

SHORT PARTICULARS OF CASES
APPEALS

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THE QUEEN v LK (S162/2009), THE QUEEN v RK (S163/2009)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales [2008] NSWCCA 338

Date of judgment: 22 December 2008

Date of grant of special leave: 19 June 2009

The respondents allegedly dealt with money which was part of the proceeds of a plan to defraud the Commonwealth Superannuation Scheme of some \$150M. They were charged with conspiring to deal with money being reckless as to the fact that the money was proceeds of crime, pursuant to s 11.5(1) and s 400.3(2) of the *Commonwealth Criminal Code* ("the Code"). The Crown case was not that the respondents had knowledge that the money was the proceeds of crime, only that they were reckless as to this fact.

Following a trial before a jury, the respondents made a no case to answer submission. The trial judge rejected the submission that the evidence could not prove beyond a reasonable doubt the critical elements of the offence charged, but upheld the submission that the indictment, on the case the Crown presented, charged an offence bad at law or unknown to the law. Her Honour directed the jury to return a verdict of not guilty relying on the Court of Criminal Appeal's decision in *R v Ansari* (2007) 70 NSWLR 89 to the effect that a person could not be charged with conspiring to commit an offence the mental element of which was recklessness, simpliciter.

The Crown appealed to the New South Wales Court of Criminal Appeal pursuant to s 107 of the *Crimes (Appeal and Review) Act* 2001 (NSW) which provides for an appeal by the Crown against an acquittal by direction.

The appeals were dismissed by the Court constituted by Spigelman CJ, Grove and Fullerton JJ. Spigelman CJ gave the judgment of the Court. His Honour noted that the critical aspect of the common law offence of conspiracy, that is picked up by the Code, is that an accused must know the facts that make the act or acts unlawful. The accused had to intend that conduct would be carried out that amounted to a criminal offence and he could not have that intention if he did not know all the facts that would make the intended conduct an offence. In the instant case it was not the Crown case that either of the accused knew that the money was proceeds of crime. The Crown case was that the respondents were reckless as to the fact whether the money was proceeds of crime. Such an allegation could not support a charge of conspiracy where, in order to satisfy the test of intention with respect to the entry into an agreement to commit an offence, the accused must know the facts that constitute the offence. The trial judge was correct to conclude that the Crown case disclosed no offence known to law.

The ground of appeal is (in each appeal):

- The Court of Criminal Appeal erred in interpreting s 11.5 of the Code such that to be guilty of conspiracy to commit an offence that has a physical element for which a fault element of recklessness is prescribed, it must be proved that the offender intended that physical element.

Each respondent has filed a notice of contention in identical terms. The grounds include:

- The Court below failed to decide that as a matter of law no appeal lay to it because s 107 of the *Crimes (Appeal and Review) Act 2001* did not come into operation until 15 December 2006 after the proceedings against the respondent had commenced by court attendance notice served on the respondent on 18 October 2006. This point was taken in the Court below but not decided in the Court's reasons for judgment: see [76], [78] and [79].

The respondent in each appeal has filed a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act 1903*. The Attorney-General of the Commonwealth and the Attorney-General for the State of New South Wales have intervened in each appeal.

HAJAMAIDEEN ANSARI v THE QUEEN (S287/2009)
ABDUL ANSARI v THE QUEEN (S288/2009)

Court appealed from: New South Wales Court of Criminal Appeal
[2007] NSWCCA 204

Date of judgment: 14 August 2007

Date of grant of special leave: 2 October 2009

The Appellants are brothers who, along with a third brother, were jointly tried with two charges of conspiring to deal with money (to the value of \$1,000,000 or more) as an instrument of crime. These are offences contrary to provisions of the *Criminal Code (Cth)* ("the Code"). After a lengthy trial before Judge Woods, the jury convicted the Appellants on both counts but were unable to agree in relation to the third brother. The Appellants were then sentenced to a total of 4 years imprisonment, with a non-parole period of 2 years and 9 months. They subsequently appealed against their convictions, while the Crown appealed against the sentences imposed.

