SHORT PARTICULARS OF CASES
APPEALS

SEPTEMBER – OCTOBER 2007

****

HML v THE QUEEN (A23/2007)

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 18 August 2006

Date special leave granted: 25 May 2007

The appellant was convicted in the District Court of South Australia of two counts of unlawful sexual intercourse contrary to s 49(1) of the *Criminal Law Consolidation Act* 1935 (SA). Both offences were alleged to have taken place in Adelaide between 27 September 1999 and 4 October 1999. The complainant was the appellant's daughter. The appellant and complainant's mother had separated when she was a baby. The two charges related to a weekend when the appellant and complainant travelled to Adelaide together. It was the prosecution case that the offences were part of a long course of similar conduct by the appellant starting when the complainant was about 7 years of age and finishing when she was 12 years of age. The other offending was said to have occurred when the complainant was staying with the appellant at his home in Victoria. As a result, police in both States conducted an investigation and apparently the two investigations ran in a parallel manner. No charges were laid in Victoria.

The prosecution relied on evidence of uncharged acts, over objection, and led evidence of the interview of the appellant by Victorian Police. The trial judge ruled that the defence would not be permitted to adduce evidence to the effect that no charges were ever laid in Victoria. The Victorian allegations were referred to before the jury as "uncharged acts". The jury were told, inter alia, that they must not reason from the uncharged acts that the "accused is the type of person likely to have committed these offences". They were directed that they must not act upon evidence of uncharged acts "unless and until you are satisfied as to it", and that the evidence was introduced to understand the relationship between the complainant and the appellant, to show the appellant's confidence in asking for sex and acting as he did in Adelaide, to show why the complainant acquiesced in the Adelaide offending, to indicate an ongoing sexual attraction of the appellant to the complainant and to explain why there was no earlier complaint. The trial judge referred to the uncharged acts as "Victorian offences" and warned the jury that they should not speculate about the outcome of the Victorian investigation.

In his appeal to the Court of Criminal Appeal (Nyland, Vanstone and White JJ), the appellant submitted that in the absence of the jury being told of the decision not to lay charges in Victoria, they might have impermissibly speculated in a prejudicial fashion to the appellant's interests. The Court did not consider the appellant's criticism of the directions to be justified. The clear and firm instruction against speculation as to the result of the Victorian investigation must be taken to have been heeded by the jury. The jury would have had no difficulty obeying the direction because the facts as the jury were given them were neutral as to the result of the Victorian inquiry. As to references by the trial judge to "offences" as opposed to "allegations", the words had to be viewed in the context of the direction. The whole purpose of the direction was to quarantine, as irrelevant, the outcome of the investigation. The jury would hardly suppose that by use of the word "offences", the Judge would supply the answer to the very question he was instructing them not to consider. There was

no reason to suppose that the jury would have latched onto that word and ignored the constant references to expressions such as “alleged acts”, “said to have occurred” and “investigation”. Moreover, the use of the expression “uncharged acts” would likely have been taken by the jury to have meant that no charges arose from those acts.

The grounds of appeal are:

The Court of Criminal Appeal erred in:

- Upholding the trial judge’s ruling that evidence of the fact that no charges had been laid or tried in respect of the criminal conduct introduced for other than propensity reasoning was irrelevant.

- In finding that the trial judge’s direction (specifically or in combination) did not leave open the inference that the appellant had in fact been convicted of that other criminal conduct.

- In finding that the trial judge’s instructions against speculation about the outcome of the investigation of that criminal conduct had the effect of neutralising the inference that the conduct had been the subject of earlier conviction.

- Failing to find that the directions as to the use to which the jury could and could not use the uncharged acts were inadequate and did not accord with what fell from the Court of Criminal Appeal in *R v Vonarx* [1999] 3 VR 618.

SB v THE QUEEN (A19/2007)

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 18 October 2006

Date special leave granted: 25 May 2007

In May 2006, after a trial by jury in the District Court, the appellant was found guilty of three offences of indecent assault and two offences of incest. The complainant was the appellant's daughter. The offences took place between 1983 and 1986. The complainant was between 13 and 14 years for the first 4 counts, and 17 years for the final count.

