SHORT PARTICULARS OF CASES

FEBRUARY 2017

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RIZEQ v THE STATE OF WESTERN AUSTRALIA (P55/2016)

Court appealed from: Supreme Court of Western Australia Court of Appeal [2015] WASCA 165

Date of judgment: 24 August 2015

Date special leave granted: 7 October 2016

After a trial in the District Court of Western Australia, the appellant, who was a resident of New South Wales, was found guilty of possession of MDMA and methylamphetamine with intent to sell or supply contrary to s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) ("the MDA"). He was convicted by a decision of 11 of the 12 jurors.

In his appeal to the Court of Appeal, the appellant submitted that the majority verdict of guilty, permitted by s 114(2) of the *Criminal Procedure Act* 2004 (WA) ("the CPA"), was inconsistent with s 80 of the *Constitution*.

The Court of Appeal held that, having regard to s 75(iv) of the *Constitution*, s 39(2) of the *Judiciary Act* 1903 (Cth) and the decision of this Court in *Momcilovic v The Queen* (2011) 245 CLR 1, the appellant's contention that the District Court was exercising federal jurisdiction was correct, but the question was whether an offence under a State law that is 'picked up' under s 79(1) of the *Judiciary Act* becomes 'an offence against a law of the Commonwealth' for the purposes of s 80 of the *Constitution*.

Based on the reasoning of the majority in *Momcilovic*, the Court of Appeal found there was no s 109 inconsistency between the MDA and the *Criminal Code* (Cth) as the Commonwealth had at no relevant time exercised any power under the Commonwealth Code to prosecute the appellant for the conduct the subject of the charges under the MDA.

Moreover, the existence of differences between the MDA and the Commonwealth Code in relation to penalties and mode of trial (a reference to s 80 of the *Constitution*) did not render the State offence invalid because of inconsistency under s 109 of the *Constitution*. The appellant's claim that the offence creating provision in the MDA under which he was charged was invalid for inconsistency therefore failed.

The Court found that as s 114(2) of the CPA was procedural rather than substantive in character, the weight of authority was that, if not inconsistent with the *Constitution*, s 114(2) would be picked up and applied as a surrogate Commonwealth law under s 79(1) of the *Judiciary Act*.

Section 114(2) of the CPA was not inconsistent with s 80 of the *Constitution* because s 80 applied only to trials on indictment of 'any offence against any law of the Commonwealth'. Based on the reasoning in *Momcilovic*, s 6(1) of the MDA was and remained an offence against the law of Western Australia, notwithstanding that the trial court was exercising federal diversity jurisdiction, or alternatively, it was not relevantly 'a law of the Commonwealth'.

The ground of appeal is:

- The Court of Appeal erred in holding that s 114(2) of the *Criminal Procedure Act 2004* (WA) applied and allowed for the appellant to be convicted by majority verdict of offences against the *Misuse of Drugs Act* 1981 (WA) when the District Court of Western Australia was exercising federal jurisdiction. Whereas the Court of Appeal should have held that s 114(2) of the *Criminal Procedure Act* 2004 (WA) had no application to the appellant's trial as s 80 of the *Constitution* provided otherwise and required the appellant to be convicted by unanimous verdict.

The Attorneys-General of the Commonwealth, New South Wales, Queensland, Tasmania, Victoria and South Australia have given notice of their intention to intervene in this appeal.

AUBREY (MA) v THE QUEEN (S274/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 323

Date of judgment: 18 December 2015

Special leave granted: 16 November 2016

In April 2002 the appellant tested positive for Human Immunodeficiency Virus ("HIV"). Doctors subsequently warned him of a need to adopt safe sexual practices, including wearing a condom, to avoid transmission of HIV to others.

In January 2004 the appellant commenced a sexual relationship with GB, who had regularly tested negative for HIV. The appellant told GB that he did not have HIV. In the ensuing months the appellant performed anal sex on GB on many occasions, without wearing a condom. In August 2004 GB tested positive for HIV. As a consequence of having HIV he has experienced serious ill health, suffering strokes, pulmonary embolism, cataracts, prostate damage, metabolic disorders, cognitive impairment, anxiety and depression.

The appellant later faced criminal charges, on an indictment containing two counts. Count 1, laid under s 36 of the *Crimes Act* 1900 (NSW) ("the Act") (as it stood in 2004), was that the appellant maliciously caused GB to contract a grievous bodily disease. Count 2, laid under s 35(1)(b) of the Act, was that the appellant maliciously inflicted grievous bodily harm upon GB. After pleading not guilty to Count 1, the appellant applied for Count 2 to be quashed. This was on the basis that the law in respect of the Count 2 offence required an injury that had an immediate connection with an act of unlawful violence, whereas the Crown case against the appellant did not allege a violent act, nor could any HIV-related injury suffered by GB have the requisite immediate connection.

On 8 March 2012 Judge Sorby stayed the proceedings on Count 2, upon holding that at the time of the charged offences there was uncertainty in the law as to whether the infecting of a person with a serious disease could constitute an infliction of grievous bodily harm.

