SHORT PARTICULARS OF CASES
APPEALS

MAY 2008

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THE QUEEN v TANG (M5/2008)

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

Dates of judgment: 27 June 2007 & 29 June 2007

Date special leave granted: 14 December 2007

On 3 June 2006, in the County Court of Victoria, the respondent was found guilty by a jury of 10 counts of breaching s 270.3(1)(a) of the *Criminal Code* (Cth) ('the Code'), being 5 counts of "possess a slave" and 5 counts of exercise of a power of ownership over a slave. Section 270.3(1)(a) provides:

> A person who, whether within or outside Australia, intentionally:
>
> (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership …
>
> is guilty of an offence.

It was the first conviction under these provisions. The complainants were recruited from Thailand and consented to work in Australia in the sex industry. The respondent's co-accused and others were involved in recruiting and transporting the complainants to Australia. The respondent was amongst the financiers and was a party to the contract with the complainants. The contractual debt was for $45,000, and each complainant worked in the respondent's brothel. The complainants earned nothing in cash during the period of the contract other than $50 on a Sunday. Their passports and airfares were retained by the respondent.

The respondent's appeal to the Court of Appeal (Maxwell P, Buchanan and Eames JJA) was allowed. The principal issue on appeal related to the elements of the offence, in particular, the character of the exercise of power by the respondent over the complainant and the exercise over the person of any or all of the powers attaching to the right of ownership. A further question arose as to the meaning of intention, in particular, whether all three definitions of "intention" in s 5.2 of the Code should have been given.

The Court of Appeal found that the trial judge did not correctly identify the elements of the offence and erred in failing to direct the jury on all three definitions of "intention" in s 5.2 of the Code. The Court concluded that the proper elements of the offence were as follows:

1. The complainant must have been reduced to the condition that would constitute her as a slave as defined in the Code ie, that she had powers exercised over her as though she were mere property over whom powers attaching to the right of ownership could be exercised;
2. The respondent must have known that the complainant had been reduced to a condition where she was no more than property;
3. The respondent intentionally possessed the complainant, that is, must have intentionally held her in custody or under physical control; and

4. The respondent must have possessed the complainant in the intentional exercise of what constituted a power attaching to a right of ownership, namely, the power of possession.

It was not sufficient that the respondent believed she was dealing with the complainant as an employee, albeit one in a subservient position and being grossly exploited.

The grounds of appeal include:

- The Court erred in its identification of the elements of the offence of "intentionally possess a slave or exercise over a slave any of the other powers attaching to the right of ownership" contrary to s 270.3(1)(a) of the Code.
- The Court erred in concluding that when directing on the fault element of "intention" in s 270.3(1)(a) of the Code, a court should direct on all three definitions of intention in s 5.2 of the Code.

IMBREE v McNEILLY & ANOR (S43/2008)
McNEILLY & ANOR v IMBREE (S392/2007)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 2 July 2007

Date of grant of special leave/referral to the Full Court: 8 February 2008

Mr Imbree was injured when his car rolled on an unsealed road in the Northern Territory. Mr McNeilly, who was driving that car, was sixteen years old and unlicenced at the time. The accident occured when Mr McNeilly swerved to miss an obstacle on the road. Mr Imbree was sitting next to Mr McNeilly and was acting as his supervisor. He suffers from tetraplegia as a result.

Mr Imbree brought proceedings in negligence against both Mr McNeilly and Qantas Airways Limited ("Qantas"). (At the time of the accident Mr Imbree was employed by Qantas who provided him with a car as part of his package.) On 5 July 2006 Justice Studdert found in favour of Mr Imbree and assessed damages at over $11 million. Contributory negligence was assessed at 30%.

Mr McNeilly appealed in relation to the finding on liability, the calculation of contributory negligence and the assessment of damages. Mr Imbree cross-appealed against the finding of contributory negligence and the award of damages. He also contended that liability should be upheld on an alternative basis.

On 2 July 2007 the Court of Appeal (Beazley, Tobias & Basten JJA) allowed Mr McNeilly's appeal and recalculated the damages to be paid to Mr Imbree. Their Honours held that while the principle of *volenti non fit injuria* can reduce the standard of care owed, it did not provide Mr McNeilly with a complete defence. Mr Imbree's claim therefore had to be assessed on the basis of the appropriate standard of care to be applied in the case of an inexperienced driver and his instructor. Their Honours also held that Justice Studdert was not in error in rejecting the defence based on voluntary assumption of risk.

Justices Beazley and Basten further held that Mr McNeilly's submission that there was no duty of care owed to Mr Imbree was inconsistent with the approach in *Cook v Cook*. Their Honours found that the relationship between Mr Imbree and Mr McNeilly did give rise to a duty of care. They also found that Mr McNeilly's actions (in swerving off the road rather than steering around the obstruction) made him liable to Mr Imbree in negligence.