The appellant appealed unsuccessfully to the Court of Criminal Appeal (Duggan, Sulan and David JJ). One of his grounds of appeal was that the trial judge misdirected the jury about the standard of proof for uncharged acts. The Court rejected that argument. David J found that the trial judge made it clear to the jury that the only uncharged acts that could be used were those which had been proved beyond reasonable doubt. The appellant also contended that the directions given by the trial judge regarding the use to which the evidence of uncharged acts could be put were inadequate and that those directions were inconsistent with the use to which the prosecution sought to put the evidence. The Court noted that the basis upon which the trial judge explained the use of the uncharged acts to the jury was to disclose a course of events leading up to the first charged incident, which may explain how the victim may have come to submit to the acts, the subject of that charge. The trial judge did not confine his remarks by merely referring to context and background but fully elaborated on the legitimate use of that evidence and instructed the jury in very clear terms on the impermissible use of such evidence.

This appeal is to be heard together with the appeal in *HML v The Queen* and the referred application for special leave in *OAE v The Queen.*

The ground of appeal is:

- The Court below erred in law in not considering that the directions given by the trial judge concerning the evidence of uncharged acts were inadequate.

OAE v THE QUEEN (A28/2007)

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 8 June 2007

Date of referral to the High Court: 31 August 2007

The applicant was charged with one count of indecent assault alleged to have occurred between 12 May and 31 July 1999, and one count of rape, alleged to have been committed between 12 May and 31 August 2003. He was acquitted of the first count but convicted of the second count. The complainant was the foster daughter of the applicant's sister. She lived on a property adjoining the applicant's property, and assisted him in the care of his horses. It was during those activities that the assaults allegedly occurred.

At the trial, despite defence objection, the prosecutor was allowed to lead evidence from the complainant that between 1999 and 2003 the applicant regularly committed various uncharged sexual acts against her. The trial judge admitted this evidence on the basis that it tended to show that the incident which was the subject of count 2 "did not happen out of the blue".

On appeal to the Court of Criminal Appeal, the applicant submitted that the evidence of uncharged acts lacked probative force in relation to count 2. He argued that the evidence might be relevant if consent was not in issue, but it was not relevant to proof of acts involving force. As the offence of rape was not one that involved the complainant submitting to the applicant, there was no need to explain why she might have submitted. Allegations of rape often involved conduct that was "out of the blue". The majority (Doyle CJ and Layton JJ, Debelle J dissenting) rejected that argument on the basis that the evidence of the uncharged acts was circumstantial evidence relevant to proof of the charged act: it provided a background that made the complainant's account of the rape, and her response to it, more believable. It could explain the applicant's boldness in taking the opportunity to act as he did, and the complainant's failure to kick and scream or to immediately complain.

The applicant also submitted that the trial judge should have directed the jury that they could use evidence of the uncharged acts only if satisfied beyond reasonable doubt that those acts occurred. The majority held that authority in South Australia did not support that proposition. In dissent, Debelle J held that where evidence of uncharged acts consists of allegations of repeated sexual misconduct which is intertwined with the charged acts, the trial judge must direct the jury that they must be satisfied that the uncharged acts have been proved beyond reasonable doubt. Here the trial judge failed to give any direction as to the standard of proof of the uncharged acts.

On the hearing of the application for special leave the Court referred the application to be heard by the same Court hearing the appeals in *HML v The Queen* and *SB v The Queen*.

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

The Court of Criminal Appeal erred:

- In upholding the decision of the learned trial judge to admit evidence of uncharged acts of sexual misconduct.
- by not finding that the learned trial judge ought to have directed the jury that they could not have regard to evidence of uncharged acts unless they were satisfied of the commission of those uncharged acts beyond reasonable doubt.

GYPSY JOKERS MOTORCYCLE CLUB INCORPORATED
v. COMMISSIONER OF POLICE (P26/2007)

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

Date of grant of special leave: 15 June 2007

The appellant is the registered proprietor of premises used for a clubhouse in respect of which the Assistant Commissioner of Police, as delegate for the respondent, issued a fortification removal notice ("the notice") on 5 May 2004 pursuant to section 72(1) of the *Corruption and Crime Commission Act* 2003 (WA) ("the Act"). Subsection 72(2) of the Act provides that the respondent may issue a notice if he or she reasonably believes, after considering the appellant's submissions, that the premises are fortified and are habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime.

Subsection 76(2) of the Act provides:

> The Commissioner of Police may identify any information provided to the court for the purposes of the review [of the fortification removal notice] as confidential if its disclosure might prejudice the operations of the Commissioner of Police, and information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to proceedings, or publicly disclosed in any way.

