SHORT PARTICULARS OF CASES

MARCH 2017

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SMITH v. THE QUEEN (S249/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2016] NSWCCA 93

Date of judgment: 20 May 2016

Special leave granted: 14 October 2016

The Appellant is a US citizen who was convicted of importing a commercial quantity of methamphetamine into Australia, contrary to s 307.1(1) of the *Criminal Code* (Cth) ("the Code"). He was subsequently sentenced to 10 years imprisonment, with a non-parole period of 5 years.

According to the Appellant, he came to travel to Australia because a "Reverend James Ukaegbu" had initially organised a trip for him from the USA to India. While in India, the Appellant said that he met with a friend of the Reverend, who then asked him to deliver some gifts to someone in Australia. Those gifts included: two executive golf sets, a pair of shoes, two containers of vitamins and various cakes of soap.

Upon arrival in Australia, Australian Customs officers detected traces of methamphetamine while examining the Appellant's luggage. Ultimately, 1,945.5 grams of methamphetamine was found in packages secreted inside that luggage. During interviews with Australian Customs and the Australian Federal Police, the Appellant recounted that he had significant misgivings about carrying the gifts to Australia, but stressed that he had absolutely no intention of importing drugs. At trial, the Appellant submitted that that he had no idea that anything illegal was concealed within his luggage.

Upon appeal, the Appellant submitted that the trial Judge, Judge Hock, had misdirected the jury with respect to the fault element of intention of s 307.1(1) of the Code. He contended that her Honour had erred in directing the jury that they might consider whether the Appellant was aware of the *likelihood* that there were packages in his luggage, in the sense that there was a "significant or real chance" that they were there. The Appellant submitted that the jury should have been directed that, for an offence contrary to s 307.1(1) of the Code, it was necessary for the Crown to prove he had an *intention to import* those packages. It was insufficient to prove that he was merely reckless as to their presence.

On 20 May 2016 the Court of Criminal Appeal (Beazley P, Harrison & R A Hulme JJ) held that the offence of importing a commercial quantity of a border controlled drug under the s 307.1(1) of the Code had three elements. The first related to the importation of a substance, in respect of which the fault element was intention. The second was that the substance was a border controlled drug, in respect of which the fault element was recklessness. The third was that the quantity was a commercial quantity, in respect of which there was absolute liability.

Their Honours found that a jury may properly be directed that a finding of intention may be arrived at by a process of inferential reasoning from proved facts. They held however that proof of intention always involves a factual inquiry to be conducted by reference to all the circumstances of the case at hand. The

question therefore is always whether intention has been established to the satisfaction of the jury beyond reasonable doubt.

The ground of appeal is:

- The Court of Criminal Appeal erred in holding that the trial judge did not misdirect the jury with respect to the fault element of intention.

THE QUEEN v. AFFORD (M144/2016)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 56

Date of judgment: 4 March 2016

Date special leave granted: 14 October 2016

In 2014, the respondent received unsolicited email from a person describing himself as Dr Anwar Mohammed Qargash ('Anwar') who claimed he was a Minister in the United Arab Emirates government. The ostensible purpose for the email was to engage the respondent to build a luxury hotel on their behalf in Australia. His reward in the building contract was to be a monthly retainer of $38,000 and twenty per cent of the dividends of the hotel. Over the next few months, emails were exchanged which alluded to large amounts of funds being held in Australia by a security company, and a Memorandum of Understanding was produced, purporting to be a partnership agreement between Anwar and the respondent. In mid-January 2014, the respondent received an email informing him that cash funds held in Australia for the project had been defaced. He was told that the money required cleaning by the security company using what was described as 'separation oil'. The respondent was asked to travel to Manila to retrieve the separation oil, and to provide it to staff of the security firm in Adelaide. On 8 March 2014, he departed Australia for Manila where he met a woman named 'Jenna', who gave him a suitcase, telling him that it contained bottles of oil 'and some presents'. The respondent returned to Australia on 14 March 2014. At Tullamarine airport his baggage was examined by Customs officers and found to contain 2,415.4 grams of pure heroin. Following a trial in the County Court, on 2 July 2015 a jury found him guilty of importing a commercial quantity of a border controlled drug. He was sentenced to three years and two months imprisonment, with a non-parole period of two years.