On 14 August 2007 the Court of Criminal Appeal (Simpson, Howie & Hislop JJ) dismissed the Appellants' appeals. They also upheld the Crown's appeals against sentence. Justice Howie (with whom the other Justices agreed) held that the conspiracy alleged in each of the charges was not bad at law. His Honour also found that there was nothing in the Code to stop a person being guilty of an offence, the mental element of which is recklessness. Furthermore, there was also no other reason to impose such a restriction on that type of offence. Provided therefore that the Appellants knew that there was a risk that the money they dealt with would become an instrument of crime, the Crown could prove the offences charged.

Their Honours also upheld the Crown appeal against sentence, finding that the sentence imposed by Judge Woods was manifestly inadequate. They then re-sentenced the Appellants to 7 years imprisonment on Count 1 to date from 18 August 2006, with a further 7 years imprisonment on Count 2 to date from 18 August 2008. A non-parole period of 5 years, 5 months was also set.

On 13 March 2008 these matters were deemed to have been abandoned. Justice Bell however reinstated them on 18 August 2009.

The grounds of appeal (in both appeals) are:

- That the Court of Criminal Appeal of New South Wales erred in holding that it was not bad in law for the Crown under the Code to charge a conspiracy to commit an offence, the fault element of which is recklessness.
- That the Court of Criminal Appeal of New South Wales erred in its characterisation of the physical and fault elements of the offence of conspiracy under the Code.

MRR v. GR (B44/2009)

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

Date of judgment: 15 May 2009

Date special leave granted: 2 October 2009

The appellant mother and the respondent father married in 2000 and their child was born in 2002. In early 2007 the family moved from Sydney to North West Queensland in order for the respondent father to take a position as an engineer. In August 2007 the parties separated and some time after that the appellant mother and the child moved back to Sydney. The respondent father then commenced proceedings in the Federal Magistrates Court for orders in relation to parenting arrangements. At the time the matter was heard before Coker FM, the parties were living in North West Queensland, with the child living with each parent on a week-about basis. Both parents sought orders that they have equal shared parental responsibility. The appellant mother sought orders that this be achieved by her and the child living in Sydney with the child to spend time with the respondent father for specified periods in North West Queensland or in Brisbane, or that she remain in North West Queensland and the child live primarily with her, or that both she and the respondent father live in Sydney with the child living primarily with her. The Magistrate noted the respondent father's evidence that he was not prepared to live in Sydney due to his employment, and the appellant mother's evidence that if the child were to live in North West Queensland, she would not move to Sydney. The Magistrate made orders that the child remain in North West Queensland living week-about with each parent but that in the event that the appellant mother was not living in North West Queensland then the child was to remain living there with the respondent father and spend agreed time with the mother.

The Full Court of the Family Court (Finn, May and Benjamin JJ) in a unanimous judgment dismissed the appellant's appeal. The Court rejected the appellant mother's argument that the Magistrate erred in failing to have regard to and give specific reasons on the matters referred to in s 65DAA(5) of the *Family Law Act* 1975 (Cth) concerning whether it is reasonably practicable for a child to spend equal time with each parent. The Court held that although the Magistrate did not explicitly address the matters specified in s 65DAA(5), those matters were considered by the Magistrate in his Honour's consideration of s.60CC or in his Honour's review of the evidence at the commencement of his reasons.

The grounds of appeal include:

- Whether the Full Court of the Family Court erred in failing to find that the Federal Magistrate's failure to make explicit findings on the reasonable practicability of an order for shared parental responsibility and on the factors specified in s 60DAA(5) of the *Family Law Act* 1975 (Cth) was ameliorated by consideration of the matters specified in s 60CC of the Act.
- Whether the Full Court erred in considering the issue of relocation by focusing on whether one parent should be permitted to remove the child instead of properly considering and assessing the proposals of the parents in dispute.

