SHORT PARTICULARS OF CASES

MAY 2018

****

STRICKLAND (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M168/2017)
GALLOWAY (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M174/2017)
HODGES (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M175/2017)
TUCKER (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS (M176/2017)

Court appealed from: Supreme Court of Victoria Court of Appeal [2017] VSCA 120

Date of judgment: 25 May 2017

Date special leave granted: 17 November 2017

On 25 June 2008 the Australian Crime Commission ('ACC') made a determination under section 7C of the *Australian Crime Commission Act* 2002 (Cth) ('the Act'). On 7 April 2010, a summons was issued by the ACC's examiner to compel the appellants to attend an ACC examination under the determination. At the time, each of the appellants was under investigation by the Australian Federal Police ('AFP') on suspicion of having committed offences against Commonwealth law. The ACC was not investigating those matters itself but had agreed, at the AFP's request, to use its coercive powers to examine the appellants on the matters the subject of the AFP investigation.

The ACC examiner permitted AFP investigators to be present during the examinations. The non-publication orders which the examiner made permitted the examination transcripts to be disseminated to the AFP and the Commonwealth Director of Public Prosecutions ('CDPP'). The appellants were subsequently charged with Commonwealth offences. They applied for a permanent stay of the criminal proceedings, contending that both the conduct of the examinations and the dissemination of the examination material had been unlawful. As a result, they argued, they would be unable to receive a fair trial.

Hollingworth J granted a permanent stay of the proceedings. Her Honour ruled that, as each of the appellants was at the time '*a person who may be charged*' within the meaning of s 25A(9) of the Act, the examiner had been bound to prohibit publication of the examination material to the AFP and CDPP, in order to avoid the risk of prejudice to a fair trial. His failure to do so was unlawful and, further, was '*reckless ... to an unacceptable degree*'. Her Honour concluded that, as a result of the unlawful dissemination of the material, the appellants would be unable to receive a fair trial as they would be unfairly constrained in the conduct of their defences. She concluded that a stay was warranted not only as a result of the forensic disadvantage considerations, but also in order to protect confidence in the administration of justice.

The CDPP's appeal to the Court of Appeal (Maxwell P, Redlich and Beach JJA) was successful, despite the Court upholding the trial judge's findings that both the decisions to conduct the examinations and the decisions to permit disclosure to the AFP and the CDPP were unlawful. However, the critical question was not whether the decisions were unlawful but whether, as a result of those decisions, there would be a miscarriage of justice if the prosecutions were not stayed.

The appellants submitted that the proposed trial would be incurably unfair because: (a) the prosecution had been able to use the examination material to assemble the cases against them; and (b) the answers which each appellant had been compelled to give at his examination constrained his ability to conduct his defence at trial. They contended that it was not necessary for them to identify any practical disadvantage. It was sufficient that they had each been compelled to provide a response to the prosecution case and that the unlawful dissemination of their answers to investigators and prosecutors had resulted in 'pervasive illegality'. In the alternative, the appellants relied on the judge's finding that it was effectively impossible for them to identify particular respects in which the prosecution had been advantaged, given the widespread dissemination of the examination material. The Court of Appeal rejected each of these arguments.

With respect to the contention that the prosecution had been able to use the examination material to assemble the cases against the appellants, the Court noted that the AFP already had a well-developed case before the examinations commenced, and that the appellants had conceded that the evidence before the judge did not disclose '*with precision any specific examples of derivative use of examination material in terms of documents or evidence to be led*'. The Court considered that the trial judge erred in concluding that, although the circumstances of the case prevented the appellants from identifying any specific forensic benefit derived by investigators, she was nevertheless justified in inferring from all of the evidence that such benefit had been derived. The Court of Appeal noted that it was well open to the appellants to seek to prove the actual advantage (if any) derived by investigators from access to that material, but they simply did not attempt the task. As a result, there was no sufficient material before her Honour to support the inference that any unfair advantage had been obtained.

