SHORT PARTICULARS OF CASES
APPEALS

MARCH 2020

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PELL v THE QUEEN (M112/2019)

Court appealed from:	Court of Appeal, Supreme Court Victoria [2019] VSCA 186
Date of judgment:	21 August 2019
Date application referred to Full Court:	13 November 2019

The applicant was convicted, after a trial by jury in the County Court of Victoria, of one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16, alleged to have been committed on two occasions in the mid-1990s, when he was the Catholic Archbishop of Melbourne. The first occasion was alleged to have taken place in the Priests' Sacristy at St Patrick's Cathedral and involved two choirboys in the Cathedral choir ("A" and "B"). The second occasion involved A alone. The prosecution case rested on the evidence given by A. By the time A first made a complaint to police, in June 2015, B had died from accidental causes. Evidence was also called from a number of witnesses who held official positions at the Cathedral, or were members of the choir, during the relevant period. Their evidence as to processes and practices at the Cathedral at the relevant time went to the issue of whether there was 'a realistic opportunity' for the offending to have taken place (the opportunity witnesses).

The prosecution case was that A was a witness of truth, on the basis of whose evidence the jury could be satisfied beyond reasonable doubt that the events he described had occurred. The defence case was that A's account was a fabrication or a fantasy and that, in any event, the evidence of the opportunity witnesses, taken as a whole, combined to render A's account either literally impossible, or so unlikely as to be of no realistic possibility.

On appeal to the Court of Appeal (Ferguson CJ and Maxwell P, Weinberg JA dissenting) the applicant's principal ground of appeal was that the guilty verdicts were unreasonable and could not be supported having regard to the evidence. The Court noted that the approach which an appellate court must take when addressing the unreasonableness ground was defined by this Court in *M v The Queen* (1994) 181 CLR 487: that is, the appeal court must ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

The majority of the Court noted that the critical issue in the trial was whether A's evidence was credible and reliable. The defence contended that there were inconsistencies in his evidence; that he consciously altered his evidence when challenged, thus demonstrating his untruthfulness; and that his story was inherently improbable. The majority, however, accepted the Crown's submissions that A was a very compelling witness; he was clearly not a liar or a fantasist; and that he was a witness of truth. They considered that the credibility of his account was considerably enhanced by the accuracy of his description of the Priests' Sacristy.

The majority found it was reasonably open to the jury to reject the improbability arguments. They were not persuaded that there was anything about A's account of the incidents which was so inherently improbable as to require the jury to entertain a doubt. Having read all of the opportunity evidence and watched some of it, they were not persuaded that the evidence of any individual witness, or the evidence taken as a whole, established impossibility in the sense contended for by the defence. What emerged was not a 'catalogue of impossibilities', as the applicant contended, but a catalogue of uncertainties and possibilities. So far from the evidence of individual witnesses supporting each other to establish impossibility, their Honours considered that evidence of the successive witnesses served only to confirm that what A claimed had occurred was not impossible.

The majority concluded that, having reviewed all of the material placed before them and having reviewed the evidence for themselves, they were not persuaded that the jury must have had a reasonable doubt about the applicant's guilt. Taking the evidence as a whole, it was open to the jury to be satisfied of the applicant's guilt beyond reasonable doubt.

Weinberg JA (dissenting) had a genuine doubt as to the applicant's guilt. He found there was a significant body of cogent evidence casting serious doubt upon A's account, both as to credibility and reliability. In order for A's account to be capable of being accepted, a number of the 'things' had to have taken place within the space of just a few minutes. In that event, the odds against A's account of how the abuse had occurred, would have to be substantial. The chances of 'all the planets aligning', in that way, would, at the very least, be doubtful. This suggested strongly that the jury, acting reasonably, on the whole of the evidence, ought to have had a reasonable doubt as to the applicant's guilt. Turning to the second limb of the *M* test, his Honour concluded that the various advantages that the jury had did not allay his doubt.