E & J GALLO WINERY v LION NATHAN AUSTRALIA PTY LIMITED
(S189/2009)

Court appealed from: Full Court of the Federal Court of Australia
[2009] FCAFC 47

Date of judgment: 24 March 2009

Date of grant of special leave: 31 July 2009

The Appellant commenced proceedings against the Respondent, alleging that its use of the word "BAREFOOT" (for its new beer) infringed its registered trade mark, "BAREFOOT", in relation to wines. This was contrary to s 120(2) of the *Trade Marks Act 1995* (Cth) ("the Act"). The Respondent both cross-claimed and sought an order under s 101(2) of the Act that the Registrar remove the Appellant's trade mark from the Register. This was on the basis that that mark had not been used by its registered owner in Australia for a continuous period of three years. The infringement issue was decided in the Appellant's favour upon appeal and is no longer in contention. The matter currently focuses on the non-use point.

From March 1999 until 17 January 2005 (when the Appellant became registered owner) the registered owner of the trade mark was a Mr Houlihan. He then licensed that mark to a United States company ("Barefoot Cellars") of which he was the president. Barefoot Cellars produced, packaged, sold and exported wine. Under the terms of that licence, Barefoot Cellars applied the BAREFOOT mark to its wine. In 2001 it also exported wine bearing that mark to a German distributor without any limitation as to where it could be resold. Some of that wine was ultimately imported into Australia and was sold in the period between May 2004 and May 2007. (This is the non-use period for the purposes of s 92(4)(b) of the Act.)

Justice Flick concluded that there had been non-use of the Appellant's trade mark and ordered its removal from the Register. His Honour held that an overseas manufacturer "uses" a trade mark in Australia if it "projects" its goods into the Australian market. This occurs through sales to Australian retailers and also when the marked goods are displayed, offered for sale or are sold in Australia. His Honour further found that while the BAREFOOT wine had been sold in Australia in the relevant period, it could not relevantly be considered a "use" of the trade mark. This is because neither Mr Houlihan (nor any officer of Barefoot Cellars) knew that it may end up being sold in Australia.

On 24 March 2009 the Full Federal Court (Moore, Edmonds and Gilmour JJ) unanimously dismissed the Appellant's appeal. Their Honours found that the registered owner had to engage in conduct that may result in its goods being dealt with in Australia for there to be "use" in Australia.

The Court further noted that there was no authority suggesting that inadvertent, unknown or unintended use in Australia resulted in ownership of a trade mark for the purposes of registration under Australian law. Their Honours found that the "use" to which s 92 was directed was conduct by or on behalf of the owner associated with the deliberate use of a trade mark in Australia. They then agreed with Justice Flick that there had only been "projection" of the BAREFOOT wine into the German, not the Australian market. There was also no course of trade

between the Appellant and the Australian importer or any other party in Australia. The Full Federal Court concluded that Justice Flick was correct in finding that the trade mark had not been "used" in Australia by either Mr Houlihan or the Appellant. It should therefore be removed from the Register.

The ground of appeal is:

- The Court erred in finding that neither the Appellant nor its predecessor-in-title used Australian Trade Mark No.787765 in Australia in relation to wines during the period 7 May 2004 to 8 May 2007.

On 28 August 2009 the Respondent filed a notice of cross-appeal, the grounds of which include:

- The Full Federal Court erred in finding that the Respondent's BAREFOOT RADLER beer, on the one hand, and wines, on the other, are goods of the same description within the meaning of s 120(2)(a) of the Act.

On 28 August 2009 the Respondent also filed a notice of contention, the grounds of which include:

- The Court below failed to decide that neither the Appellant nor its predecessor-in-title used Australian Registered Trade Mark No. 787765 ("the Appellant's Mark") in Australia during the period 7 May 2004 to 8 May 2007 because Grape Links Inc, trading as Barefoot Cellars, was not an authorised user of the Appellant's Mark.