The Court found that the evidence did not permit the inference that it was highly probable that, as a result of the examinations, the AFP had undertaken inquiries or targeted witnesses, resulting in the prosecution gaining a material forensic advantage. Assuming that the investigators did make some use of the information obtained, there was no evidence as to the extent or importance of that use to the prosecution case and hence no foundation for a conclusion that its use was productive of such unfairness as to warrant a stay of the trial. Even if the investigators had derived some assistance from the examinations in 'guiding' and 'refining' subsequent documentary searches, the case against the appellants had not materially changed as a result of the examinations. The appellants failed to identify any evidence relied on by the prosecution which would not have been obtained but for the examinations. The Court identified steps that should be taken to ensure that the appellants receive a fair trial: the replacement of the prosecution team; the enjoining of the investigators from disclosing the contents of the ACC examinations to the prosecutors, or at all; and the trial judge's ability to prohibit the Crown from leading evidence, and to prohibit certain matters being referred to by investigators in their cross-examination, if to do so would be productive of unfairness to the appellants.

The ground of appeal is:

- The Court of Appeal erred by finding that the unlawful compulsion of answers from the appellants for the purpose of achieving a forensic advantage to the prosecution was not sufficient in the circumstances of this case for the grant of a permanent stay.

COSHOTT v SPENCER & ORS (S4/2018)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 118

Date of judgment: 31 May 2017

Special leave granted: 15 December 2017

Mr Keith Spencer is a solicitor who is the principal of the incorporated legal practice Kejus Pty Ltd, trading as Spencer & Co Legal ("Spencer Legal"). Spencer Legal provided legal services to Ms Ljiljana Coshott, Mr James Coshott and Schlotzsky Nominees Co Pty Ltd ("Mr Spencer's clients") in respect of certain proceedings in the Federal Court. The Appellant in this Court, Mr Ronald Coshott ("Mr Coshott"), was not a party to those proceedings.

On 4 August 2014 Mr Spencer's clients, along with Mr Coshott, brought an application for assessment of the costs claimed by Spencer Legal relating to the Federal Court proceedings. That application was then referred to a costs assessor. On 29 June 2015 the costs assessor dismissed Mr Coshott's application on the basis that he was not a "third party payer" within the meaning of the *Legal Profession Act* 2004 (NSW) ("the Act").

Mr Coshott unsuccessfully appealed to the District Court, with Judge Gibson also making a costs order in favour of Mr Spencer. Mr Spencer then made an application for the assessment of his costs in respect of the appeal proceedings. A second costs assessor subsequently allowed Mr Spencer's professional costs in acting as a legal representative for himself ("the second costs assessment").

Mr Coshott then commenced proceedings in the Court of Appeal, challenging both the District Court decision and the second costs assessment. Upon appeal the main issues were:

a) whether Judge Gibson had erred in law in holding that the costs assessor had jurisdiction to determine whether Mr Coshott was a "third party payer" within the meaning of s 302A of the Act; and

b) whether the "Chorley exception" to the rule that a self-represented litigant is not entitled to professional costs still applied in New South Wales.

On 31 May 2017 the Court of Appeal (Beazley ACJ, McColl & Simpson JJA) unanimously held that a costs assessor does have the jurisdiction to determine whether or not a party is a "third party payer". All Justices further noted that a self-represented litigant is not generally entitled to professional costs when acting for himself or herself in legal proceedings. An exception to that rule however exists (the Chorley exception) where a solicitor represents himself or herself. As section 98 of the *Civil Procedure Act* 2005 (NSW) did not, by its express terms, render the "Chorley exception" inapplicable, their Honours found that it continued to apply in New South Wales.

The grounds of appeal include:

- The Court erred in finding that there is an exception in the case of a solicitor litigant to the general rule that a litigant is not entitled to recover as costs for his or her time in conducting his or her own litigation.

- The Court erred in failing to find that pursuant to section 98 of the *Civil Procedure Act* 2005 (NSW) there is no exception in the case of a solicitor litigant to the general rule that a litigant is not entitled to recover as costs for his or her time in conducting his or her own litigation.

On 6 March 2018 Mr Spencer filed a summons, seeking leave to rely upon a proposed notice of contention filed out of time, the ground of which is:

- Having found (at J[108]) that Mr Spencer acted through a solicitor corporation, the Court erred in not also finding that Mr Spencer was not a self-represented litigant and that the "Chorley exception" had no application.