On appeal to the Court of Appeal (Beach and Priest JJA, Maxwell P dissenting) the respondent argued that a substantial miscarriage of justice occurred as a result of the trial judge's failure to properly direct the jury on the intentional fault element of the offence created by s 307.1 of the *Criminal Code* (Cth) (the Code). It was submitted that the judge's directions to the jury improperly left open the real risk that one or more jurors founded an inference that the respondent had intended to import the substance, upon no more than an awareness on his part of a significant or real chance that his conduct involved the importation of that substance. That awareness, it was submitted, could not be reconciled with the definition of intention set out in s 5.2(1). Hence, the directions resulted in a substantial miscarriage of justice.

The Crown submitted that the judge's charge was unimpeachable and that what his Honour said was supported by what this Court had said in *Kural v The Queen* (1987) 162 CLR 502.

The majority of the Court considered that the *Kural* reasoning, which has application in cases where the prosecution is required to prove an intention to import a narcotic drug, was not easily translatable into cases where the prosecution is only required to prove an intention to import a substance. Adopting the language of *Kural* and the authorities that have followed it, it may be that an intention to import a substance into Australia may be an inference to be drawn from circumstances that include a person's awareness of the likelihood that the substance would be imported. Their Honours could not see how (without more) it could be said, in all cases, involving any conceivable type of substance, a jury could infer to the requisite standard an intention to import a substance from an awareness of the likelihood of the presence of the substance alone.

They considered that the charge suffered from two deficiencies. First, it may have left the jury with the impression that the establishment of an awareness of likelihood that the substance was being imported, was the equivalent of establishing the intention required under the Code. Secondly, the judge did not make clear that any such awareness could only be part of the circumstances from which a relevant inference of intention might be capable of being drawn, and was in any event no more than a path of reasoning which the jury could follow or not follow as it saw fit.

Having reviewed all of the evidence, the majority of the Court was unable to see how the jury could not have had a reasonable doubt about the respondent's intention to import the substance. The conviction was set aside and an acquittal was directed.

Maxwell P (dissenting) found that the authorities established authoritatively that the *Kural* formulation applies to proof of intention under the Code and hence to proof of the fault element of the Code importation offence.

The proposed grounds of appeal include:

- The majority of the Court of Appeal erred by concluding that the factual reasoning referred to in *Kural v The Queen* (1987) 162 CLR 502 in relation to proving intention, does not apply to the offence contrary to s 307.1 of the *Criminal Code* (Cth).

AIR NEW ZEALAND LTD v. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (S245/2016)

PT GARUDA INDONESIA LTD v. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (S248/2016)

Court appealed from: Full Court of the Federal Court of Australia [2016] FCAFC 42

Date of judgment: 21 March 2016

Special leave granted: 14 October 2016

The Appellants each operate international air services that include the carriage of cargo.

In 2009 and 2010 the Respondent ("the ACCC") commenced Federal Court proceedings against the Appellants (and other airlines) under the *Trade Practices Act* 1974 (Cth) ("the TPA"). The ACCC alleged that during several years to 2006 the Appellants had engaged in collusive behaviour with other airlines in the setting of various fees, including fuel and insurance surcharges, for the carriage of air cargo to Australia from Hong Kong, Singapore and Indonesia. The ACCC contended that the Appellants' behaviour was contrary to s 45 (read with s 45A) of the TPA. That is, that the Appellants had made or given effect to arrangements that had the effect of substantially lessening competition in a market. Pursuant to s 4E of the TPA, the market in question was required to be "a market in Australia".

Justice Perram found that the Appellants had engaged in price fixing, in markets for the supply and acquisition of air cargo services. His Honour however dismissed both of the ACCC's applications, upon holding that the markets were not "in Australia" within the meaning of ss 4E and 45 of the TPA. Justice Perram found that the market participants were international airlines, consignors and consignees (together, "shippers") who sent large volumes of cargo, and freight forwarders (who provided intermediary services including preparation, storage, customs clearing and land transport). Airlines competed for the custom of large-volume shippers. Where such a shipper was an importer in Australia, the choice of airline would likely be made in Australia. Other connections with Australia were the carriage of cargo through Australian airspace and the airlines' provision of ground handling and tracking services in Australia. Prices however were generally negotiated and paid (by freight forwarders) at each place of departure. Airlines also imposed their surcharges at that point. Justice Perram held that the market in question was located at the place where a customer's choice of airline took effect. That place was where an airline received the cargo it was to carry. The ACCC's claims therefore failed, as the Appellants' price fixing had occurred in markets in Hong Kong, Singapore and Indonesia.

