SHORT PARTICULARS OF CASES
APPEALS

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EAST AUSTRALIAN PIPELINE LIMITED v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ANOR (S57/2007)

Court appealed from: Full Court of the Federal Court of Australia

Dates of judgment: 2 June 2006 & 18 August 2006

Date of grant of special leave: 9 February 2007

East Australian Pipeline Limited ("EAPL") owns the Moomba to Sydney Gas Pipeline ("the Pipeline"). That Pipeline is covered by the National Third Party Access Code for National Gas Pipeline Systems ("the Code"). That Code gives effect to a National Competition Policy and a National Pipeline Access Agreement made between the Commonwealth, State and Territory Governments in 1995 and 1997 respectively. Under it, EAPL was required to propose an Access Arrangement for use of the Pipeline by third parties and to propose a reference tariff of charges for such use. That Access Arrangement must then be approved by the Australian Competition and Consumer Commission ("ACCC") before it can become operative.

In this instance, the ACCC did not approve of EAPL's proposed Access Arrangement. Exercising its powers under the Code, it then substituted its own arrangement incorporating a tariff based upon a lower Initial Capital Base ("ICB") of $559 million. That valuation was based on different assumptions on both the past and estimated future lifespan of the Pipeline. EAPL challenged the ACCC's decision in the Australian Competition Tribunal ("Tribunal"). On 19 May 2005 the Tribunal varied the ACCC's decision insofar as it related to the ICB. The Tribunal went onto find that the ACCC had misconstrued section 8.10(f) of the Code.

The ACCC instituted proceedings for the judicial review of the Tribunal's decision. It sought an order setting aside the Tribunal's decision and further orders for writs of certiorari and mandamus. The ACCC also sought declarations that its calculation of the ICB was in accordance with sections 8.10 and 8.11 of the Code and that the Tribunal had acted *ultra vires* section 44ZZOA of the *Trade Practices Act* 1974 (Cth).

On 2 June 2006 the Full Federal Court (French, Goldberg and Finklestein JJ) held that the the Tribunal had erred in its interpretation of the Code. Their Honours further found that Section 8.10 of the Code does not require the establishing of the ICB solely by reference to a known valuation method. Their Honours found that the ACCC could reject a value of the Pipeline so long as it had still taken the economic depreciation of it into account. The Full Federal Court found that none of the available grounds upon which the Tribunal could interfere with the ACCC's determination had been made out. There was also no error in the ACCC's findings of fact in relation to its determination of the ICB. Furthermore the exercise of the ACCC's discretion in reaching that determination was neither incorrect nor unreasonable having regard to all the circumstances.

On 18 August 2006 the Full Federal Court delivered supplementary reasons for judgment in this matter. On that date, their Honours agreed that paragraph 1 of the order made on 2 June 2006 was expressed too widely. They otherwise

dismissed EAPL's notice of motion as a challenge to the reasoning of their earlier judgment.

The grounds of appeal are:

- The Full Court misapprehended or exceeded its jurisdiction under the *Administrative Decisions (Judicial Review) Act* 1977 or under section 39B of the *Judiciary Act* 1903 in that it set aside the decision of the Second Respondent made on 19 May 2005 without identifying clearly, or at all, the ground which entitled it to so act.

- The Full Court erred in law in misconstruing the scope of the jurisdiction of the Second Respondent to review the decision of the First Respondent made on 8 December 2003 under section 39(2) of Schedule 1 of the *Gas Pipelines Access (South Australia) Act* 1997: see paragraphs 175, 187, 194 and 198 of the Full Court's reasons delivered on 2 June 2006.

- The Full Court failed to give any, or any adequate reasons, for concluding that the Second Respondent's findings at paragraphs 25 to 30 of the reasons of the Second Respondent delivered on 8 July 2004 were infected by any relevant error susceptible to judicial review.

- The Full Court at paragraph 196 of its reasons delivered on 2 June 2006 misapprehended the Second Respondent's reasons, and thereby disabled itself from performing its judicial review function.