HEALTH WORLD LTD v SHIN-SUN AUSTRALIA PTY LTD
(S199/2009; S200/2009))

Court appealed from: Full Court of the Federal Court of Australia
[2009] FCAFC 14

Date of judgment: 17 February 2009

Date of grant of special leave: 31 July 2009

Both Health World Ltd ("Health World") and Shin-Sun Australia Pty Ltd ("Shin-Sun") are involved in the manufacture and supply of health products. Shin-Sun obtained the registration of the word mark, HEALTHPLUS after Health World opposed its registration. Health World later obtained the registration of a word mark, "Power Health Plus". Health World then sought to have Shin-Sun's mark removed from the Register pursuant to s 88 of the *Trade Marks Act 1995* (Cth) ("the Act"). This was on the basis that Shin-Sun's mark was deceptively similar to one of its own marks.

The question of Health World's standing arose. Section 88(1) of the Act allows an "aggrieved person" to apply for the cancellation of the registration of a trade mark (or the removal of an entry wrongly made) in certain circumstances. While Justice Jacobson accepted that the use by Shin-Sun of HEALTHPLUS was likely to cause confusion, his Honour found that that confusion was unrelated to the relationship between the parties' marks.

His Honour also found that Health World was not an "aggrieved person" in the relevant sense. An "aggrieved person" was someone who has a real interest in having a trade mark removed from the Register. It could also be someone who would be appreciably disadvantaged in a legal or practical sense if that mark remained on the Register. Justice Jacobson held that it was insufficient for an applicant for rectification simply to be in the same trade as the registered owner of the mark. It had to have a desire to use the mark, or was likely to be hampered in some other way by its registration. His Honour found that Health World did not have a genuine desire to use the HEALTHPLUS mark. It was not therefore an "aggrieved person" and it consequently lacked the standing to bring the rectification proceedings.

On 17 February 2009 the Full Federal Court (Emmett, Besanko and Perram JJ) dismissed Health World's appeal. The Full Court found that the standing requirement in s 88(1) was not triggered by the fact that a trade mark was misleading or deceptive. The misleading or deceptive nature of the mark had to affect the applicant for removal in some meaningful way. Their Honours found that Health World would be aggrieved if there was a reasonable possibility of it being appreciably disadvantaged in a legal or practical sense by the Register remaining unrectified. That test however was unlikely to be satisfied unless it established that it had some reputation concerning the goods that would lead to consumers being misled or deceived. Justice Jacobson was therefore correct in finding that the parties' marks were not deceptively similar. It was difficult therefore to identify what interest of Health World would be affected by the registration of Shin-Sun's mark.

In S199/2009 the grounds of appeal include:

- The Full Court erred in its construction of "aggrieved person" within the meaning of s 88 of the Act.

In S200/2009 the grounds of appeal include:

- The Full Court erred in its construction of "person aggrieved" within the meaning of s 92 of the Act, before it was amended by the *Trade Marks Amendment Act 2006*.

In matter S199/2009 the Respondent filed a notice of contention, the grounds of which include:

- The learned trial judge erred at [172] – [174] of the reasons for judgment dated 21 February 2008 concerning proceeding no. NSD 226 of 2006 in finding that the Respondent had no intention to use or authorise the use of Australian registered trade mark no. 874755 within the meaning of s 59 of the Act for the purposes of par 88(2)(a) of the Act.

In matter S200/2009 the Respondent filed a notice of contention, the grounds of which include:

- The learned primary judge erred at [213] – [222] of the reasons for judgment dated 21 February 2008 concerning proceeding no. NSD 1418 of 2006 in finding that the Respondent had not used the *HealthPlus* trade mark for the three year period referred to in par 92(4)(b) of the Act.

The Respondent has, with the Appellant's agreement, decided not to press its notices of contention before this Court. In the event however that the Appellant is successful in its appeals, the parties have requested that the issues relating to the notices of contention be remitted to the Full Court of the Federal Court of Australia.