The ACCC appealed.

The Full Court of the Federal Court (Dowsett & Edelman JJ; Yates J dissenting) allowed both appeals and remitted the matters to a single Judge for the making of orders in relation to the Appellants' conduct that had contravened the TPA.

Dowsett and Edelman JJ held that the market in question was located partly overseas but also "in Australia" within the meaning of ss 4E and 45 of the TPA. This was after undertaking what their Honours held to be a necessary evaluative exercise, giving due consideration to all aspects of the market. Their Honours found it relevant that the Appellants' services were supplied to customers in Australia and that a significant part of those services was carried out in Australia. Airlines competed for business in Australia, where they also faced barriers to entry. The receipt of cargo by an airline was no more important than the flight itself or delivery at the destination. Dowsett and Edelman JJ held that their conclusion was consistent with the purpose of the TPA (as stated in s 2), which was "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." Their Honours also held that, at the time when the TPA was enacted, it was not inconsistent with the *Air Navigation Act* 1920 (Cth) so as to be inapplicable to international airlines. Dowsett and Edelman JJ also rejected a contention by the Appellants that they had been compelled by the law of Hong Kong to join with other airlines in obtaining approval for a certain fuel surcharge.

Justice Yates however would have dismissed the appeal. His Honour held that Justice Perram had correctly focused on the geographic area in which the market product, being a suite of transport services, was bought and sold. This was the port of origin, where substitution would occur by the implementation of decisions as to which airline's services would be used.

In appeal S245/2016, the grounds of appeal include:

- The Full Court (by majority) erred in finding that each of the uni-directional route specific markets for the supply of air cargo services alleged by the ACCC for routes between airports in each of Hong Kong and Singapore, and airports in Australia, were markets in Australia within the meaning of s 4E of the TPA.

In appeal S248/2016, the grounds of appeal include:

- The Full Court should have found that the markets for carriage of cargo by air from the airports in Hong Kong, Jakarta and Denpasar to airports in Australia were not in Australia for the purposes of ss 45(3) and 4E of the TPA.
- The Full Court erred in adopting an expansive approach to the construction of the term "market in Australia" in s 4E supported by reliance upon s 2 of the TPA to conclude that the better approach was to visualise the metaphorical market and then to consider whether it is in Australia.

TALACKO v. BENNETT & ORS (M154/2016)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 179

Date of judgment: 28 July 2016

Date special leave granted: 10 November 2016

Before World War II, Anna and Alois Talacko owned several properties in the Czech Republic, Slovakia and Germany, which were expropriated by the communists. The couple came to Australia and lived here with their three children. In 1989, the collapse of communism opened the way to the restitution of the properties. Their parents having died, the three children agreed to apply for their restitution and to share them or the proceeds of them. One of the sons, Jan Talacko, managed to secure all the available properties in his own name, and denied any entitlement in his brother and sister. In 1998, the excluded children commenced proceedings in the Supreme Court of Victoria against him. The claim was compromised as a result of which all parties were to share in the fruits of the restitution.

When Jan Talacko failed to perform his part of the compromise, the respondents had the proceedings reinstated. They secured orders that Jan had breached the terms of the compromise and that he pay them equitable compensation, which was assessed at approximately €10 million. The respondents then commenced proceedings in the Czech Republic to enforce the judgment of the Supreme Court of Victoria. On 7 November 2011, the Federal Court of Australia declared Jan Talacko bankrupt. He died on 3 November 2014.

