SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2006

****

THOMAS v MOWBRAY & ORS (M119/2006)

Date special case referred to Full Court: 2 October 2006

This special case concerns the validity of Division 104 of the *Criminal Code Act 1995* (Cth) ("the Code"), the object of which is stated to be: "to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act".

In March 2001, the plaintiff, an Australian citizen, travelled to Pakistan and Afghanistan, where he undertook paramilitary training at the Al Farooq training camp for three months. He was arrested in Pakistan in January 2003, but returned to Australia on 6 June 2003. In November 2004 the plaintiff was charged with various offences under Part 5.3 of the Code and the *Passports Act 1938* (Cth). He was found guilty in the Supreme Court of Victoria of intentionally receiving funds from a terrorist organisation and of possession of a passport that had been falsified. The Victorian Court of Appeal set aside the convictions on 18 August 2006, but has not yet decided whether to order a retrial.

On 27 August 2006, on the application of the Australian Federal Police ("the AFP"), an interim control order in respect of the plaintiff was made by the Federal Magistrates Court, under Division 104 of the Code. The AFP contended, inter alia, that the plaintiff had received training from Al Qa'ida; he had heard Usama Bin Laden speak at the training camp on several occasions, and he had attempted to join the Taliban after September 11 2001. The plaintiff was not notified of the hearing, which was held on an ex parte basis. The interim control order was served on him on 28 August 2006. On 22 September 2006, the plaintiff filed an application for an order to show cause in this Court, seeking, inter alia, a writ of certiorari to quash the order of the Federal Magistrate, and an injunction restraining the Commonwealth from acting upon the order. The parties have agreed in stating the questions of law arising in the proceeding in the form of a special case for the opinion of the Full Court. The Attorneys-General of New South Wales, Western Australia and South Australia have given notice of their intention to intervene in the proceeding.

The special case raises the following issues:

- Is Division 104 of the *Criminal Code Act 1995* (Cth) invalid because it confers on a federal court non-judicial power contrary to Chapter III of the Constitution?

- Is Division 104 invalid because, in so far as it confers judicial power on a federal court, it authorises the exercise of that power in a manner contrary to Chapter III of the Constitution?

- Is Division 104 invalid because it is not supported by one or more express or implied heads of legislative power under the Commonwealth Constitution?

THE QUEEN v TAUFAHEMA (S142/2006)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 8 May 2006

Date of referral to the Full Court: 29 September 2006

On 27 March 2002 two off-duty police officers reported seeing a car being driven in an erratic and a potentially dangerous fashion. Constable McEnallay responded to that call and he began a pursuit. In that car were the Respondent, three passengers and four loaded firearms. In the course of that pursuit, the Respondent's car collided with a gutter and was immobilised. One of the occupants got out and fatally shot Constable McEnallay. All four men then fled, with each of them carrying a firearm. The Respondent was later charged with Constable McEnallay's murder without ever having fired a shot. He was also charged with the illegal possession of a firearm.

The central issue at trial was whether the Respondent was party to a joint criminal enterprise. Justice Sully instructed the jury that it must be satisfied that all four men had agreed to jointly evade lawful apprehension before it could convict the Respondent for murder. It also had to be satisfied that the Respondent knew of at least one loaded gun in the car and had considered the possibility that someone may use it. This is in circumstances whereby there was a real risk that Constable McEnallay might be killed or seriously injured. The Respondent said however that he had no knowledge of the firearms prior to the firing of the fatal shots. The Respondent was found guilty of murder and of posession of a firearm. Justice Sully then sentenced him to 23 years imprisonment, with an effective non-parole period of 16 years. As for the others, Mr Penisini (the shooter) pleaded guilty to murder. The Respondent's brother, Mr John Taufahema, was tried separately and was also convicted of murder. Mr Meli Lagi was acquitted of murder but found guilty of using a firearm to evade apprehension.

On 8 May 2006 the Court of Criminal Appeal (Beazley JA, Adams & Howie JJ) unanimously held that Justice Sully had misdirected the jury on the elements of joint criminal enterprise with respect to murder. He had also failed to leave manslaughter open as an alternaitve. Their Honours found that Justice Sully had wrongly directed the jury that the joint criminal enterprise was "evading lawful apprehension". This was held to be an error for two reasons. Firstly, there was no offence of "evading lawful apprehension". Secondly, there was also no evidence that the Respondent had agreed with the others to jointly evade apprehension. This is distinct from the Respondent individually deciding to avoid apprehension, knowing that his co-offenders would do likewise. The Court of Criminal Appeal therefore held that there was no evidence of a joint foundational offence arising out of the attempt to evade Constable McEnallay. The Respondent could not therefore be convicted of either murder or manslaughter. A verdict for acquittal was then entered.

On 29 September 2006 Chief Justice Gleeson and Justice Heydon adjourned this application for special leave to appeal to a Full Court.

The questions of law said to justify the grant of special leave to appeal are:

- Whether the liability of a secondary party for a contingency arising in the context of a joint criminal enterprise depends on the scope of the joint criminal enterprise and whether the contingency was contemplated as a possible incident of the enterprise, or whether liability is determined separately by identifying a discrete foundational offence which the parties agreed to commit or contemplated might be committed in respect of that contingency.