DL v THE QUEEN (S309/2017)

Court appealed from: New South Wales Court of Criminal Appeal [2017] NSWCCA 58

Date of judgment: 13 April 2017

Special leave granted: 15 December 2017

In March 2008 the Appellant was found guilty of the murder of a 15 year old girl in July 2005. At the time that he committed the offence, the Appellant was just 16 years old. The then maximum penalty for murder was life imprisonment, with a standard non-parole period (which also applied to juvenile offenders) of 25 years if the victim was a child.

In November 2008 Justice RS Hulme sentenced the Appellant to 22 years imprisonment, with a non-parole period of 17 years. In doing so, his Honour concluded that that the offence fell a little below the mid-range of objective seriousness, being a conclusion relevant to the applicability of the then standard non-parole period. For various reasons, the Appellant did not appeal either his sentence or his conviction until 2016.

Upon appeal the Crown conceded that Justice Hulme had committed a *"Muldrock error"*. Justice Hulme did this by assessing the sentence in accordance with the principles of *R v Way* [2004] NSWCCA 131 and then giving considerable importance to the standard non-parole period of 25 years. Although correct at the time, this approach was subsequently overturned by *Muldrock v The Queen* [2011] HCA 39.

On 13 April 2017 the Court of Criminal Appeal (Leeming JA, Rothman & Wilson JJ) nonetheless dismissed the Appellant's appeal against conviction, with Justices Leeming and Wilson also dismissing the appeal against sentence. Justice Rothman however would have allowed the appeal against sentence.

When it came to resentencing the Appellant, almost a decade after he had initially been sentenced, Justices Leeming and Wilson came to a very different conclusion concerning the objective seriousness of the Appellant's crime as did Justice Hulme. Unlike Justice Hulme, who partly relied upon the assumption that the Appellant had been suffering from a temporary psychosis as a mitigating factor, the majority noted that no diagnosis of serious mental illness had ever been made in the decade that the Appellant had been in custody. Justices Leeming and Wilson therefore found the level of the Appellant's offending as being objectively very serious and not one warranting the imposition of a lesser sentence.

Justice Rothman however noted that the offence was a violent one, seemingly without motive and wholly irrational. The attack was frenzied and the mental condition of the Appellant was, at least in part, causative of the offending. He further noted that the Appellant was then an extremely immature 16 year old. His Honour concluded that the Appellant's mental health contributed to the commission of the offence in a material way and, as a consequence, his moral culpability was reduced. In those circumstances, the necessity for denunciation as an element of the sentence was reduced. Justice Rothman would have

therefore imposed a head sentence of 18 years imprisonment, with a non-parole period of 12 years.

The grounds of appeal are:

- The Court erred in dismissing the appeal in circumstances where the Appellant was denied procedural fairness.

- The Court erred in substituting aggravated factual findings, on an Appellant's appeal, in the absence of any challenge to the factual findings of the primary judge by the Crown, and in circumstances where the majority held that the primary findings of the sentencing judge were "open", when determining whether a lesser sentence was warranted in law.

MINOGUE v STATE OF VICTORIA (M2/2017)

Date Special Case referred to Full Court: 21 December 2017

On 12 July 1988, in the Supreme Court of Victoria, the plaintiff was convicted of one count of murder arising from the explosion of a car bomb in the vicinity of the Russell Street Police Complex on 27 March 1986. The explosion resulted in the death of a policewoman. The plaintiff was sentenced to imprisonment for life with a non-parole period of 28 years. On 30 September 2016, his non-parole period expired and he became eligible for the grant of parole. He made an application to the Adult Parole Board ("the Board"), which made a decision to proceed to parole planning. Before the Board could complete the performance of its functions, the *Corrections Act* 1986 (Vic) ("the Act") was amended to insert s 74AAA, which provides that the Board must not make a parole order in respect of a prisoner convicted and sentenced to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless it is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated.

Following the commencement of this proceeding, s 127A was inserted into the Act with effect from 20 December 2017. Section 127A relevantly provides that, *"*to avoid doubt*",* the amendments made by made by Part 2 of the 2016 Amendment Act (which inserted s 74AAA) also apply to a prisoner regardless of whether, before the commencement of those amendments, the prisoner had become eligible for parole, or the prisoner had taken steps to ask the Board to grant the prisoner parole, or the Board had begun any consideration of whether the prisoner should be granted parole.