In order to facilitate their proceedings in the Czech Republic, the respondents successfully applied to the Prothonotary of the Supreme Court for the issue of certificates under s 15 of the *Foreign Judgments Act* 1991 (Cth) ('the *Foreign Judgments Act*'). The representative of Jan Talacko's estate (the appellant in this Court) brought proceedings in the Supreme Court of Victoria, seeking a declaration that the certificates were invalid and should be set aside by reason, inter alia, of s 58(3) of the *Bankruptcy Act* 1966 (Cth) ('the *Bankruptcy Act*'), which provides that, without the leave of the Court, '*it is not competent for a creditor to enforce any remedy against the person or the property of*' a bankrupt in respect of a provable debt. That application was successful.

The respondents appealed to the Court of Appeal (Ashley and Priest JJA, Santamaria JA dissenting). The first issue in the appeal was whether s 58(3) of the *Bankruptcy Act* operated as a stay of enforcement of a judgment debt for the purposes of s 15(2) of the *Foreign Judgments Act*, which states that '*an application for a certificate may not be made until the expiration of any stay of enforcement of the judgment in question*'. The majority of the Court held that s 15(2) referred only to a judicially ordered stay and not a stay by operation of a statute.

The second issue in the appeal was whether a judgment creditor can '*wish to enforce*' a judgment in a foreign country for the purposes of s 15(1) of the *Foreign Judgments Act* in circumstances where it is not competent for the creditor to enforce any remedy against the debtor by reason of s 58(3) of the *Bankruptcy Act*. Although finding that the respondents had no entitlement to

enforce the judgment by reason of s 58(3)(a) of the *Bankruptcy Act*, the majority found that it was clear that they did 'wish to enforce' the judgment in a foreign country. The fact that there were various steps which would have to be successfully undertaken, if and when a s 15(1) certificate issued, before there could be any enforcement in the Czech Republic did not mean that the relevant wish was not present.

Santamaria JA (dissenting) held that the expression '*any stay of enforcement of the judgment in question*' should be construed as applying to all stays howsoever imposed by law. In reaching that conclusion, his Honour noted that the phrase was unqualified; it did not refer expressly to the judicial stay of such proceedings, and there was nothing in the text of s 15(1) that required that limitation. On the contrary, the presence of the word '*any*' was itself inconsistent with the narrow meaning that the respondents sought to give to the expression.

The grounds of appeal include:

- The Court of Appeal erred in holding or finding that in the events that had occurred the first to third respondents were judgment creditors who 'wishe[d] to enforce' in a foreign country a judgment that had been given in an Australian court for the purposes of s 15(1) of the *Foreign Judgments Act* 1991 (Cth).

PLAINTIFF M96A/2016 & ANOR v. COMMONWEALTH OF AUSTRALIA & ANOR (M96/2016)

Date demurrer referred to Full Court: 2 November 2016

The plaintiffs, a mother and daughter, are citizens of Iran. They arrived in Australia by boat at Christmas Island in August 2013. Being "unauthorised maritime arrivals" within the meaning of s 5AA of the *Migration Act 1958* (Cth) ('the Act'), they were detained under s 189(3) of that Act and were subsequently taken to Nauru in February 2014. On or about 1 November 2014, the plaintiffs were brought to Australia by Commonwealth officers for the purposes of medical treatment. They have received and continue to receive medical treatment in Australia. Pursuant to ss 46(1)(e)(iii) and 46B of the Act, the plaintiffs are not entitled to apply for a visa while they are in Australia.

On 16 December 2016 the plaintiffs were released from the Melbourne Immigration Transit Accommodation to a place specified in a Residence Determination made by the second defendant ('the Minister') under s 197AB of the Act. They currently reside at that place subject to the conditions of the Residence Determination.

The plaintiffs are seeking a declaration that their detention is unlawful and has been since 1 November 2014, on the basis that, insofar as they purport to authorise such detention, ss 189 and 196 of the Act are beyond power and invalid. They further assert that the Minister did not have power to make the Residence Determination as they were not lawfully detained under s 189 of the Act at the time the Determination was made.

