SHORT PARTICULARS OF CASES

NOVEMBER 2017

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KALBASI v THE STATE OF WESTERN AUSTRALIA (P21/2017)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2016] WASCA 144

Date of judgment: 17 August 2016

Date special leave granted: 12 May 2017

The appellant was convicted of one count of attempting to possess a prohibited drug with intent to sell or supply it to another, contrary to s 6(1)(a) and s 33(1) of the *Misuse of Drugs Act* 1981(WA) ("the MDA"). The charge related to 4.891 kg of 84% pure methylamphetamine in two padlocked tool cases inside a cardboard box ("the box") which was in the possession of a freight company in Sydney for consignment to Perth. On 12 November 2010 New South Wales Police searched the box. Police brought the box to Perth and on 15 November 2010 rock salt was substituted for the methylamphetamine and a listening device was placed in the box.

Matthew Lothian collected the box from the Perth premises of the freight company on 16 November 2010 and carried it into his house in Spearwood at about 3.16pm on that day. At about 3.20pm, the appellant arrived at Lothian's house. He left the house 37 minutes later. The State case was that during that period the appellant was in possession of the whole of the drug substitute, believing it to be the methylamphetamine removed by police.

The evidence established the following. The only people in Lothian's house during the 37 minutes were the appellant, Lothian and Lothian's girlfriend. After the appellant entered Lothian's house, the cardboard box was opened; the padlocks were cut from the tool cases; the 10 packages of intended drugs were removed from the tool cases; the outer wrapping of the 10 packages containing the intended drugs was removed and placed in the kitchen sink; nine packages of intended drugs were placed in the kitchen cupboard; a plastic bag containing one package of intended drugs was placed in a beer carton; a dish containing MSM (a cutting agent commonly added to methylamphetamine) was on the stove; on the kitchen bench were three bowls, two pairs of disposable gloves, three digital scales, a lighter, and a box of disposable gloves; bolt cutters were found in the kitchen; at around 3.40 pm the appellant asked Lothian for a pipe; and about four minutes after the appellant asked for the pipe, he said to Lothian 'Don't move' and 'I'll come back'. The appellant's DNA was on one of the two pairs of disposable gloves found on the kitchen bench. The State case was that the appellant and Lothian were in the process of adding MSM to some of what they thought was methylamphetamine when the appellant sampled the substance and discovered it was not what he was expecting.

On the appellant's appeal to the Court of Appeal (McLure P, Mazza and Mitchell JJA) the respondent conceded that the trial judge erred in directing the jury that s 11 of the *MDA* applied to the offence. Pursuant to s 11, if a person has 2 gm or more of a prohibited drug in his possession, he is deemed to have it with intent to sell or supply it to another. However it does not apply to offences of attempt to possess.

The respondent submitted, however, that the proviso in s 30(4) of the *Criminal Appeals Act* 2004 (WA) should be applied because, although there was a misapprehension as to the applicability of s 11 of the MDA to the charge, the appellant's intention was not a live factual issue at trial. The respondent contended that the case concerned whether or not it had proved beyond reasonable doubt that the appellant possessed, in the sense that he controlled, the whole of the 4.981 kg of what was thought to be methylamphetamine. If the appellant possessed such a large and valuable quantity of methylamphetamine, it was implausible that he would do so other than for the purpose of selling or supplying it to another.

The appellant submitted that, for two reasons, the error in ground 1 was a 'process' error of such a nature that the application of the proviso is excluded. First, the jury returned a verdict of guilty without having considered whether the particular crime with which the appellant was charged was committed by him. Second, the removal of the element of intention from the jury's consideration was analogous to a failure to leave a defence to a jury. Further, the appellant submitted that the Court could not be satisfied beyond reasonable doubt of the appellant's guilt.

In rejecting the appellant's submission that the defence case was fought on the basis that the appellant possessed a small amount of methylamphetamine merely to sample it, the Court noted that the opening and closing addresses of counsel and the trial judge's summing up revealed that the case was about whether the State had proved beyond reasonable doubt that the appellant possessed, in the sense of control, the entire contents of the cardboard box. If the defence case was that the appellant possessed a small portion merely for the purpose of sampling it one would have expected it to have been put fairly and squarely to the jury and that the trial judge would have been asked to direct the jury along those lines.