The plaintiff contends that ss 74AAA and 127A of the Act should be construed as not applying to the exercise by the Board of its jurisdiction and power to make a parole order in respect of him because: in the case of s 74AAA, his parole eligibility date had arisen, he had applied for parole, and the Board's jurisdiction had been enlivened and exercised, before the commencement of that section; and, in the case of s 127A, he had instituted these proceedings before the commencement of that section.

The plaintiff further contends that s 74AAA does not apply to his application for parole because it is expressed to turn upon the prisoner's having been convicted and sentenced for an offence involving a particular state of mind at the time of his or her offending (namely, knowledge or recklessness as to whether the deceased was a police officer as defined) and that state of mind was not an issue arising in his trial and was not a matter established by his conviction.

If the Court were to find that ss 74AAA and 127A apply to the making of a parole order in respect of the plaintiff, he contends that those provisions exceed the legislative power of the Parliament of Victoria on the ground that they are contrary to the rule of law and inconsistent with the Commonwealth Constitution because they purport to affect the criteria for the grant of the plaintiff's parole, or divest the Board's jurisdiction or power to order the plaintiff's release on parole, after it had been enlivened by the expiration of the non-parole period, been engaged by the making of an application for parole, and been exercised by the decision to proceed to parole planning.

On 21 December 2017 Gordon J referred the parties' Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. The Attorneys-General of New South Wales, Queensland, Western Australia and South Australia have filed Notices of Intervention.

The questions in the Special Case include:

(a) Is s 74AAA of the Act capable of applying to the plaintiff in circumstances where:
    (i) before the commencement of that section:
        (A) the plaintiff's non-parole period had ended or parole eligibility date had occurred;
        (B) the Plaintiff had made an application for parole; or
        (C) the Board had made a decision to proceed with parole planning in respect of the plaintiff; or
    (ii) before the commencement of s 127A of the Act, the plaintiff had commenced this proceeding?

(b) Is s 74AAA of the Act capable of applying to the plaintiff in circumstances where it was not an element of the offence of which the plaintiff was convicted that the plaintiff knew, or was reckless as to whether, the deceased was a police officer as defined by s 74AAA(6)?

(c) If the answer to (a) and (b) is "yes", is s 74AAA and/or s 127A of the Act invalid in their application to the plaintiff in that they do not operate consistently with the Commonwealth Constitution and the constitutional assumptions of the rule of law?

LANE v THE QUEEN (S308/2017)

Court appealed from: New South Wales Court of Criminal Appeal [2017] NSWCCA 46

Date of judgment: 22 March 2017

Special leave granted: 15 December 2017

In September 2012 Mr Peter Morris died, nine days after he had incurred head injuries during an altercation in the street with Mr Paul Lane. Video footage of the altercation recorded via CCTV camera showed Mr Morris falling and striking his head on the roadway on two occasions.

Mr Lane later stood trial on a charge of having murdered Mr Morris. Medical evidence was to the effect that either or both of Mr Morris' falls could have caused his death. The prosecution case was that Mr Morris' first fall had resulted from him stumbling backwards off the gutter due to Mr Lane advancing towards him (after having pushed him) and that his second fall had resulted from a punch thrown by Mr Lane that had connected with Mr Morris' face. The defence case was that the jury could not be satisfied that either fall had resulted from a voluntary act of Mr Lane's and that Mr Lane had been engaged in self-defence. In summing up, Campbell J instructed the jury that if they did not find Mr Lane guilty of murder they could find him guilty of manslaughter by either excessive self-defence or an unlawful and dangerous act. Campbell J also instructed the jury that they could return a verdict of guilty (of either murder or manslaughter) only if they were unanimous.

The jury found Mr Lane guilty of manslaughter, whereupon Campbell J sentenced him to imprisonment for 8 years and 6 months, with a non-parole period of 6 years and 4 months. Mr Lane appealed against his conviction.

