SHORT PARTICULARS OF CASES
APPEALS

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STATE OF NEW SOUTH WALES v ROBINSON (S119/2019)

Court appealed from: New South Wales Court of Appeal
[2018] NSWCA 231

Date of judgment: 16 October 2018

Special leave granted: 12 April 2018

At 5:00 pm on 22 December 2013, Mr Bradford Robinson attended a Sydney police station in response to attempts by police to contact him. Upon attendance he was immediately arrested, without warrant, for breach of an apprehended violence order. Mr Robinson was offered, and accepted, the opportunity to participate in a record of interview. He was released without charge at 6:18 pm, following the conclusion of that interview.

Mr Robinson commenced proceedings against the State of New South Wales, claiming damages for wrongful arrest and false imprisonment. On 3 August 2017 the trial judge, Judge Taylor, dismissed his claim. In doing so, Judge Taylor accepted the arresting officer's evidence that a decision on whether to charge Mr Robinson depended on what he said in the interview and that, at the time of the arrest, he had not decided to charge him.

On appeal, the key issue was whether the arrest of Mr Robinson was lawful under s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("the Act") in circumstances where there was no positive intent to lay charges at the time of arrest.

On 16 October 2018 the Court of Appeal (McColl and Basten JJA; Emmett AJA dissenting) allowed Mr Robinson's appeal. The majority held that in legal terminology, "arrest" is generally used to identify that deprivation of liberty which is a precursor to the commencement of criminal proceedings against the person arrested, justified as necessary for the enforcement of the criminal law. The power to arrest exists, and must be exercised, for the purpose of bringing the person arrested before a justice as soon as reasonably practicable.

Their Honours held, that as no decision whether to charge Mr Robinson had been made at the time of his arrest, the arrest was not for the purpose of commencing the criminal process. It was therefore unlawful.

Justice Emmett however held that the legislative scheme contemplates a distinction between the decision to arrest and the decision to charge. A positive intent to charge at the time of arrest is not a necessary precondition of the valid exercise of the power of arrest under s 99 of the Act. Accordingly Mr Robinson's arrest was lawful.

The ground of appeal is:

- The Court of Appeal erred in concluding that, for an arrest to be lawful under s 99(1) of the Act, there is an implied requirement that the arresting police officer intend to charge the arrested person with an offence.

DE SILVA v THE QUEEN (B24/2019)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2018] QCA 274

Date of judgment: 16 October 2018

Special leave granted: 12 April 2019

The Appellant was found guilty by a jury of having raped a woman ("the Complainant") by digital penetration of her vagina in the early hours of a certain morning after a night out.

At the trial, the Complainant gave evidence but the Appellant did not. In evidence however was an audio-visual recording of an interview of the Appellant conducted by police on the day after the alleged offence ("the police interview"). On the Appellant's version of events, the Complainant was naked from the waist down, she asked him to cuddle her and if he would date her, and she became upset when the Appellant then said that he had a girlfriend. The Appellant also denied that he had touched the Complainant's vagina. On the Complainant's account, she was wearing a shirt and underwear, she had fallen asleep after talking with the Appellant (who also had hugged her), and she later awoke to feel the Appellant committing the alleged offence after he had removed her underwear. Evidence was also given by friends of the Complainant, who were in a nearby bedroom at the time. They testified that the Complainant had burst into the bedroom, upset and yelling, and that she said what the Appellant had just done to her.

In an appeal against conviction, the Appellant contended that a miscarriage of justice had occurred due to the directions given by the trial judge, Judge Farr, in relation to how the jury should approach the evidence contained in the police interview. The Appellant submitted that Judge Farr had improperly used the word "innocence" twice while summing up in respect of how the jury might assess answers given by the Appellant during the police interview. The Appellant also submitted that, since the evidence in relation to the charged offence made the case essentially one of "word against word", Judge Farr should have warned the jury that even if they did not believe the answers given in the police interview, they ought not to find the Appellant guilty if a reasonable doubt remained. (Such a direction is known as a "*Liberato* direction", being based on the observations of Brennan J in *Liberato v The Queen* (1985) 159 CLR 507 at 515.)