The proposed grounds of appeal are:

- The majority erred by finding that their belief in the complainant required the applicant to establish that the offending was impossible in order to raise and leave a doubt.
- The majority erred in their conclusion that the verdicts were not unreasonable as, in light of findings made by them, there did remain a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

PICKETT v THE STATE OF WESTERN AUSTRALIAU (P45/2019)
MEAD v THE STATE OF WESTERN AUSTRALIA (P46/2019)
MEAD v THE STATE OF WESTERN AUSTRALIA (P47/2019)
ANTHONY v THE STATE OF WESTERN AUSTRALIA (P48/2019)
TSM (a child) v THE STATE OF WESTERN AUSTRALIA (P49/2019)

Court appealed from: Court of Appeal, Supreme Court of Western Australia [2019] WASCA 79

Date of judgment: 21 May 2019

Special leave granted: 11 September 2019

On 27 January 2016, Patrick Slater died as a result of a stab wound that was inflicted in the course of an attack by a group of eight males, each of whom was charged with murder. Their ages ranged from 11 years to 29 years. The youngest ("PM") was tried separately in the Children's Court of Western Australia. The others were tried in the Supreme Court of Western Australia. On 11 July 2017, after a trial before Martino J and a jury, each of them was convicted of murder.

The prosecution case was that one, and only one, of the accused was guilty of murder as the principal offender under s7(a) of the *Criminal Code* (WA) ("the Code"). The prosecution alleged that all the accused, other than the principal offender, were guilty of murder by operation of ss 7(b), (c) or 8 of the Code, which extend criminal responsibility beyond the person who does the act which constitutes the offence to secondary offenders such as "aiders", and parties to an unlawful common purpose.

It was not in dispute that it was reasonably possible that the principal offender was PM. Because he was under the age of 14 years, but over the age of 10 years, s 29 of the Code was relevant to the question of his criminal responsibility. Section 29 relevantly provides that "*a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission*." At the trial the prosecution led no evidence relevant to PM's capacity.

In their appeals to the Court of Appeal (Buss P and Mazza JA), Beech JA dissenting), the appellants contended that the prosecution did not prove at the trial that PM had capacity under s 29; consequently, if PM had stabbed the victim, PM did not commit an offence; therefore, the appellants could not have any derivative liability under ss7(b), (c) or 8. In dismissing the appeal, the majority held that the effect of s 7(b) and (c) and s 8 is to deem a person falling within their terms to have done the relevant acts which the principal has done, and not to deem that person to be liable to the same extent as the principal. The sections are not concerned with the criminal responsibility of any person who is a party to an offence, including whether any person who has killed another person was authorised or justified or excused by law in killing the other person. Criminal responsibility is dealt with in Chapter V of the Code, which includes s 29. By operation of s36 of the Code, the provisions of Chapter V operate to excuse a person who would otherwise be criminally responsible for an act or omission. In particular s 29 of the Code confers on a child between the ages of 10 and 14 years a *personal* exemption or immunity from criminal responsibility for an act or omission.

The majority held that if the principal, as a *person*, was not criminally responsible by virtue of s 29, as it applied to the principal pursuant to s 36, the principal's personal exemption or immunity did not preclude the appellants from being liable for the victim's death as an "aider" under s 7(b) or (c) or as a secondary party under s 8.

Beech JA (dissenting) found that if a person who did the acts that constituted an offence was not criminally responsible because of the application of any of the provisions in Chapter V of the Code, then that person would not have committed an offence. In those circumstances the preconditions for the operation for ss 7 and 8, namely that 'an offence is committed', could not be established and, as a result, no person could be found to have committed the offence by operation of any of s7(b) or (c), or s 8.

The ground of appeal is:

- The majority of the Court of Appeal erred in holding that the appellants could be guilty by the operation of section 7(b) or (c), or section 8, of the *Criminal Code* (WA) of an offence founded upon the act of an 11 year old child "PM", who was an alleged co-offender, when the act of PM did not constitute an offence because the prosecution had not proved beyond reasonable doubt (or at all) that PM was criminally responsible for the act.