On the question of contributory negligence, their Honours held that Justice Studdert had correctly rejected the claim that Mr Imbree had failed to exercise reasonable care for his own safety. This allegedly arose from him permitting Mr McNeilly to both drive, and to drive on the road where the accident occurred. Justices Basten and Tobias however held that Mr Imbree's failure to give appropriate instructions to Mr McNeilly significantly contributed to the accident and involved a failure to take care for his own safety. Mr Imbree's contributory negligence was then assessed at two-thirds.

On 8 February 2008 Chief Justice Gleeson, Justice Gummow and Justice Crennan granted special leave to appeal in matter number S385/2007 (which subsequently became the appeal file numbered S43/2008.) With respect to matter number S392/2007 however, their Honours referred it into the same Full Court that deals with matter number S43/2008 to be argued as on a full hearing.

In matter number S43/2008 the grounds of appeal are:

- The Court of Appeal erred in finding that the duty of care owed by a learner driver to an instructor was different from and less than that owed by all other drivers to their passengers (the *Cook v Cook* principle).
- The Court of Appeal erred in interfering with the trial judge's factual findings as to the causes of accident and the consequential assessment by the trial judge of the degree of any contributory negligence on the part of Mr Imbree
- The Court of Appeal erred in finding a causal connection between the motor vehicle accident and the absence of any additional driving instruction which the trial judge and the Court of Appeal found that Mr Imbree ought to have provided to Mr McNeilly.

In matter number S392/2007 the questions of law said to justify the grant of special leave include:

- Was Tobias JA correct in viewing the driving of Mr McNeilly leading to Mr Imbree's injury, as a single process involving sequential and related errors, which began and continued in a manner consistent with Mr McNeilly's lack of skill and experience?
- Did the majority of the New South Wales Court of Appeal, and the trial judge, err in dissecting Mr McNeilly's driving on a step by step basis, and isolating (each differently) an element of the driving which amounted to carelessness (negligence) rather than inexperience?

FERGUSSON bhnf LARA FLOYD v LATHAM (S47/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 3 November 2006

Date of grant of special leave: 8 February 2008

On 8 April 2003 Olivia Fergusson ("Olivia"), aged 23 months, was struck by a car driven by Ms Kim Latham on a pedestrian crossing in Garden Street, North Narrabeen. Olivia's mother, Ms Lara Floyd, did not have a hold of Olivia as she herself crossed the pedestrian crossing while pushing a pram containing her other, infant, child. She then looked back, only to see that Olivia had not followed her across the crossing. Ms Latham was driving at approximately 40 kph when she struck Olivia after she entered the crossing from behind a chevron sign. At no time prior to impact did Ms Latham see Olivia.

In a separate trial on liability, Judge McGuire found that Ms Latham had been negligent while driving her car. This was on the basis that she had failed to immediately brake when she first saw Ms Floyd crossing the road. His Honour also found that she was not keeping a proper lookout because she failed to see Olivia behind the chevron sign. She had also failed to see her prior to impact.

On 3 November 2006 the Court of Appeal (Santow JA, McClellan CJ at CL and Hoeben J) unanimously upheld Ms Latham's appeal. Their Honours found that Judge McGuire was not entitled to find that Olivia should have been visible to Ms Latham at a distance of 25 metres or more from the crossing. They also criticised his finding that Ms Latham had failed to keep a proper lookout simply because she didn't see Olivia behind the chevron sign.

The Court of Appeal further found that the presence of Olivia in the immediate vicinity of the pedestrian crossing was not reasonably forseeable in the circumstances. This is because it was highly unusual for a mother to be separated from a young child while crossing a busy road. That Ms Floyd was looking back towards the crossing was indicative only of her looking at something or someone, either on the crossing or on the other side of the road. To require Ms Latham to adopt an emergency braking response as a consequence was both unreasonable and based on hindsight.

Despite this finding, their Honours still held that Ms Latham owed, and breached, her duty of care towards Olivia. This is because Ms Latham appears to have focused on Ms Floyd rather than on the pedestrian crossing immediately in front of her. The Court of Appeal held that Ms Floyd's actions were not so imminently threatening so as to absolve Ms Latham from her primary obligation of looking to her front. In that regard Ms Latham failed to keep a proper lookout. Their Honours however found that even if Ms Latham had been keeping a proper lookout (and had observed Olivia as soon as she entered the crossing), at 40kph there was insufficient time for her to react and avoid impact. It followed therefore that although a breach of duty had been established, it was not causative of Olivia’s injuries.