An appeal by the Crown was unanimously allowed by the Court of Criminal Appeal ("the CCA") (Macfarlan JA, Johnson & Davies JJ) on 29 November 2012. Their Honours held that the meaning of the word "inflicts" in s 35(1)(b) of the Act (as s 35 stood in 2004) was not confined to an application of force. By 2004, the law in respect of the infliction of grievous bodily harm no longer required even an indirect application of force, nor did it require an immediate connection between an offender's act and consequent injury to the victim. The CCA then set aside Judge Sorby's order staying proceedings on Count 2.

An application by the appellant for special leave to appeal from the CCA's orders was dismissed by this Court on 10 May 2013.

When the appellant subsequently stood trial, a jury found him guilty on Count 2 (after finding him not guilty on Count 1). Judge Marien then sentenced the appellant to imprisonment for five years with a non-parole period of two years.

The appellant appealed, on grounds which included that Judge Marien had erred by directing the jury that the element of malice in Count 2 was satisfied (on the basis of recklessness, under s 5 of the Act) if the appellant had foreseen the *possibility* of harm being inflicted on GB, rather than the *probability* of harm.

The CCA (Gleeson JA, Button & Fagan JJ) unanimously dismissed the appellant's appeal. Their Honours held that Judge Marien had not misdirected the jury, as the chance of harm to GB foreseen by the appellant did not need to be so high as to be "probable" as opposed to "possible". Nor was any direction required so as to distinguish between a "merely theoretical possibility" and a "possibility as a matter of reality". The CCA also held that its earlier decision, on the Crown appeal in respect of the staying of proceedings on Count 2, was not wrong.

The grounds of appeal are:

- The Court of Criminal Appeal of New South Wales erred in holding that the offence of which the appellant was convicted was available in law, notwithstanding the decision in *R v Clarence* (1888) 22 QBD 23 and the subsequent New South Wales legislative amendments, in that the Court held that the offence of maliciously inflicting grievous bodily harm, as required by s 35(1)(b) *Crimes Act* 1900 (NSW) (as it stood in 2004), did not require an act by the accused that directly resulted in force being applied violently to the body of the victim.

- The Court of Criminal Appeal erred in finding that the mental state of recklessness, provided for by s 5 *Crimes Act* 1900 (NSW), did not require a foresight of the probability of harm in accordance with this Court's holding in *The Queen v Crabbe* (1985) 156 CLR 464, but instead was satisfied by the mere foresight of the possibility of harm.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING MR ROBERT JOHN DAY AO (C14/2016)

Date referred to a Full Court: 12 December 2016

On 12 December 2016 Justice Gordon, 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 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(v) of the Constitution, or for any other reason, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned;
(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;
(c) whether, by reason of s 44(v) of the Constitution, or for any other reason, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable;
(d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
(e) what, if any, orders should be made as to the costs of these proceedings.

An issue raised by the reference is whether Mr Day had a direct or indirect pecuniary interest, of a kind prohibited by s44(v) of the Constitution, in a lease agreement between the owner of his electorate office premises in South Australia, as lessor, and the Commonwealth, as lessee.

On 21 November 2016 Chief Justice French made orders that Mr Robert Day, the Attorney-General of the Commonwealth and Ms Anne McEwen be heard on the hearing of the reference and be deemed to be parties to the reference pursuant to s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

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

HUGHES v THE QUEEN (S226/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 330

Date of judgment: 21 December 2015

Special leave granted: 2 September 2016

In 2014 Mr Robert Hughes stood trial in the District Court of New South Wales on 11 charges of having sexual intercourse with, and committing acts of indecency on, five girls under the age of 16. The alleged offences occurred between 1984 and 1990.

In its case against Mr Hughes, the Crown served notice on him under s 97(1) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") that it intended to adduce evidence against him in seeking to prove that Mr Hughes had a tendency to act in a particular way and to have a particular state of mind, namely:

(i) To having a sexual interest in female children under 16 years of age;
(ii) To use his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;
(iii) To use his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;
(iv) To use his working relationship with females to utilise an opportunity to engage in sexual activities;
(v) To engage in sexual conduct with females aged under 16 years of age.

The witnesses whom the Crown proposed to call to give tendency evidence were the five complainants, plus six others who had either worked with Mr Hughes or had known him through social or familial connections. The Crown sought that each complainant's testimony be admitted as tendency evidence in relation to the charges in respect of each other complainant, and that the testimony of the six other witnesses be admitted as tendency evidence in relation to all of the charges.

Prior to the trial, Mr Hughes challenged the admissibility of the tendency evidence. On 14 February 2014 Judge Zahra held that the tendency evidence was admissible in relation to each of the charges, after finding that it would have "significant probative value" as required by s 97(1) of the Evidence Act. His Honour found that the proposed evidence was capable of demonstrating that Mr Hughes had at various times acted upon a sexual attraction to young female children.