The appeal was dismissed by the Court of Criminal Appeal ("the CCA") (Meagher JA & Davies J; Fagan J dissenting). The CCA unanimously held that Campbell J had erred by failing to direct the jury that they could not return a verdict of guilty unless they were unanimous as to the precise voluntary act (or acts) of Mr Lane's that had caused Mr Morris' death. The majority nevertheless held that the appeal should be dismissed, because no substantial miscarriage of justice had actually occurred. This was because the evidence was such that the jury would have entertained doubt about Mr Lane's guilt in respect of the first fall but could not have had a reasonable doubt about Mr Lane's guilt on the basis of his unlawful and dangerous act that had caused Mr Morris' second fall.

Fagan J however would have quashed the conviction and ordered a new trial. His Honour held that there was no occasion for the trial record to be examined by the CCA for the purpose of concluding whether Mr Lane was proved guilty. This was because a factual question central to an element of the charge of murder had not been properly identified for the jury, which was a serious error that had given rise to a substantial miscarriage of justice.

The ground of appeal is:

- The CCA erred in failing to determine the appellant's appeal in accordance with s 6(1) of the *Criminal Appeal Act* 1912 (NSW), and in particular, the CCA erred in finding that no substantial miscarriage of justice actually occurred in a case where the Crown relied on two distinct acts of the appellant, each of which was capable of forming the basis of a verdict of guilty, and where the CCA held that the trial judge erred in failing to direct the jury that they must be unanimous as to the act causing death.

NOBARANI v MARICONTE (S270/2017)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 124

Date of judgment: 5 June 2017

Special leave granted: 17 November 2017

This matter concerns the grant of probate of the last will ("the 2013 Will") of Ms Iris McLaren who died on 12 December 2013. The 2013 Will, which is dated 5 December 2013, names Ms Teresa Mariconte ("Ms Mariconte") as Executrix. In it, Ms McLaren gives her the whole of her estate. On 22 May 2015 the primary judge dismissed Mr Homayoun Nobarani's challenge to the grant of probate and ordered that Ms Mariconte be granted probate instead.

Upon appeal, Mr Nobarani submitted that the primary judge had denied him procedural fairness. He also complained about the way in which his Honour had dealt with Ms Mariconte's application for the removal of certain caveats.

On 5 June 2017 the Court of Appeal (Ward JA & Emmett AJA; Simpson JA dissenting) dismissed Mr Nobarani's appeal. While all Justices shared concerns about the procedural fairness issue, the majority concluded that an order for a re-trial was not warranted. Justice Ward held that there was no possibility that any re-trial would yield a different result. Her Honour noted that Ms McLaren's long standing solicitor had given evidence concerning her alert testamentary capacity. He also gave evidence on how Ms McLaren signed that will in his presence. In the face of such evidence, Justice Ward was not satisfied that any procedural irregularities complained about by Mr Nobarani had deprived him of any realistic possibility of a different result. Justice Emmett also held that neither Mr Nobarani nor anyone else appeared to have a sufficient interest in the validity of the 2013 Will, so as to warrant a new trial on its validity.

Justice Simpson however disagreed. Her Honour held that while Mr Nobarani's financial interest in the application for the grant of probate was admittedly limited, it was however sufficient. He was therefore entitled to a hearing that accorded with the rules of procedural fairness, the denial of which resulted in a substantial miscarriage of justice. Justice Simpson also found that there was a public interest dimension in a grant of probate that went beyond the interests of the immediate parties. In this respect her Honour noted that there was evidence capable of raising doubts about the validity of the 2013 will. Mr Nobarani's inability to explore those doubts also resulted in a substantial miscarriage of justice.

The grounds of appeal include:

- The Court unanimously having found that Mr Nobarani, a self-represented litigant, was denied procedural fairness, the majority erred in not ordering a re-trial because:

    a) Ward JA erred in determining that an intermediate appellate court could make an assessment that a re-trial would not have yielded a different result in circumstances where the denial of procedural fairness was Mr Nobarani not being entitled to:

i. Call evidence;
ii Find witnesses;
iii. Obtain an expert;
iv. Issue a subpoena on relevant factual issues;
v. Be given time to prepare pleadings; and
vi. Be given time to prepare properly for the hearing.

b) Emmett AJA erred in determining Mr Nobanani had no interest in the estate sufficient to challenge the validity of the 2013 will.

On 9 February 2018 the Respondent filed a summons, seeking leave to rely upon a notice of contention filed out of time, the grounds of which include:

- The Court of Appeal erred in finding that there was a denial of procedural fairness in any respect.