By originating motion filed 12 May 2004, the appellant applied for review of the notice, in response to which the respondent's delegate filed an affidavit identifying information material which had been taken into account in issuing the notice and which was said to be confidential within the meaning of section 76(2) of the Act. Blaxell J referred to the Court of Appeal for determination the following questions of law:

(a) Is section 76 of the Act valid?

(b) In the alternative, is section 76(2) of the Act valid?

A third question concerning the validity of the whole of Part 4 Division 6 of the Act was put before the Court of Appeal by originating motion and argued, but that decision is not the subject of challenge in this Court.

The appellant argued that the section was invalid because it may deny a party access to evidence relied upon by the executive in a judicial proceeding and thereby may result in a denial of natural justice, such that the provision is inconsistent with the requirements of Chapter III of the Commonwealth Constitution and in particular the requirement that the parliaments of the States not legislate to impose procedures on State courts which are repugnant to, or incompatible in their exercise with, the judicial power of the Commonwealth.

A majority of the Court of Appeal (Martin CJ and Steytler P; Wheeler JA dissenting) concluded that the provision is valid. The majority of the Court concluded that the Court's function under the impugned legislation is limited to deciding, having regard to the submissions by the appellant and to any material

relied upon by the respondent, whether the respondent could have reasonably had the belief required by subsection 76(2) of the Act at the time of issuing the notice. Wheeler JA would have answered the questions referred in the negative. Her Honour concluded that the provision was invalid because it involved a departure from the basic requirements of the judicial process and with the notion of institutional integrity, and was therefore invalid as incompatible with Chapter III of the Commonwealth Constitution.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in finding that section 76(2) of the Act is not invalid on the ground that it infringes Chapter III of the Commonwealth Constitution.

ATTORNEY-GENERAL OF THE COMMONWEALTH v ALINTA LIMITED & ORS (S331/2007)

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

Dates of Judgment: 30 April 2007

Date of Grant of Special Leave: 15 June 2007

One of the main issues in this appeal is whether the Full Court erred in holding that section 657A(2)(b) of the *Corporations Act* 2001 ("the Act") is invalid on the gound that it purports to confer the judicial power of the Commonwealth on the Takeovers Panel contrary to Chapter III of the Constitution.

On 26 April 2006 Alinta Limited ("Alinta") entered into a Heads of Agreement ("the Agreement") with the Australian Gas Light Company ("AGL"). That agreement contemplated AGL acquiring an interest in certain Alinta assets, while Alinta would acquire an interest in certain AGL assets. These included units held by AGL in the Australian Pipeline Trust ("the Trust"). On 22 June 2006 AGL and Alinta entered into a Merger Implementation Agreement ("the Merger Agreement") which provided a scheme for the implementation of the Agreement.

From 16 - 22 August 2006 Trewas Pty Limited ("Trewas"), a wholly-owned subsidiary of Alinta, acquired 10.25% of the issued units in the Trust ("the Trewas Acquisitions"). On 21 August 2006 Australian Pipeline Limited ("APL"), the responsible entity of the Trust, applied to the Takeovers Panel ("the Panel") concerning the Trewas Acquisitions. On 20 September 2006 the Panel made a declaration of unacceptable circumstances pursuant to both section 657A(2)(a)(i) and section 657A(2)(b) of the Act. In making that declaration, the Panel found that the Trewas Acquisitions had, or were likely to have, an effect on the control or potential control of the Trust. This gave rise to a contravention of section 606 of the Act ("the Panel Declaration"). On 24 September 2006 the Panel ordered ("the Panel Orders") that the units, the subject of the Trewas Acquisitions, be vested in the Australian Securities and Investments Commission ("ASIC") to be held on trust for sale. It also ordered that Alinta not acquire any further units in the Trust

APL commenced proceedings in the Federal Court seeking declarations ("the declaration proceedings") that both the Trewas Acquisitions and Alinta's acquisition of an interest in APL contravened section 606 of the Act. Alinta also commenced proceedings for the judicial review of both the Panel's decision and its orders ("the judicial review proceedings"). Both matters were heard together.

