryan & Aldridge JJ, Le Poer Trench J dissenting) dismissed the Father's appeal against Justice Watts' orders. The majority rejected the Father's submission that his Honour had failed to give sufficient weight to the Boys' opinions concerning their potential living arrangements in Australia. It also rejected the submission that Justice Watts had erred in making orders giving effect to the benevolent volunteers option.

Justice Le Poer Trench however found that Justice Watts should not have made any return orders concerning the Boys on 8 March 2016. What Justice Watts should have done was to have required further evidence to be obtained, sufficient for him to have a clearer understanding of the Boys' views on each of the respective accommodation proposals. Justice Le Poer Trench noted, for instance, that the Court did not even have the address(es) at which the Boys would be living under the benevolent volunteers option. Furthermore, the failure to have regard to their views on this proposal was a failure to fulfil the mandatory requirement of s 60CC(3)(a) of the *Family Law Act* 1975 (Cth) ("the Act").

Justice Le Poer Trench acknowledged that Justice Watts was entitled to form an adverse view of the Father's actions in failing to return the Boys to Australia. The Boys should not however be effectively blamed for the circumstance in which they found themselves. The Boys were the subject of, not parties to, the existing parenting orders. It was the Father, not they, who was in breach.

The grounds of appeal include:

- The Full Court of the Family Court of Australia erred in finding that despite an order already devolving to children the right to decide where to live, it was acceptable to make a parenting order contrary to that right without first determining the views of the children on orders that the children live with persons other than their parents and where such persons had not made application for parenting orders;

- The Full Court of the Family Court of Australia erred in principle in determining that it was acceptable to make a parenting order in favour of strangers to the proceedings where such persons had not made such application and where there was no evidentiary basis to establish that those persons engaged section 65CA of the Act.

ECOSSE PROPERTY HOLDINGS PTY LTD v GEE DEE NOMINEES PTY LTD (M143/2016)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 23

Date of judgment: 4 March 2016

Date special leave granted: 7 October 2016

This appeal concerns the construction of a lease, dated 19 November 1988, which was made between Westmelton (Vic) Pty Ltd, as landlord, and Peter Morris, as tenant, whereby the subject land was leased for a term of 99 years commencing on 1 November 1988 ("the Lease"). The respondent ("Gee Dee Nominees") is currently the tenant under the Lease. The leasehold reversion was, in about 1993, sold by Westmelton to the appellant ("Ecosse"), which is now entitled to the reversion immediately expectant on expiry of the Lease.

The contracting parties expressed an intention, in clause 13 of the lease, that the lessor wished to sell and the lessee wished to purchase the leased land for a consideration of $70,000 but they were precluded from doing so because of planning restrictions. The contracting parties therefore sought to achieve as nearly as they practicably could, what they could not achieve directly by a sale transaction by making amendments to a standard form instrument of lease. Clause 4 of the Lease was revised as follows:

> 4. [The Lessee] will pay all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the said premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~).

A dispute arose between Ecosse and Gee Dee Nominees with respect to the payment of rates, taxes, assessments and outgoings, and Ecosse issued proceedings in the Supreme Court of Victoria. Croft J held that the absence of the onerous obligations on the tenant that are commonly found in leases, together with the provisions of cl.13 of the Lease, indicated that the document was intended to be, in effect, a conveyance of freehold title. As such, cl.4 should not be construed as imposing an obligation on the landlord which would be wholly at odds with the result that would have been produced had the parties been able to give effect to their intention of transacting a freehold conveyance by way of sale.

Gee Dee Nominees' appeal to the Court of Appeal (Santamaria and McLeish JJA, Kyrou JA dissenting) was successful. The Court agreed that cl.4 was ambiguous and two interpretations were open. The first, advanced by Gee Dee Nominees, was that it required the lessee to pay all rates, taxes, assessments and outgoings payable by the tenant in respect of the premises. The second construction, advanced by Ecosse, treated the words '*by the tenant*' as words of emphasis which served to reinforce the meaning of the clause. That meaning was that all rates, taxes, assessments and outgoings should be paid by the tenant.

The majority considered that if cl.4 was read alone, the former meaning was the more natural reading. Ecosse's construction attributed a clumsy operation to the words which, in both constructions, were critical: '*by the tenant*'. The striking out of the words '*Landlord or'* in cl 4 clearly operated to reduce the ambit of the clause as originally drafted. The extensive and all-embracing liability of the lessee in the original version of the clause was cut down by this change. It was difficult to see any other basis for omitting the words. Ecosse submitted that, on its construction, the words '*Landlord or*' needed to be omitted to make it clear that the tenant, and not the landlord, was to pay the amounts in question. But it was already plain that cl.4 only imposed an obligation on the tenant. If it was intended to make it clear that the tenant, and not the landlord, was to be liable, the more likely scenario was that the entire phrase '*by the Landlord or tenant*' would have been deleted. Clarity would, in other words, have been achieved by adopting simpler language and avoiding awkward repetition. The omission of the words '*Landlord or*' was therefore a strong indication that the parties considered, and rejected, the possibility that the lessee should pay rates, taxes, assessments and outgoings payable by the landlord.

Kyrou JA (dissenting) found that when the Lease was read as a whole and regard was had to its purpose as disclosed in cl.13, and the surrounding circumstances that were known to the original contracting parties at the time the Lease was executed, Ecosse's preferred construction of cl.4 was much more persuasive than that of Gee Dee Nominees.

The grounds of appeal include:

- The Court of Appeal erred in law in holding that the lease of land dated 19 November 1988 on its proper construction provides that the lessee is not liable to pay to the lessor rates, taxes, assessments and outgoings which during the term of the lease are levied on or otherwise payable by the lessor in respect of the leased land.