EM v THE QUEEN (S59/2007)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 3 November 2006

Date of grant of special leave: 9 February 2007

The appellant was charged with three offences (murder, aggravated assault with intent to rob and firing a firearm with disregard for safety) in relation to a home invasion on 7 January 2002 and five aggravated robbery offences in relation to a home invasion on 17 January 2002.

A trial before Shaw J and a jury commenced on 1 September 2003. The Crown case on the first set of offences (the Logozzo offences) relied substantially on admissions made by the appellant in a conversation with police officers on 15 May 2002. After a voir dire hearing Shaw J ruled that the evidence of the conversation was not admissible. The Crown appealed pursuant to s 5F of the *Criminal Appeal Act* 1912 (NSW). The Court of Criminal Appeal upheld the appeal. The Court did not rule that evidence of the conversation was admissible, but rather left it to the trial judge to make further findings of fact and to exercise his or her discretion accordingly. A second trial commenced before James J and a jury in October 2004 in which a further voir dire hearing was conducted. James J ruled that the evidence of the conversation of 15 May 2002 was admissible in part. On 3 November 2004 the appellant entered pleas of guilty in respect of the aggravated robbery offences and on 26 November 2004 he was found guilty by the jury in relation to the Logozzo offences.

The Crown case was that when Mr and Mrs Logozzo returned home in the early hours of 7 January 2002 they were approached by two masked men and ordered inside. One man held a rifle and the other held a handgun. There was a scuffle between Mr Logozzo and the assailant with the rifle and Mr Logozzo was shot at by the man with the handgun. On the Crown case, the appellant was the man with the handgun. Mr Logozzo later died.

On 15 May 2002 detectives, each wearing covert listening devices, went to the appellant's premises. The appellant got into the police vehicle and was told that he was not being taken to the police station and that he was not under arrest. The detectives drove to a park. In the course of the drive one of the detectives reminded the appellant that he did not have to say anything to the police. In the course of the conversation the appellant made certain inculpatory statements. Before James J, the appellant contended that this conversation was inadmissible by virtue of either s 85, s 90 or s 138 of the *Evidence Act* 1995 (NSW) ('the Act').

James J found that the accused was told several times on 15 May that he did not have to say anything to police and was reminded of the written summary under Part 10A of the *Crimes Act* which he had been given on 24 April when previously interviewed by the police. His Honour was satisfied that the appellant understood that he did not have to say anything to the police.

His Honour found that the appellant would not have spoken to the police on 15 May if he had known that the conversation was being recorded, and that the police knew of this belief. His Honour further found that the appellant did not

know that the conversation was being recorded and, indeed, believed that it was not. The police were also said to know that the appellant believed that the conversation was not being recorded and that they did not disabuse him of such belief. His Honour found that those factors were not sufficient of themselves to satisfy him that it would be unfair to the appellant to use evidence of the admissions made in the course of that conversation.

His Honour found that the appellant believed that if the conversation he had with the police officers was not recorded, evidence of the conversation could not be used against him in criminal proceedings. That was a belief which the appellant had formed himself independently of anything said or done by the police. Police officers had not set out to induce in the appellant a belief that, if what he said to them was not recorded, evidence of what he said could not be used against him. However, part of the conversation was found to be inadmissible on the basis that one of the detectives had intended to induce or promote a belief on the part of the appellant that, if he spoke to the police about the shooting, what he said would not be used disadvantageously to him. This impugned the appellant's freedom to choose whether to speak to police.

The appellant appealed. The appeal focused on the application of s 90 of the Act. Giles JA (Grove and Hidden JJ agreeing) noted that s 90 called for an evaluation of whether or not, having regard to the circumstances in which the admission was made, it would be unfair to the accused to use the evidence. His Honour found that the evidence should not have been excluded under the s 90 discretion and that there was no miscarriage of justice by virtue of its admission. The appellant contended that James J erred in principle in regard to s 90 by focusing on the intention of the detectives rather than all the circumstances of the conversation. Giles JA found that his Honour's application of s 90 was not in error in this respect.