On 20 October 2006 Justice Emmett held that the Panel had erred in finding that there had been a contravention of section 606 of the Act. His Honour then dismissed the declaration proceedings. He nevertheless found that the Panel Orders could stand because they were based on the finding of unacceptable circumstances within section 657A(2)(a), as well as section 657A(2)(b) of the Act. Justice Emmett further dismissed Alinta's application for judicial review. In doing so, his Honour rejected the submission that the Panel Declaration and the Panel Orders were invalid exercises of Commonwealth judicial power. Both APL and Alinta appealed to the Full Federal Court.

On 20 April 2007 the Full Federal Court (Finkelstein, Giles & Lander JJ) held, with respect to APL's appeal, that there had been contraventions of section 606 of the Act arising from the Merger Agreement and the Trewas Acquisitions. Their Honours then referred the matter to the trial judge for the determination of what relief, if any, should be granted. With respect to Alinta's appeal (in which the Attorney-General of the Commonwealth intervened), a majority (Giles & Lander JJ, Finkelstein J dissenting) held that section 657A(1) of the Act was invalid. This was insofar as it purported to give the Panel jurisdiction to declare circumstances to be unacceptable based on a finding of a contravention of the Act. The majority also held that section 657A(2)(b) of the Act was invalid and could not be saved.

In separately considering the validity of section 657A(2)(a) of the Act, the majority expressed the view that that section was invalid for the same reason as section 657A(2)(b) was invalid.

Special leave applications were filed by the Attorney-General, Alinta and APL. Special leave was granted to the Attorney-General and to APL. Alinta's application for special leave was referred to the Full Court. By reason of a commercial settlement reached between APL and Alinta, APL did not file a notice of appeal and the grant of special leave lapsed. Alinta discontinued its application for special leave.

The first and second respondents have filed a summons seeking the revocation of the grant of special leave to the appellant or, alternatively, an order revoking the grant of special leave in part. The appellant has filed a summons seeking leave to amend its notice of appeal.

Section 78B notices have been served.

The grounds of appeal include:

- The Court below erred in holding that section 657A(2)(b) of the Act was invalid in that it purported to confer the judicial power of the Commonwealth on the Third Respondent contrary to Chapter III of the Constitution.

- The Court below ought to have held that section 657A(2)(b) of the Act was valid.

YEO v. ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (B40/2007)

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

Date of grant of special leave: 21 June 2007

On 3 April 2006 on the application of the respondent, the Supreme Court (per Philippides J) made a continuing detention order in respect of the appellant, Raymond Yeo, pursuant to section 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"). The appellant was then serving a sentence of two years' imprisonment imposed on 18 April 2002 (cumulative on earlier sentences of three years' imprisonment imposed on 5 April 2001 for 13 sexual offences on two young boys) for two offences of indecent dealing with a child under 12 years old. The appellant also has a previous conviction of carnal knowledge by anal intercourse of an intellectually disabled boy aged 16 years committed in 1993. The appellant was examined by two psychiatrists pursuant to section 11 of the Act, and by a third psychiatrist for assessment of whether the appellant posed a risk if released, all of whom gave evidence before Philippides J. The psychiatrists' opinions were that the appellant's risks of re-offending on release were "high" or "extremely high" and that he had not been rehabilitated whilst in custody. Section 13 of the Act provides that the Court may make a continuing detention order if satisfied by acceptable, cogent evidence to a high degree of probability that the prisoner is a serious danger to the community, defined to mean that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody. A serious sexual offence includes an offence of a sexual nature involving violence or against children. The appellant appealed to the Court of Appeal.

The Court of Appeal (McMurdo P, Williams JA and Helman J) in separate reasons dismissed the appellant's appeal. The appellant argued that the trial judge had erred by failing to apply the principles expressed in *Chester v The Queen* (1988) 165 CLR 611 and *Buckley v The Queen* (2006) 80 ALJR 605 that a case must be "very exceptional" to warrant continuing detention beyond the sentence imposed. Williams JA distinguished these two authorities on the basis that the indefinite sentence was there imposed at the time of initial sentencing. Helman J (with whom McMurdo P agreed) held that the Act specifies exhaustively the circumstances in which the extraordinary power of indefinite detention should be invoked and, to the extent that *Chester* and *Buckley* are applicable, the principles expressed in those decisions are given effect in the Act without the need to apply a separate test of exceptionality.

The grounds of appeal include:

- Whether the Court of Appeal erred in not finding that the trial judge should have, or did not have sufficient, regard to the principles in *Chester* and *Buckley*, specifically, that the power to sentence a person to indefinite detention must be confined to "very exceptional cases".