The Court was satisfied beyond reasonable doubt that the appellant exercised control over the entire 4.981 kg of ‘methylamphetamine' and not over some much smaller quantity consistent with a mere sample. Given the quantity and value of the drug, their Honours found it was inconceivable that the appellant would possess it without an intention to sell or supply it to another. Having considered the entire trial record, the Court was satisfied beyond reasonable doubt of the appellant's guilt of the crime with which he was charged. They were persuaded that, notwithstanding the error in ground 1, there had been no substantial miscarriage of justice, and the proviso should be applied.

The proposed grounds of appeal are:

- Having upheld the appellant’s first ground of appeal, the Court of Appeal erred in finding that there was no substantial miscarriage of justice and in applying the proviso in s 30(4) of the *Criminal Appeals Act* 2004 (WA) to the appellant’s conviction appeal.

PROBUILD CONSTRUCTIONS (AUST) PTY LTD v SHADE SYSTEMS PTY LTD & ANOR (S145/2017)

Court appealed from: New South Wales Court of Appeal
[2016] NSWCA 379

Date of judgment: 23 December 2016

Special leave granted: 12 May 2017

Shade Systems Pty Ltd ("Shade Systems") was a subcontractor of Probuild Constructions (Aust) Pty Ltd ("Probuild"). On 23 December 2015 it served a payment claim on Probuild pursuant to the provisions of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Security of Payment Act"). On 11 January 2016 Probuild denied that claim. That dispute was then referred to an adjudicator ("the Adjudicator") who found in favour of Shade Systems. A progress payment of $277,755 was then allowed.

Probuild then sought to review the Adjudicator's determination in the Equity Division of the Supreme Court. It alleged that there had been a denial of procedural fairness in the adjudication process constituting jurisdictional error. Probuild also alleged error of law arising from the Adjudicator's written reasons. The primary judge, Justice Emmett, rejected the claim of procedural unfairness. His Honour however held that the Court's supervisory jurisdiction was still available to review non-jurisdictional errors of law on the face of the record. Having found such an error, Justice Emmett then quashed the Adjudicator's determination and remitted the matter for redetermination according to law.

Upon appeal, Shade Systems submitted that there was no power to intervene in a case where the only errors identified were non-jurisdictional errors of law. It further submitted the cases of *Brodyn Pty Ltd v Davenport* and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* were binding authority for that proposition. Probuild however disputed that assessment and a five judge bench was then constituted to decide the matter.

On 23 December 2016 the Court of Appeal (Bathurst CJ, Beazley P, Basten, Macfarlan & Leeming JJA) unanimously allowed Shade Systems' appeal. Their Honours found that the Security of Payment Act did not permit a review of an adjudicator's decision other than for jurisdictional error.

The ground of appeal is:

- The NSW Court of Appeal erred in holding that the NSW Supreme Court's power to make orders in the nature of certiorari for error of law on the face of the record is ousted in relation to determinations under the Security of Payment Act.

MAXCON CONSTRUCTIONS PTY LTD v MICHAEL CHRISTIAN VADASZ (TRADING AS AUSTRALASIAN PILING COMPANY) & ORS (A17/2017)

Court appealed from: Full Court of the Supreme Court of South Australia [2017] SASCFC 2

Date of judgment: 8 February 2017

Special leave granted: 12 May 2017

Maxcon Constructions Pty Ltd ("Maxcon") entered into a contract with Mr Christian Vadasz to design and construct piling for an apartment building. It was a term of that contract that Maxcon would retain 5% of the contract sum as a retention sum. (This sum was to be released at defined times after the issue of a certificate of occupancy for the building.) Unbeknown to Maxcon, Mr Vadasz was an undischarged bankrupt at the time.