The Court of Appeal (Fraser, Gotterson and Morrison JJA) unanimously dismissed the Appellant's appeal against conviction. Their Honours held that there was no need for Judge Farr to have given a *Liberato* direction, since there was no oral testimony of the Appellant's to directly conflict with the Complainant's oral testimony. The Court of Appeal also found that Judge Farr's statements in relation to the jury potentially viewing some answers given in the police interview as pointing to the Appellant's "innocence" would not have conveyed to the jury that their task was to determine innocence or otherwise. The summing up as a whole had properly conveyed that the jury could not convict the Appellant if exculpatory answers given by him had left the jury with a reasonable doubt as to his guilt.

The ground of appeal is:

- The Court of Appeal erred in finding that a *Liberato* direction is not required if the defendant does not give evidence.

The Appellant seeks leave to rely also on the following proposed ground of appeal:

- The Court of Appeal erred in failing to find that the directions given to the jury were inadequate and that as a result there was a miscarriage of justice.

IN THE MATTER OF JERROD JAMES CONOMY (P22/2019)

Court appealed from: High Court of Australia
[2019] HCA Trans 049

Date of judgment: 20 March 2019

Date referred to the Full Court: 22 May 2019

In this matter the Applicant seeks to bring an appeal from orders made by Justices Keane and Edelman on 20 March 2019:

(a) dismissing his Applications for special leave to appeal in each of P3/2019 and P11/2019 together with a Summons filed in each application; and

(b) ordering pursuant to S77RN of the *Judiciary Act 1903* (Cth) ("the vexatious proceedings order") that he be prohibited from instituting any further proceedings in the High Court relating to the convictions the subject of the two decisions by the Western Australian Court of Appeal in *Conomy v Maden* [2016] WASCA 30 and *Conomy v Maden* [2016] WASCA 301 which were the subject of the applications for special leave to appeal.

The grounds of the proposed appeal, as filed in April 2019, included that there was a "substantial miscarriage of justice" in both the dismissal of the special leave applications and the making of the vexatious proceedings order. The Applicant claims to have been given insufficient notice of the Court's intention to consider making such an order against him. The Applicant also contends that the Court ought not to have been satisfied that he had "frequently instituted or conducted vexatious proceedings in the Australian courts… within the meaning of s 77RN(1)(a) of the Act". The Applicant also contends that the fact that the special leave applications were 'dismissed' not 'refused leave' is an important distinction. The Applicant has sought in June 2019 to amend, and in July and August 2019, to further amend the Notice of appeal.

The case raises a threshold procedural matter as to whether the appeal is competent. The Applicant contends that the dismissal of the two special leave applications and the orders refusing special leave to appeal in each of P3/2019 and P11/2019 were final orders made under S 77RN of the *Judiciary Act* ("the *Act*") in the original jurisdiction of the Court and that therefore an appeal lies from them under s 34(1) of the *Act* which provides:

> **Appeals from Justices of High Court**
> *(1) The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers.*

The Applicant's Notice of appeal dated 3 April 2019 was not accepted as filed within 14 days after the date of the judgment below, as required by the *High Court Rules 2004*. By Summons filed on 23 April 2019 the applicant seeks, inter alia, that his Notice of appeal be accepted for filing and an order that the time fixed by the Rules be enlarged. On 22 May 2019 Justice Gordon directed that the applicant's Summons be referred for consideration by the Court that is to deal with the purported appeal.

At a directions hearing on 3 July Justice Gordon ordered that counsel, to be identified by the Australian Government Solicitor, be appointed amicus curiae in relation to the applicant's Summons dated 23 April and any appeal.

The amicus contends that the determination of the special leave applications was made independently of S77RN of the *Act* and that insofar as such orders were made in the original jurisdiction of the Court, they were interlocutory in nature, so that an appeal without leave under s 34(2) of the Act would be incompetent. In any event, there was no error in the reasons for refusing special leave to appeal as any appeal from the decisions of the Western Australian Court of Appeal would have no prospect of success. The amicus argues that there is no material distinction between the "dismissal" and the "refusal" of an application and notes that both terms are often used interchangeably in special leave applications.

The amicus accepts that the vexatious proceedings order was a final order made in the exercise of the original jurisdiction conferred by s 77RN of the *Judiciary Act,* and that accordingly the High Court has jurisdiction pursuant to s 34(1) of the Act to hear and determine an appeal from that order. The amicus contends that the Applicant was given the opportunity of being heard before the vexatious proceedings order was made and there was no error in the reasons for making the vexatious proceedings order. Further or alternatively, the amicus submits that the vexatious proceedings order should be affirmed by the Full Court.