The Court also rejected a ground of appeal that the trial judge should have warned the jury about the potential significance of the fact that the appellant believed that what he said could not be used in evidence against him.

The grounds of appeal include:

- The Court of Criminal Appeal erred in upholding the decision of the trial judge that, pursuant to paragraph (b) of s 90 *Evidence Act* 1995 (NSW), it would not be unfair to the appellant to use evidence of admissions made by the appellant on 15 May 2002.

- The Court of Criminal Appeal erred in failing to find that, having regard to the circumstances in which the admissions were made by the appellant on 15 May 2002, and in particular the failure of the police to give the second part of the standard caution to the appellant, it would be unfair to the appellant to use the evidence.

CARR v STATE OF WESTERN AUSTRALIA (P34/2006)

Court appealed from: Court of Appeal, Supreme Court of Western Australia

Date of grant of special leave: 26 October 2006

On 25 November 2004 the appellant, Michael John Carr, was convicted, after a jury trial, of armed robbery while in company. He was sentenced to six years' imprisonment without parole. The circumstances of the offence were that on 8 April 2003 the appellant and a co-offender drove to the South Perth branch of the Commonwealth Bank in a stolen car, where the appellant went into the bank armed with a handgun which he pointed at a teller and demanded that she fill several bags with money. The appellant then left the bank with the money, a total of $7,750, and escaped in the stolen car driven by his co-offender.

The appellant was later arrested, his premises were searched, and he was taken to the police station. He was interviewed by the investigating officers, with the interview video-recorded. During the interview he was cautioned by the investigating officer that he was not obliged to speak. He had been cautioned several times earlier, during the search of his premises and while being driven to the police station. At the interview, the appellant declined to answer any questions without the presence of a lawyer, but denied his involvement in the crime. He was then taken to the "lock-up" section of the police station by the same investigating officers. He initiated a conversation with those officers and made several admissions of his involvement in the crime. This conversation was recorded by fixed surveillance cameras and microphones in the lock-up. The Crown tendered the video recording of this conversation at trial, which was admitted over objection.

On appeal, the appellant argued that the trial judge (Wheeler J, as she then was) erred in admitting the video recording of the lock-up conversation, either because it was not an "interview" within the meaning of section 570D of the *Criminal Code* (WA), or because the appellant should have been cautioned again when he initiated the conversation because he was not aware that the conversation was being recorded and accordingly he had not participated voluntarily in the conversation, particularly since the investigating officers encouraged him to continue speaking. The Court of Appeal (Steytler P, McLure and Buss JJA) rejected these arguments and dismissed the applications for an extension of time to seek leave to appeal against conviction and sentence.

At the hearing of the application for special leave to appeal, leave was granted to amend the draft notice of appeal to identify more clearly the point of construction raised by the appeal.

The grounds of appeal include:

- That section 570D of the *Criminal Code* requires that a record of an "interview" is inadmissible where the interviewee is not aware that the conversation is being recorded and therefore cannot be said to have voluntarily participated in the interview.

AJS v THE QUEEN (M2/2007)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 7 December 2005

Date special leave granted: 20 December 2006

This application concerns the issue of whether a court of appeal should order an acquittal or a retrial where a conviction is quashed.

The appellant was convicted, after trial by jury, of an act of sexual penetration of his 13 year old granddaughter. On 13 December 2002 the complainant went to the appellant's house where it was intended that she would stay over for the night. The complainant consumed a quantity of liquor in the course of the evening. She complained of a stomach ache and vomited a number of times. She was in great pain, and allowed the appellant to rub her stomach. She claimed that the appellant then put his hand under her underpants and inserted his fingers into her vagina. The appellant denied that he had touched the complainant. He gave evidence that the complainant had asked him to "take the hurt away" and that was when he rubbed her stomach. He volunteered that he had put his hands under the elastic of her pyjamas and her knickers to take the pressure off her stomach. He said he had no recollection of touching her on the vagina, and that if he had done so it would have been unintentional.

