

MANSFIELD v. THE QUEEN AND ANOR (P60/2011),
KIZON v. THE QUEEN AND ANOR (P61/2011)

Court appealed from: Court of Appeal of the Supreme Court of Western
Australia
[2011] WASCA 132

Date of judgment: 16 June 2011

Date of grant of special leave: 9 December 2011

The appellants, Nigel Mansfield and John Kizon, were jointly tried upon an indictment containing 52 counts. Nine of the counts alleged a conspiracy between the appellants pursuant to s 11.5 of the *Criminal Code* (Cth) to commit an offence contrary to s. 1311(1) of the *Corporations Act 2001* (Cth) ("the Act") by contravening the insider trading provisions of s. 1002G(2)(b) of the Act (before 11 March 2002) and s 1043A(1)(d) of the Act on and after 11 March 2002.. Five of the counts alleged a substantive insider trading offence against Mr Kizon alone and the remaining counts alleged a substantive insider trading offence against Mr Mansfield alone. A number of substantive counts were alternatives to the conspiracy counts.

The Crown filed and served particulars of the information which it alleged constituted the "inside information" for each count. The "inside information" allegedly concerned the affairs of two publicly listed companies, Adultshop.com.Ltd ("ASC") and My Casino Ltd ("MYC"). The alleged inside information did not include the fact that it was allegedly sourced from Malcolm Day, the CEO of ASC or Michael O'Donnell, the managing director of MYC. The source was only relevant to the issue of materiality.

The Crown opened its case before Wisbey DCJ on 18 January 2010 and closed it on 12 March 2010. The Crown did not call Malcolm Day or Michael O'Donnell as witnesses. The Crown conceded with respect to all but four counts that the evidence could not satisfy a jury beyond reasonable doubt that all of the particulars of the alleged inside information were fact. On 15 March 2010 counsel for the appellants submitted that there was no case to answer on all counts on the grounds that "information" for the purpose of the insider trading offences of the Act did not include falsehoods or lies.

On 19 March 2010 Wisbey DCJ ruled that "information" for the purpose of the relevant insider trading offences of the Act "must, in general circumstances, be a factual reality". His Honour directed verdicts of acquittal on all counts, except counts 2, 3, 19 and 20. The jury subsequently acquitted Mr Mansfield on those counts.

The Crown appealed pursuant to s 24(2)(e)(i) of the *Criminal Appeals Act 2004* (WA) against the judgments of acquittal. The Court of Appeal (McLure P, Buss JA and Murray J) by majority (McLure P dissenting) allowed the Crown appeal and set aside the judgments of acquittal. Buss JA and Murray J held that the fact that an information is untrue did not cause it to cease to be information. Pursuant to orders sought by the Crown, a new trial of Mr Kizon and Mr Mansfield was ordered in respect of the ASC counts only.

The grounds of appeal are materially identical in each appeal and include:

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- The Court of Appeal erred in law finding that ‘information’ for the purpose of the offence created (by the former) s 1002G of the Act and “inside information” for the purpose of the offence created by s.1043A of the Act could include falsehoods, lies or matters devoid of factual reality.

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- The court below erred in failing to hold and find that it is an element of the offence of insider trading created by s 1002G of the Act and s.1043A of the Act that the inside information in the possession of the accused correspond in whole or in part with the actual information in the possession of the entity entitled to have or use it.