- Whether the determination of the scope of the relevant joint criminal enterprise should take into account all the circumstances and contingencies contemplated as within the scope of the common design when the enterprise was embarked upon or whether the determination is confined to the discrete circumstances of each contingency that arises leading to the commission of the incidental offence.

FARAH CONSTRUCTIONS PTY LTD & ORS v SAY-DEE PTY LTD
(S347/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 21 December 2005

Date of grant of special leave: 19 September 2006

Say-Dee Pty Ltd ("Say-Dee") and Farah Constructions Pty Ltd ("Farah") entered into a joint-venture ("the joint-venture") to purchase and redevelop No.11 Deane Street, Burwood ("No. 11"). Ms Dalida Dagher ("Dalida") and Ms Sadie Elias ("Sadie") were the sole directors and shareholders of Say-Dee. Farah was a company controlled by Mr Farah Elias ("Mr Elias"), who was no relation to Sadie. Mr Elias was an experienced real estate developer, while Dalida and Sadie were not.

By agreement, Say-Dee was to provide the finance for the joint-venture while Mr Elias was responsible for managing the development application with Burwood Council ("the Council"). He was also responsible for the ultimate construction and sale of the development. Upon completion of the joint venture, the profits were to be distributed equally between Say-Dee and Farah.

Mr Elias lodged a development application with the Council. This was refused on the basis that the site was too narrow. The Council then advised him that the site needed to be amalgamated with an adjacent site in order to achieve its development potential. Mr Elias subsequently acquired two adjoining properties, namely, Nos.13 and 15 Deane Street, Burwood ("Nos.13 and 15"). He did this through a company ("Lesmint Pty Ltd") that he and members of his immediate family controlled.

It was common ground that Farah owed fiduciary duties to Say-Dee. The issue therefore was the scope of those duties. Say-Dee claimed that Farah had breached its fiduciary duties by Mr Elias' failure to disclose information pertinent to the joint-venture. In particular, it was his failure to disclose the Council's refusal to allow the development of No.11 unless it was amalgamated with an adjoining property. It was also Mr Elias' subsequent exploitation of that information for his own benefit by acquiring Nos.13 and 15 through parties associated with Farah.

Justice Palmer found that Mr Elias had disclosed Farah's proposed purchase of Nos.13 and 15 to Dalida and Sadie. His Honour also found that Mr Elias had invited Say-Dee to participate in those acquisitions. In relation to the scope of Farah's fiduciary duties however, Justice Palmer held that Farah did not contract with Say-Dee to provide it with opportunities beyond the boundaries of No.11. His Honour therefore found that Farah was under no fiduciary duty to disclose to Say-Dee the opportunity to acquire either Nos.13 or No.15. It was also under no fiduciary inhibition from purchasing those properties itself.

On 21 December 2005 the Court of Appeal (Mason P, Giles & Tobias JJA) allowed Say-Dee's appeal. Their Honours held that Farah, Lesmint Pty Ltd, Mr Elias and the members of his immediate family held Nos.13 and 15 on constructive trust for the joint-venture.

The grounds of appeal include:

- The Court of Appeal was in error in ordering that the Second to Sixth Appellants held Nos.13 and 15 upon a constructive trust for the Respondent and the First Appellant and making orders for the appointment of receivers thereto and other orders.

- The Court of Appeal was in error in holding that the finding by the trial judge that Mr Elias had disclosed to Sadie and Dalida the opportunities in 2001 to purchase 15 Deane Street and 20 George Street, and in 2002 the opportunity to purchase 13 Deane Street was glaringly improbable and contrary to compelling inferences and should therefore be set aside.

BODRUDDAZA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS (S241/2006)

Amended application to show cause filed: 13 September 2006

Special case filed: 21 September 2006

The Plaintiff is not, nor has he ever been an Australian citizen. On 18 July 2003 he entered Australia holding a Class TU, subclass 574 (Postgraduate Research Sector) visa. On 26 July 2005 he applied for a Class DD, subclass 880 (Skilled Independent Overseas Student) visa. On 17 September 2005 and 17 December 2005 the Plaintiff sat tests under the International English Language Testing System ("IELTS"). On 5 January 2006 the Applicant's application for the Skilled Independent Overseas Student visa was refused. The Applicant scored 115 points under the applicable 'points test', while the pass mark for further consideration of his application was 120 points. In particular, he scored only 15 points in the 'Vocational English' category despite having sat the IELTS test twice. On both occasions he scored an average mark of more than 6 over the four sub-categories of; 'listening', 'reading', 'writing' and 'speaking'. He did not however score a minimum mark of 6 in each of those sub-categories, as required.

The Plaintiff applied to the Migration Review Tribunal ("MRT") for a review of the delegate's decision, but his application was one day out of time. On 9 May 2006 the MRT held that it did not have the jurisdiction to determine the matter.