On appeal to the Court of Appeal (Maxwell P, Nettle JA and Redlich AJA) the appellant submitted that the trial judge erred by failing to direct the jury that an element of the offence of incest is that the act of penetration be committed intentionally. This ground was upheld and the conviction was quashed.

After reviewing the evidence, the Court of Appeal stated that it had doubt as to the guilt of the accused and that the evidence was insufficient to establish any degree of penetration beyond reasonable doubt. Despite the advantages the jury had in assessing the demeanour of witnesses and observing the atmospherics of the trial, the jury, acting reasonably and appreciating the burden as to standard of proof, could not have reached the view beyond reasonable doubt that the appellant was guilty of incest. A new trial was ordered.

The appellant contends that once the Court of Appeal quashed the incest conviction on the basis that the jury's verdict could not be supported having regard to the evidence, it was erroneous for the Court not to have acquitted the appellant and to have ordered that there be a new trial. The appellant notes that in exercising the discretion whether to enter an acquittal or order a new trial the common law recognises that where evidence at the original trial is insufficient to warrant a conviction, then it is contrary to the interests of justice to order a new trial and the appellant is entitled to an acquittal as of right.

The grounds of appeal are:

- The Court below erred in failing to direct a judgment and verdict of acquittal on the count of incest and by directing that there be a new trial.

WASHER v STATE OF WESTERN AUSTRALIA (P6/2007)

Court appealed from: Court of Appeal, Supreme Court of Western Australia

Date of grant of special leave: 9 February 2007

The appellant, Raymond James Washer, was charged (with two other co-conspirators, John Di Lena and Andrea Scott, Di Lena's de facto partner) and convicted on 23 March 2000 of one count of conspiring between 18 May 2000 and 2 June 2000 to possess a prohibited drug, namely methylamphetamine, with intent to supply or sell it to another. The appellant was sentenced to seven years' imprisonment with eligibility for parole. Over objection by the appellant at trial in the District Court (Fenbury DCJ), evidence led by the prosecution was admitted of transcripts of telephone intercepts and listening devices of certain inculpatory statements, some of which post-dated the period of the conspiracy alleged in the indictment. The appellant argued that this evidence was highly prejudicial and was not admissible as propensity evidence because the conversations occurred after the alleged conspiracy had come to an end. The appellant also argued that because the same evidence had been led in another conspiracy trial in which he had been acquitted, the trial judge should have allowed him to lead evidence of that acquittal and should have directed the jury that they were bound to give full effect to his acquittal on the other conspiracy charge.

On appeal, the Court of Appeal (Wheeler, Roberts-Smith and Pullin JJA) applied section 31A of the *Evidence Act* 1906 (WA) which requires the court in deciding whether to admit propensity evidence to determine whether the evidence has significant probative value and, if so, whether fair-minded people, comparing that significant probative value to the degree of risk of an unfair trial, would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial. The Court held that the trial judge had, despite not considering section 31A, nevertheless approached the issue correctly and that there had been no error in admitting the evidence.

The Court also concluded that the trial judge did not err in refusing to allow the appellant to lead evidence of his previous acquittal, or in failing to direct the jury that the previous acquittal could not be challenged and that they were bound to give full effect to it. The Court concluded that the previous conspiracy case never arose before the jury, and the jury was neither invited nor required to make findings of fact on the existence of any element of the conspiracy of which the appellant was acquitted.

Special leave to appeal was granted but was limited to the second ground raised in the court below.

The ground of appeal for which leave was granted is:

- Whether evidence forming the basis of a prosecution case of which an accused is acquitted may be led as propensity evidence in a subsequent trial, and whether the trial judge erred in refusing to admit evidence of that acquittal, thereby giving rise to a substantial miscarriage of justice.