NGUYEN v THE QUEEN (D15/2019)

Court appealed from: Supreme Court of the Northern Territory (Full Court) [2019] NTSC 37

Date of judgment: 29 May 2019

Special leave granted: 16 August 2019

The appellant was charged with one count of unlawfully causing serious harm and one count of assault aggravated by the use of an offensive weapon at Palmerston in the Northern Territory on 18 June 2016. The appellant pleaded not guilty to both counts.
During the (first) trial, the prosecution led evidence of a record of interview between the appellant and the police dated 19 July 2016. This interview was what is colloquially referred to as a "mixed" statement or record of interview as it contained both admissions made by the appellant referrable to the charges and exculpatory statements that he acted in self-defence. During the trial the appellant did not give evidence and the trial judge left self-defence to the jury, however the jury was unable to reach a verdict and was accordingly discharged.

Prior to the commencement of the second trial, the prosecution gave notice that for 'tactical reasons' the mixed statement would not be tendered as a part of the Crown's case. The Crown submitted that the mixed statement should be categorised as being substantially or wholly exculpatory and therefore inadmissible, or in the alternative, if it were categorised as being a mixed statement that containing both exculpatory and inculpatory material, the Crown had absolute discretion whether to tender the evidence. The appellant submitted that the tactical reason for the Crown not tendering the mixed record of interview as a part of the prosecution case was to force the appellant into the witness box where he would be subject to cross-examination by the prosecutor.

The appellant applied to stay the proceedings on the basis that the refusal to tender the record of interview amounted to an abuse of process, constituted a breach of the prosecutorial duty to represent the case fairly and completely and impinged on the appellant's right to a fair trial. At the request of both parties the trial judge then referred two questions of law arising from the mixed statement to the Full Court of the Supreme Court of the Northern Territory:

- Question 1: Is the recorded interview of 19 July 2016… admissible in the Crown case?

- Question 2: Is the Crown obliged to tender the recorded interview?

The Full Court noted that the same questions of law had arisen shortly before in the Court of Criminal Appeal in the matter of *Singh v The Queen ("Singh").* The Full Court answered the questions in this case in the same way as in *Singh*. That is:

- As to Question 1 "Yes: the record of interview would be admissible in evidence at the instance of the Crown. The exculpatory parts of the interview are not admissible at the instance of the accused"; and

- As to Question 2 "No: The Crown is not obliged to tender the recorded interview".

The Full Court was constituted by the same Justices who had decided *Singh*, in which Kelly and Barr JJ were in the majority and Blokland J had dissented. In this appeal Blokland J agreed with the majority but noted that she was bound by the reasoning in *Singh.*

The ground of appeal is:

- That the Full Court of the Supreme Court of the Northern Territory erred in answering the second of the two questions referred to it in the negative.

The North Australian Aboriginal Justice Agency and the Director of Public Prosecutions for Western Australia have both filed submissions seeking leave to intervene in the appeal.

SINGH v THE QUEEN (D16/2019)

Court appealed from: Court of Criminal Appeal, Supreme Court of the Northern Territory
[2019] NTCCA 8

Date of judgment: 25 March 2019

Special leave granted: 16 August 2019

The appellant was charged with armed robbery of a taxi driver whilst in company of other passengers pursuant to section 211(1) and (2) of the *Criminal Code* (NT).

On 15 May 2017, the appellant had ordered a taxi to drive him and three boys, one of whom was his nephew, to Ryland Road. The three boys and the appellant entered the taxi and the appellant sat behind the taxi driver's left shoulder. Once the taxi driver arrived at Ryland Road, the appellant told the taxi driver to stop. At this point, the boy seated directly behind the taxi driver pulled out a knife and held it to the throat of the victim. The taxi driver then heard a number of voices say "Give me the money. Give me the money." The taxi driver told them to take whatever they wanted. One of the boys took money from the front console of the car and from the pocket of the taxi driver's shirt, in the sum of $400.