The plaintiffs submit that their detention is not for any purpose connected with the executive power to permit non-citizens to enter and remain in Australia. This is because the plaintiffs have no right to make an application for a visa while they are in Australia, and have not at any time been the subject of any consideration whether to permit them to make a valid application for a visa. Nor is the plaintiffs' detention for the purpose of removing them from Australia. If the plaintiffs are not held in detention for the purposes of their admission to Australia or their expulsion or deportation from Australia, the purposes for which they are being detained by the defendants can only be connected with the purposes for which they were brought to Australia under s 198B. In the present case, these purposes are directly related to the physical and mental health of the plaintiffs. They submit that it cannot be said that administrative detention for such purposes satisfies the principle in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (*Lim*). To keep the plaintiffs in detention is not conducive to the purpose of medical treatment, and is highly likely to be inimical to the fulfilment of that purpose. Detention in such circumstances is not for any of the three purposes identified by the plurality in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219*,* and there is no warrant to extend the *Lim* principle to create a new category of permissible purposes for which the Executive may detain a non-citizen which would cover the present case.

Accordingly, the plaintiffs assert that to the extent that ss 189 and 196 of the Act purport to authorise the detention of a transitory person who has been brought to Australia for a temporary purpose under s 198B of the Act and who needs to be in Australia for that purpose, those provisions are beyond power and invalid.

The defendants have demurred to the plaintiff's claim on the grounds that none of the challenged provisions of the Act are invalid or beyond power and the detention of the plaintiffs has been authorised by the Act since 1 November 2014.

On 2 November 2016 Gordon J referred the demurrer for consideration by the Full Court.

Notices of Constitutional Matter have been served. At the time of writing no Attorney-General had filed a Notice of Intervention.

PICKERING v. THE QUEEN (B68/2016)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2016] QCA 124

Date of judgment: 6 May 2016

Special leave granted: 16 November 2016

At a party on the evening of 19 December 2012 Mr Ivan Owens was fatally stabbed during an altercation with his friend Mr Rodney Pickering. Mr Pickering later stood trial on a charge of having murdered Mr Owens.

Mr Pickering gave evidence that he had gone to the party to rescue his son from a potential fight with Mr Owens. He took a knife in order to keep Mr Owens away from him, as he had been challenged to a fight by Mr Owens at a hotel earlier in the evening. At the party, Mr Owens aggressively confronted Mr Pickering, who feared for his safety. Mr Pickering testified that he had tried to fend off Mr Owens and that he did not know how the knife had left his hand and ended up in Mr Owens' chest.

The trial judge, Justice Henry, left for the jury's consideration various defences raised by Mr Pickering. These included accident, self-defence and mistaken belief as to a fact. The jury found Mr Pickering not guilty of murder but guilty of manslaughter. Justice Henry then sentenced Mr Pickering to imprisonment for seven and a half years.

Mr Pickering appealed against his conviction, on the ground that a miscarriage of justice had occurred because the defence prescribed by s 31(1)(c) of the *Criminal Code* (Qld) ("the Code") had not been left for the jury's consideration. Section 31(1)(c) relevantly provides as follows:

> (1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances …
>
> (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person …

Mr Pickering submitted that an exclusion, set out in s 31(2) of the Code, applied to s 31(1)(d) but not to s 31(1)(c). The Crown did not oppose that submission. Section 31(2) relevantly provides as follows:

> (2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element …

The Court of Appeal (Holmes CJ, Fraser & Gotterson JJA) unanimously dismissed Mr Pickering's appeal. Their Honours found that the defence under s 31(1)(c) of the Code was fairly raised upon the evidence and that the verdict may have been affected by Justice Henry's failure to direct the jury about that defence. The Court of Appeal held however that s 31(2) operated to exclude the defence. This was after their Honours had held, upon considering both the structure of s 31 and its context (being relevant provisions of the Code), that s 31(2) applied to s 31(1)(c). The Court of Appeal then rejected an argument by

Mr Pickering that s 31(2) should not apply in his case because the offence he faced was manslaughter, of which the causing of grievous bodily harm was not an element. Their Honours considered that the word "act" in s 31(2) encompassed Mr Pickering's stabbing of Mr Owens because that act, when combined with the requisite state of mind and the injury to the victim, would constitute an offence of unlawfully doing grievous bodily harm.

The ground of appeal is:

- The Court of Appeal erred in concluding that s 31(2) of the *Criminal Code* (Qld) was not confined to the offence charged and to any alternative charge established by the evidence.