HT v THE QUEEN & ANOR (S123/2019)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 17 July 2017

Special leave granted: 12 April 2018

This appeal raises the question of whether, in a Crown appeal against sentence pursuant to s 5D of the *Criminal Appeal Act 1912* (NSW), the Court of Criminal Appeal has the power to deny the respondent access to evidence admitted in the sentencing proceedings. If such a power does exist, then by what principles is the Court of Criminal Appeal guided in assessing the procedural unfairness occasioned to the affected party?

The appellant submits that she was denied procedural fairness at the hearing of the Crown appeal against sentence because she was denied access to material ("Exhibit C") which was the basis of the imposition of a statutorily authorised disproportionate sentence upon her and which contained evidence critical to the questions involved in the determination of the Crown appeal against her sentence.

The appellant submits that she was effectively denied the opportunity to properly address the Court of Criminal Appeal regarding the adequacy of the discount given by the sentencing Judge. She further claims that she was denied the ability to make submissions on whether a residual discretion should be re-exercised and what level of discount should be applied in the event of a re-sentence.

The grounds of appeal include:

- The Court of Criminal Appeal erred in denying the appellant and/or her legal representatives access to Exhibit C at the hearing of the Crown appeal against sentence.

- The appellant was denied procedural fairness at the hearing of the Crown appeal against sentence in the Court of Criminal Appeal.

- The Court of Criminal Appeal erred in exercising its discretion in s 5D of the *Criminal Appeal Act 1912* (NSW) to vary the sentence imposed on the appellant. In particular, the Court of Criminal Appeal failed to consider:

    I. The denial of procedural fairness afforded to her at the hearing of the Crown appeal against sentence and its significance; and

    II. The conduct of the executive in bringing the appeal in circumstances where she was denied access to Exhibit C.

FENNELL v THE QUEEN (B20/2019)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2017] QCA 154

Date of judgment: 21 July 2017

Special leave granted: 22 March 2019

On 21 March 2016 the Appellant was convicted of murdering Mrs Liselotte Watson on or around 12 November 2012 at Macleay Island. He was later sentenced to life imprisonment.

Mrs Watson was an 85 year old Macleay Island resident for whom the Appellant did occasional odd jobs. She lived alone in a two-storey house and she was killed in her bed by blows to the head with a blunt instrument. It was actually the Appellant who alerted police and expressed concerns about Mrs Watson's welfare on 13 November 2012. When the police, in the company of the Appellant, attended Mrs Watson's residence later that day, they found her body face-down on the floor of her bedroom. It looked as if there had been a break-in.

The Crown's case against the Appellant's was entirely circumstantial. It alleged that the Appellant had been stealing from Mrs Watson (to fund his gambling habit) and that the risk that he would soon be discovered provided him with a motive for killing her. The Appellant submitted that an alternative hypothesis consistent with innocence, that of a botched burglary, was reasonably available on the evidence.

Upon appeal, the Appellant submitted that the jury's verdict was unreasonable and that it could not be supported by the evidence. On 21 July 2017 the Queensland Court of Appeal (Gotterson & Philippides JJA, Byrne SJA) unanimously dismissed the Appellant's appeal. Their Honours noted that the task for a Court when an "unreasonable verdict" ground of appeal is raised, is to make an independent assessment of the sufficiency and quality of the evidence at trial. Their task is then to decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the Appellant was guilty of the offence for which he was convicted. The Court of Appeal found that, while this was not a case of evidential perfection, there was sufficient evidence to support the major strands in the Crown's circumstantial case. Furthermore, the alternative hypothesis consistent with innocence proposed by the Appellant was not a reasonable one. The absence of any evidence of a forced entry, the rummaging of drawers or the disturbance of anything in the upper floor of Mrs Watson's home weighed against that theory being accepted.

After considering the evidence as a whole, the Court of Appeal found that it was open to the jury to be satisfied beyond reasonable doubt that the Appellant had murdered Mrs Watson. Their Honours also dismissed the Appellant's other grounds of appeal.

The sole ground of appeal is:

- The Court of Appeal erred in failing to find that the verdict was unreasonable or cannot be supported having regard to the evidence, in part because it made significant errors of fact.