The Crown case was that while the appellant was not holding the knife or demanding the money, he had engaged in an arrangement to commit the offence and was equally involved in the offending, either by being a party to a common purpose to rob the taxi or by aiding the other offenders to do so.

The robbery was partially captured on the taxi video camera. The appellant participated in an electronically recorded interview with the police in which he admitted his presence in the taxi but explained that he was not part of an agreement to rob the driver or aid and abet the co-offenders. The Defence argued that this was a contention open on the video footage. The appellant did not give evidence at the trial. Therefore, there was no additional evidence to support the contention that he did not participate in the robbery.

At trial, defence counsel informed the Court that the Crown would not be tendering the appellant's interview with the police. Defence counsel submitted that the record of interview should be tendered as part of the prosecutor's duty to put all relevant and admissible material before a jury. The defence also sought a ruling as to whether the interview could be tendered by the defence pursuant to section 81 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("*ENULA*"). The trial Judge noted that a prosecutor could not be compelled to tender a record of interview and further ruled that the defence could not adduce the record of interview through cross-examination. The jury returned a verdict of guilty, and the appellant was sentenced to 3 years' imprisonment, suspended after 1 year.

The appellant appealed to the Supreme Court of the Northern Territory, Court of Criminal Appeal. Kelly and Barr JJ held that there was no general obligation on a prosecutor to tender a record of interview that was both exculpatory and inculpatory, ("a mixed statement") as part of the Crown's case. Further, that in the circumstances of the case there was no relevant unfairness. Blokland J dissented. She held that, in

the circumstances of the case, the prosecutor's discretion miscarried and there was not a full presentation of the evidence, constituting a miscarriage of justice.

The appellant has appealed to the High Court. He argues that there is a divergence in the development of the common law across Australia regarding the obligations of a prosecutor to adduce evidence of mixed statements.

The ground of appeal is:

- That the Court of Criminal Appeal erred in not holding that the Crown, in choosing not to adduce the appellant's record of interview of 8 June 2017, deprived the appellant of a reasonable chance of acquittal.

The North Australian Aboriginal Justice Agency and the Director of Public Prosecutions for Western Australia have both filed submissions seeking leave to intervene in the appeal.

BINSARIS v NORTHERN TERRITORY OF AUSTRALIA (D11/2019)
WEBSTER v NORTHERN TERRITORY OF AUSTRALIA (D12/2019)
O'SHEA v NORTHERN TERRITORY OF AUSTRALIA (D13/2019)
AUSTRAL v NORTHERN TERRITORY OF AUSTRALIA (D14/2019)

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory [2019] NTCA 1

Date of judgment: 18 February 2019

Special leave granted: 16 August 2019

Each of the appellants sued the respondent for damages for assault and battery said to have occurred while they were detained at Don Dale Youth Detention Centre in Darwin in August 2014. At the trial, their claims for damages for battery arising out of the use of CS gas at Don Dale on the night in question were dismissed. The dismissal of those claims was upheld on appeal by the Court of Appeal of the Supreme Court of the Northern Territory. These four appeals are concerned with the proper construction of several statutes in force in the Northern Territory on 21 August 2014. The issues for determination are whether one or other of two statutory prohibitions was contravened by the use of CS gas at Don Dale on the night in question. The first prohibition prohibited the use of a prohibited weapon unless under an exemption or an approval. The second provision provided that 'enforced dosing with a medicine, drug or other substance' is not reasonably necessary force which the superintendent may use to maintain discipline. In 2014 the four appellants were youths serving sentences of detention at Don Dale. All of them were between 15 and 17 years of age and had lengthy criminal records including convictions for escaping lawful custody. Another detainee, JR, had also committed serious crimes of violence. On 21 August 2014 the appellants were housed in the "Behavioural Management Unit" (BMU) of Don Dale which comprised five cells adjacent to an enclosed exercise yard. They were housed there because they could not be held securely elsewhere in the detention centre, having all escaped from there on 2 August 2014 and having been recaptured by 6 August 2014.