Mr Vadasz served on Maxcon a payment claim under section 13 of the *Building and Construction Industry Security of Payment Act* 2009 (SA) ("the Act") for $204,864.55. Maxcon then served on Mr Vadasz a payment schedule of $141,163.55, with $38,999.40 having been deducted by way of the retention sum and $24,750 as a set off for administration charges.

Mr Vadasz then applied for an adjudication of his payment claim. The Third Respondent ("the Adjudicator") later issued an adjudication determination ("the Adjudication") for $204,864.55. He held that the retention sum provisions in the contract were "pay when paid" provisions and thereby void pursuant to section 12 of the Act. The Adjudicator also rejected Maxcon's setoff claim for administration charges.

Maxcon then commenced proceedings, seeking a declaration that the Adjudication was a nullity. It submitted that the contract was rendered void as a result of Mr Vadasz's breach of section 269(1)(b) of the *Bankruptcy Act* 1966 (Cth). This was because he had not disclosed his bankruptcy to Maxcon. Maxcon further submitted that the Adjudication comprised jurisdictional errors or errors of law on the face of the record thereby vitiating the entire determination. Justice Stanley however dismissed that action. His Honour found that Mr Vadasz's failure to disclose his bankruptcy did not result in the contract being void. He further held that there was no jurisdictional error (or other error of law) made by the Adjudicator.

On 8 February 2017 the Full Court of the South Australian Supreme Court (Blue and Lovell JJ, Hinton J dissenting) dismissed Maxcon's subsequent appeal. The majority held that the Adjudicator's error in concluding that the retention sum provisions were "pay when paid" provisions (and thereby void pursuant to section 12 of the Act) did not comprise a jurisdictional error. All Justices held however that that error *did* comprise an error of law on the face of the record. Despite this finding, their Honours held that *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 was authority for the proposition that the remedy of certiorari was impliedly excluded under the Act.

The grounds of appeal include:

- The Full Court erred by following *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No.2)* [2016] NSWCA 379 and concluding that the Act excluded judicial review on the ground of error of law on the face of the record;

- The Full Court erred by holding that the error of law made by the Adjudicator in the application of s 12 of the Act did not amount to jurisdictional error.

On 16 October 2017 the Respondent filed a Summons, seeking to rely upon a proposed Amended Notice of Contention, the grounds of which include:

- The Full Court erred in holding (at [98] – [113]) that the Second Respondent made an error of law in concluding that the contractual provisions in respect of the retention sum were “pay when paid” provisions within the meaning of s 12 of the Act.

FALZON v MINISTER FOR IMMIGRATION AND BORDER PROTECTION (S31/2017)

Date application for an order to show cause filed: 14 February 2017

Date application referred to Full Court: 11 April 2017

Mr John Falzon migrated to Australia from Malta with his parents in 1956, at the age of three. He has never become an Australian citizen. From 1 September 1994 however he held an absorbed person visa, by the operation of s 34 of the Migration Act 1958 (Cth) ("the Act").

In June 2008 Mr Falzon pleaded guilty to a charge of trafficking a large commercial quantity of cannabis. He was then sentenced (by the County Court of Victoria) to imprisonment for 11 years, with a non-parole period of eight years.

On 10 March 2016, while Mr Falzon was still in prison, a delegate of the defendant ("the Minister") cancelled Mr Falzon's visa on character grounds, under s 501(3A) of the Act ("the cancellation decision"). This was on the basis that Mr Falzon had been sentenced to a term of imprisonment of 12 months or more.

Mr Falzon later applied for revocation of the cancellation decision, under s 501CA of the Act. On 10 January 2017 the Assistant Minister for Immigration and Border Protection decided not to revoke the cancellation decision.

Mr Falzon then commenced proceedings in this Court by application for an order to show cause, seeking the quashing of the cancellation decision. On 11 April 2017 Justice Keane referred Mr Falzon's application to the Full Court for hearing.