The ground of appeal is:

- The Court of Appeal erred in that it made a finding that the respondent driver was not keeping a proper lookout and this breach of duty of care meant that the respondent did not brake or slow her vehicle, yet there was no consideration or inadequate consideration of the issue of causation.

MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZKKC & ANOR (S45/2008), MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZJMA & ANOR (S46/2008)

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

Date of judgment: 12 July 2007

Date of grant of special leave: 8 February 2008

These appeals concern the operation of section 477(1) of the *Migration Act 1958* (Cth) ("the Act"). Relevantly, that section limits the time which an application for judicial review may be made to the Federal Magistrates Court to *"within 28 days of the actual (as opposed to deemed) notification of the decision".*

The respondents each sought judicial review in the Federal Magistrates Court of the Refugee Review Tribunal ("the Tribunal") decision refusing them protection visas. They both said that they did not receive actual notification of their Tribunal decisions until shortly before they commenced proceedings in the Federal Magistrates Court. The appeals before this Court deal only with whether the time limits in section 477 prevented any jurisdictional challenge to either decision. In each case Federal Magistrate Driver held that they did not. (The question of whether there might be jurisdictional error in the Tribunal's decisions has not yet been addressed.)

In dismissing the Ministers' appeals on 12 July 2007, the Full Federal Court (Gyles, Jacobson & Buchanan JJ) unanimously held that the Federal Magistrates Court had the jurisdiction to hear the respondents' application for judicial review. Their Honours noted that when the Tribunal affirms a decision to refuse an applicant a protection visa, it must notify that applicant by giving him or her a written statement as required by section 430(1) of the Act. They further held that the sole method of actual (as opposed to deemed) notification was the delivery of that written statement by hand.

So far as the limitation periods in section 477 are concerned, the Full Federal Court further held that applicants with authorised recipients will be treated in the same way as those without. Before their right to judicial review is extinguished, the time period prescribed by section 477 needs to expire following the applicant having been personally given the Tribunal's written statement.

The grounds of appeal (in both matters) include:

- The Full Court of the Federal Court ("the FFC") erred in its construction of section 477 of the Act.

- The FFC erred in constructing section 477 of the Act as operating such that time starts to run for the beginning of proceedings only if an applicant is personally served with a decision record within 14 days of the handing down of the decision.

- The FFC erred in construing section 477 of the Act in such a way that physical receipt of the decision record by an applicant would not start time running under that section unless it was physically served by the Tribunal or an authorised officer; actual receipt by mail or facsimile would not be sufficient.

HEARNE & ANOR v STREET & ORS (S123/2008)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 17 August 2007

Date of grant of special leave: 7 March 2008

The respondents, who were adjoining occupiers, commenced proceedings in the Equity Division of the Supreme Court of New South Wales claiming noise nuisance against the proprietors of Luna Park at North Sydney. Directions were given for the filing of affidavits and the exchange of expert reports. It was common ground that these were the subject of implied undertakings or obligations to the Court imposed on the litigants by law that such documents would not be used except for the proper purposes of the litigation.

The appellants, one a director of Luna Park Sydney Pty Limited, the lessee and operator of Luna Park, and another who was a director of its parent company, but was active in its affairs, disclosed documents covered by the implied undertaking to the relevant Minister and her staff in an attempt, which was successful, to have Parliament pass legislation to protect the proprietors of Luna Park from claims for noise nuisance.

The respondents applied to have the appellants dealt with for contempt of court for breach of the implied undertaking claiming that as directors they were personally bound by the obligation not to use the affidavits other than for the purposes of the principal proceedings. Gzell J was satisfied that both knew the material had been created in the course of the principal proceeding but found that it had not been proved they were aware of the obligation on a party to use them only for the purpose of the proceeding. This was an essential element and accordingly the contempt was not made out.

The Court of Appeal, by majority, (Ipp and Basten JJA, Handley AJA dissenting) allowed the appeal holding that the appellants were personally bound by the implied undertaking to the Court not to use the documents except for the proper purposes of the litigation and that they had committed a breach of the implied undertaking and were guilty of contempt of court and that the contempt was civil in nature.

The grounds of appeal are:

- The Court of Appeal erred in holding that as a consequence of the participation by Luna Park Sydney Pty Limited in the proceedings, the First and Second Appellants gave implied personal undertakings not to use, otherwise than for the purposes of the proceedings, affidavits that had been filed in Court.

- The Court of Appeal erred in holding that a breach by the First and Second Appellants of that personal undertaking was not a "criminal contempt for the purposes of s 101(6) of the *Supreme Court Act* 1970 (NSW) and accordingly that the appeal to that Court was competent.