On 11 July 2006 the Plaintiff filed an application for an order to show cause, which was amended on 13 September 2006. In his amended application he sought writs of prohibition, certiorari and mandamus arising from the delegate's decision of 5 January 2006. The Plaintiff alleged that there had been either a constructive failure to exercise jurisdiction or an error of law by the delegate. He also submitted that the delegate misunderstood the applicable law as it related to points to be allocated in respect of language skills.

On 21 September 2006 Justice Heydon referred the special case to the Full Court.

The questions of law reserved for the consideration of the Full Court are:

- Does section 486A(1) of the *Migration Act* 1958 ("the Act") apply to the Plaintiff's application to the High Court for remedies to be granted in exercise of the Court's original jurisdiction?

- If the answer to Question 1 is yes for any or all of the remedies applied for, is section 486A(1) of the Act invalid in respect of the Plaintiff's application?

- If appropriate to answer having regard to the answers to questions 1 and 2, did the delegate of the Minister make a jurisdictional error in the course of assessing the Plaintiff's visa application?

- By whom should the costs of the proceedings in this Honourable Court be borne?

On 3 October 2003 the Plaintiff filed a notice pursuant to Section 78 of the *Judiciary Act* 1903. The issue said to arise under the Constitution is whether the time limits imposed by section 468A of the Act on the making of an application to this Court for constitutional writs is inconsistent with Chapter 3 of the Constitution.

On 21 November 2006 this Court was advised that the Attorney-General for South Australia would intervene in this matter.

GOLDEN EAGLE INTERNATIONAL TRADING PTY LTD & ANOR v ZHANG BY HIS TUTOR THE PROTECTIVE COMMISSIONER & ANOR (S355/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 22 February 2006

Date of grant of special leave to appeal: 29 September 2006

On 24 December 1997 Mr Chen Guang ("Mr Guang") was driving a van owned by Golden Eagle International Trading Pty Ltd ("Golden Eagle") when he lost control and crashed. Mr Yu Zhang ("Mr Zhang") was a passenger in that van and he sustained very serious injuries. As a result, Mr Zhang sued Golden Eagle, Mr Guang and DMP Automotive Repairs ("DMP"). DMP was the automotive repair business which had issued that van with a pink-slip shortly before the accident. Mr Zhang asserted, inter alia, that DMP was negligent in servicing the van. Golden Eagle and Mr Guang both admitted a breach of duty of care, but DMP denied liability. Each of them however asserted that Mr Zhang was guilty of contributory negligence by failing to wear a seat belt.

Mr Zhang succeeded against both Golden Eagle and Mr Guang, but his award of damages was reduced by 30% due to contributory negligence. He failed however against DMP. Judge Balla held that the primary cause of the accident was tread separation on a rear tyre. The evidence also clearly established that, at all material times, the van's tyres were not in accordance with the manufacturer's specifications. This is because they had a significantly lower load carrying capacity than those recommended.

The issues before the Court of Appeal included whether DMP was liable in negligence for either issuing a pink-slip or failing to identify the defect. They also included whether the issuing of that pink-slip constituted a misleading or deceptive representation as to roadworthiness pursuant to section 42 of the *Fair Trading Act* 1987 (NSW) ("FTA"). A further issue was whether Judge Balla had erred in reducing the amounts paid under section 45 of the *Motor Accidents Act* 1988 (NSW) ("MAA") for contributory negligence.

On 22 February 2006 the Court of Appeal (Ipp, McColl & Basten JJA) allowed Mr Zhang's appeal in part. Their Honours also found that Judge Balla was correct in finding that the inspector was not negligent in failing to identify the problem with the tyres. This is because his duty of care did not extend to checking that requirement. They also held that it was open for Judge Balla to conclude that Mr Zhang had not proven, on the balance of probabilities, that the inspector had exercised a lack of reasonable care in failing to identify that defect.

In relation to potential liability under the FTA, the Court of Appeal found that the issuing of a pink-slip would represent that a vehicle had no apparent defects. Such a representation however extended only in relation to those aspects of that vehicle that were required to be inspected. Furthermore, it was only made to the owner of the vehicle and was temporally limited. Their Honours concluded that since the inspection in this case did not extend to checking that the tyres accorded with the manufacturer's specifications, it was

not relevantly misleading or deceptive for the purposes of the FTA. In relation to the assessment of damages, their Honours however found that they should be reduced by the "section 45 payment" before being reduced further on account of contributory negligence.

The grounds of appeal include:

- Section 45 of the MAA provides for the payment by a compulsory third party insurer of medical, rehabilitation and/or respite expenses once liability for a motor accident claim is admitted (wholly or in part). Section 45(4) provides that any such payment made by the insurer "is to the extent of its amount, a defence to proceedings by the claimant against the defendant for damages". The New South Wales Court of Appeal erred in the construction of the operation and effect of section 45 of the MAA and in particular section 45(4).

- The New South Wales Court of Appeal erred in concluding that, where a finding of contributory negligence was made against the First Respondent, the amount of payments made (and recoverable in full as a defence) by the Appellants' insurer, being part of the First Respondent's damages, was not subject to apportionment for contributory negligence.