On the evening in question JR escaped from his cell into the exercise yard, became very aggressive and destructive, damaged property and caused a disturbance. Although the other detainees remained confined in their cells, some of them also became agitated and damaged property in their cells.

As a result of communication between the Superintendent of Don Dale, the Director of Correctional Services and the Acting General Manager of Berrimah Correctional Centre, three prison officers at Berrimah who were members of the Immediate Action Team (IAT) arrived at the BMU at about 8.30pm. The members of the IAT were equipped with aerosol canisters of CS gas.

CS gas is a form of tear gas which is a prohibited weapon under the *Weapons Control Act 2001* (NT). The Act exempts a 'prescribed person' acting in the course of their duties…in respect of a prohibited weapon that is supplied to them by their employer for the performance of their duties as a prescribed person. An officer under the *Prisons (Correctional Services) Act 1980* (NT) is a prescribed person but not an officer under the *Youth Justice Act 2005* (NT).

On the night in question, the decision to deploy the CS gas was taken by the Director of Correctional Services. The gas was sprayed in the enclosed exercise yard in 3 short initial bursts followed by a further 6 short bursts by a member of the IAT using an article known as a 'fogger' which was a prohibited weapon under the *Weapons Control Act.* After the last burst JR fell to the ground at which point members of the IAT entered the BMU and removed him. Once JR was secured the cells in the BMU were unlocked and the other detainees including the appellants were removed. The detainees were handcuffed behind their backs and taken to the basketball courts adjacent to the exercise yard where they were hosed down to remove the residue of the CS gas. It is uncontroversial that the relevant safety data sheet for the CS fogger states that its use may cause 'acute eye, skin, digestive and respiratory system irritation" as well as other potential health effects including "difficulty breathing, possible feeling of suffocation", and "nausea, vomiting in higher concentrations", "60 seconds-total incapacitation may occur"….". The officers concerned all gave evidence that they believed the temporary discomfort to the other detainees in the BMU was necessary to temporarily incapacitate JR so he could be taken back into safe custody and accomplished this in a way that avoided the risk of serious injury to JR and/or to the prison officers.

The Court of Appeal determined first that the CS gas was deployed by a prison officer acting within the scope of the power granted of the superintendent under s 152(1) of the *Youth Justice Act,* and delegated to the prison officer under ss 157(2) of the Act; and second, that the officer was acting within the scope of his duties as a prison officer when he deployed the gas. Therefore the use of the prohibited weapon on the appellants was authorised. The appellants dispute the correctness of the legal conclusions embodied in those findings. The appellants argue that ss 153(2) is the only general provision of the *Youth Justice Act* authorising the use of force in the conduct of the youth detention centre. It is limited to force that is reasonably necessary in the circumstances. By ss 153(3), reasonable force does not include physical violence or enforced dosing with a medicine, drug or other substance. "On no view could the ancillary "necessary or convenient" power in ss 152(1) grant, by a side wind, a power to infringe the liberty of a subject, to use coercive force, and to dispense with the generally applicable penal law".

The grounds of appeal in each matter are:

- That the Court of Appeal erred in holding that the exemption in subsection 12(2) of the *Weapons Control Act 2001* (NT) applied to the deployment of CS gas by a prison officer at Don Dale Youth Detention Centre on 21 August 2014.

- That the Court of Appeal erred in holding that the power of the superintendent under subsection 152(1) of the *Youth Justice Act 2005* (NT) was not limited by subsection 153(3) of the Act.

The Respondent has sought an extension of time in which to file a Notice of Contention in each matter contending that the decision of the Court below should be affirmed but on the ground that the subject prison officer was acting in the course of his duties within the scope of his powers and privileges pursuant to ss 8(2) and 9 of the *Prisons (Correctional Services) Act 1980* (NT).