At the conclusion of the trial, the jury found Mr Hughes guilty on 10 of the 11 charges. Judge Zahra then sentenced Mr Hughes to imprisonment for ten years and nine months with a non-parole period of six years.

Mr Hughes appealed against his conviction, on grounds which included that the tendency evidence should not have been admitted. He submitted that several of the alleged tendencies could pertain to only some of the charges, and that the

various circumstances and types of conduct described in the tendency evidence were not sufficiently similar as to have significant probative value.

The Court of Criminal Appeal ("the CCA") (Beazley P, Schmidt & Button JJ) unanimously dismissed Mr Hughes's appeal. Their Honours described the Crown's case as having alleged that Mr Hughes had the two essential tendencies of a sexual interest in female children and engaging in sexual conduct with them. Those tendencies were exhibited in the different contexts of Mr Hughes's social and familial relationships, his work environment and his daughter's relationship with her friends. The CCA found that, despite obvious dissimilarities in the circumstances, there was a commonality of occasions on which young females were present and Mr Hughes had used those occasions for the purpose of engaging in sexual activities. Their Honours also found that the alleged conduct, notwithstanding dissimilarities, was sexual in nature and had occurred opportunistically on occasions when young females were in the company of Mr Hughes. The CCA held that, for tendency evidence to be admissible under s 97 of the Evidence Act, it need not exhibit an "underlying unity" or a "pattern of conduct". Their Honours then found that Judge Zahra had correctly assessed the tendency evidence as having significant probative value.

The grounds of appeal are:

- The New South Wales Court of Criminal Appeal erred in:

  (i) finding that the tendency evidence had significant probative value as required by s 97 of the Evidence Act;
  (ii) finding that the trial judge did not err in finding that the tendency evidence had significant probative value as required by s 97 of the Evidence Act;

  in circumstances where the alleged acts relied upon as tendency evidence were dissimilar in nature, context and circumstance.

- The New South Wales Court of Criminal Appeal erred in:

  (i) holding that an "underlying unity" or "pattern of conduct" need not be established for tendency evidence to have significant probative value as required by s 97 of the Evidence Act;
  (ii) rejecting the approach adopted by the Victorian Court of Appeal in *Velkoski v R* [2014] VSCA 121 which requires an assessment of the degree of similarity when considering whether the proposed tendency evidence has significant probative value.

KENDIRJIAN v LEPORE & ANOR (S170/2016)

Court appealed from: New South Wales Court of Appeal
[2015] NSWCA 132

Date of judgment: 21 May 2015

Special leave granted: 17 June 2016

On 21 November 1999 Mr David Kendirjian was injured when a vehicle in which he was travelling collided with a vehicle driven by Ms Cheree Ayoub. In 2004 Mr Eugene Lepore, a solicitor, ("the First Respondent") commenced District Court proceedings on Mr Kendirjian's behalf against Ms Ayoub. Ms Ayoub admitted liability and a five day hearing on the quantum of Mr Kendirjian's loss was fixed to commence on 30 August 2006 before Delaney DCJ. Mr Lepore briefed Mr Jim Conomos ("the Second Respondent") to appear for Mr Kendirjian.

On the first day of the hearing, and after some earlier negotiations, Ms Ayoub's legal representatives communicated to the Respondents an offer to settle the proceedings for $600,000 plus costs.

Mr Kendirjian alleged that the Respondents did not advise him of the amount of that settlement offer "but merely of the fact that an offer had been made" and that they had rejected it "absent any instructions from him, on the basis that it was too low".

Mr Kendirjian alleged that he only became aware of the amount of the settlement offer around January 2009. He then commenced District Court proceedings against the Respondents in October 2012, claiming the difference between the settlement offer and the judgment on damages.

On 16 May 2014 Taylor DCJ ordered that Mr Kendirjian's proceedings be summarily dismissed. This was on the basis that the Respondents were immune from suit under the advocates' immunity principle stated in *D'Orta- Ekenaike v Victorian Legal Aid* (2005) 23 CLR 1 ("D'Orta-Ekenaike").

On 21 May 2015 the New South Wales Court of Appeal (Macfarlan & Leeming JJA, Bergin CJ in Eq) dismissed Mr Kendirjian's subsequent appeal. Their Honours held that the Respondents' allegedly negligent advice (or omission to advise) in relation to the settlement offer constituted out of court conduct that led to the continuation of court proceedings. It was therefore protected by the advocate's immunity.

On 11 November 2016 the Full Court of this Court (Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ) allowed, by consent, Mr Kendirjian's appeal against the First Respondent. Consequential orders were also made. The appeal therefore is proceeding only against the Second Respondent.

The grounds of appeal are:

- The New South Wales Court of Appeal erred in finding that the Respondents were immune from suit under the advocates' immunity principle.

- The New South Wales Court of Appeal erred in extending and not limiting the scope of the application of the advocates' immunity principle as stated in D'Orta-Ekenaike to the facts of Mr Kendirjian's case.