The grounds on which Mr Falzon claims relief include:

- Section 501(3A) is invalid because it purports to confer the judicial power of the Commonwealth on the Minister. That is so, inter alia, because:

    a) the legal criteria enlivening the duty in s 501(3A) are exclusively or primarily that a person has committed an offence or offences and is serving a custodial sentence for an offence;

    b) s 501(3A) is not subject to a duty to afford procedural fairness;

    c) s 501(3A), in its legal or practical operation, by reason of s 189 of the Act, exposes a person to extra-judicial detention;

    d) the extrinsic materials to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) evidence an intention that the purpose of s 501(3A) was to "ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued";

    e) the detention to which the person is so exposed exceeds or may exceed the period which a court has deemed appropriate for the offence for which the person was imprisoned and on which s 501(3A)(b) operates;

f) in exercising the s 501(3A) power, the Minister is not obliged or empowered to have regard to the protection of the Australian community or any other protective consideration;

g) the Minister is not obliged to exercise the s 501(3A) power for a protective purpose;

h) there is no duty to revoke a s 501(3A) decision even if the Minister is satisfied that the person does not pose a risk to the Australian community;

i) s 501(3A) does not rationally or proportionately pursue a protective purpose. The offence upon which s 501(3A)(a) operates may be stale. The section applies to persons who have fully rehabilitated. It applies to persons who the courts or executive believe pose no risk to the community. The connection between the seriousness of offending and the fact that a person is serving a full-time sentence of imprisonment is no more than arbitrary;

j) s 501(3A) is properly characterised as authorising the Minister to impose punishment for a breach of the law;

k) further, s 501(3A) is punitive and/or pursues a punitive purpose.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING THE HON MS FIONA NASH (C17/2017)

Date referred to Full Court: 10 November 2017

In August 2016 Senator Fiona Nash was elected as a senator for New South Wales, as a result of the general election held on 2 July 2016.

On 4 September 2017 the Senate resolved pursuant to s376 of the *Commonwealth Electoral Act* 1918 (Cth) to refer the following questions to the Court of Disputed Returns:

(a) whether by reason of s 44(i) of the Constitution, there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator [the Hon] Fiona Nash 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.

On 27 October 2017, the Court declared that there is a vacancy by reason of s44(i) of the Constitution in the representation of New South Wales in the Senate for the place for which Senator Nash was returned and that the vacancy should be filled by a special count of the ballot papers. The Court ordered that any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

In accordance with orders made by Justice Gageler on 2 November 2017 the Australian Electoral Officer for the State of New South Wales conducted a special count of the ballot papers on 6 November 2017. The results of the special count identified Ms Hollie Hughes as the candidate who should take the place of Ms Nash.

On 7 November 2017 the Attorney-General of the Commonwealth filed a summons in the proceedings seeking a declaration that Ms Hollie Hughes is duly elected as a senator for the State of New South Wales for the place for which Fiona Nash was returned.

On 10 November 2017, on the return of the summons filed by the Attorney-General, Mr Kennett, appearing in the reference as amicus curiae to act as a contradictor in law, submitted that the Court should not proceed to make the declaration sought by the Attorney-General until the question of Ms Hughes' eligibility to be chosen or of sitting as a senator is resolved.

The issue between the parties and the amicus curiae is whether Ms Hughes is precluded by s44(iv) of the Constitution from being chosen or of sitting as a senator.

Section 44 of the Constitution relevantly provides:

"Any person who:

…

(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth

…

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

It is agreed by the parties that on 23 June 2017 Ms Hughes was appointed a part-time member of the Administrative Appeals Tribunal with effect from 1 July 2017 and that by letter sent to the Governor-General by email on 27 October 2017, following the delivery of the Court's judgment in relation to Senator Nash, Ms Hughes resigned her position as a part-time member of the Tribunal.

Justice Gageler ordered that Ms Hughes shall be allowed to be heard on the issues raised by the summons filed by the Attorney-General and shall be deemed to be a party to the reference pursuant to s378 of the *Commonwealth Electoral Act* 1918 (Cth). Justice Gageler stated the following question for the consideration of the Full Court:

- Should the order sought by the Attorney-General of the Commonwealth in the summons filed on 7 November 2017 be made?

A Notice of a Constitutional Matter has been filed by the Attorney-General.