SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 10 JUNE 2014

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TAJJOUR v STATE OF NEW SOUTH WALES (S36/2014)
HAWTHORNE v STATE OF NEW SOUTH WALES (S37/2014)
FORSTER v STATE OF NEW SOUTH WALES (S38/2014)

Court from which causes removed: New South Wales Court of Appeal

Date causes removed: 14 February 2014

Date special cases referred to Full Court: 5 March 2014

Section 93X of the *Crimes Act* 1900 (NSW) ("the Act") creates an offence of consorting. The offence is committed where a person consorts with two or more convicted offenders on two or more occasions, after receiving a warning from a police officer of the potential offence.

After being charged with offences pursuant to s 93X of the Act, the Plaintiffs each commenced Supreme Court proceedings to challenge the validity of s 93X. On 13 May 2013 Justice Beech-Jones ordered that the question "is s 93X of [the Act] invalid?" be decided separately from all other questions in the proceedings. His Honour then removed all three proceedings into the Court of Appeal.

The Attorney-General for New South Wales then intervened in the three proceedings pursuant to s 78A of the *Judiciary Act* 1903 (Cth) and applied for their removal into this Court. On 14 February 2014 Justices Kiefel and Bell ordered that the whole of all three causes be removed from the Court of Appeal into this Court.

A special case filed in each of the proceedings was referred to the Full Court by Justice Kiefel on 5 March 2014.

In response to Notices of a Constitutional Matter filed in this Court, the Attorneys-General of Victoria, Western Australia, Queensland and South Australia are all intervening in addition to the Attorney General for New South Wales. The Australian Human Rights Commission has also applied for leave to intervene (or to appear as *amicus curiae*) in these proceedings.

In the matters of Tajjour (S36/2014) and Hawthorne (S37/2014), the following questions are stated for the opinion of the Full Court:

1. Is s 93X of the Act invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth *Constitution*?

2. Is there implied into the Commonwealth *Constitution* a freedom of association independent of the implied freedom of communication on governmental and political matters?

3. Does s 93X of the Act contravene any implied freedom of association referred to in question 2?

4. Is s 93X of the Act invalid because it is inconsistent with the International Covenant on Civil and Political Rights as ratified by the Commonwealth of Australia?

5. Who should pay the costs of the special case?

In the matter of Forster (S38/2014), the questions stated for the opinion of the Full Court are:

1. Is s 93X of the Act invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth *Constitution*?

2. Who should pay the costs of the special case?

HONEYSETT v THE QUEEN (S57/2014)

Court appealed from: New South Wales Court of Criminal Appeal [2013] NSWCCA 135

Date of judgment: 5 June 2013

Special leave granted: 14 March 2014

In September 2008 three armed men robbed a pub after it had closed. The event was recorded on CCTV. That footage showed that each of the men wore dark clothing and had a T-shirt or a pillow case wrapped around his head. One of them ("the Offender") carried a hammer. Mr Anthony Honeysett was later charged with armed robbery, on the basis that he was the Offender. The case against him was circumstantial.

Evidence admitted at the trial of Mr Honeysett included test results indicating that his DNA was on both a hammer found at the crime scene and a T-shirt found in the get-away car. Also admitted was evidence given by Professor Maciej Henneberg, an experienced forensic anatomist, who compared images of the Offender from the pub's CCTV footage with police photographs of Mr Honeysett. Professor Henneberg gave an anatomical description of the Offender, based on eight features. These included a slim body build, a well-bent small of the back, short hair and a head that was somewhat elongated rather than round. Professor Henneberg said that Mr Honeysett shared those eight features with the Offender. He also said that he was unable to discern any differences between the Offender and Mr Honeysett. Evidence given by another forensic anatomist (Dr Meiya Sutisno) was to the effect that seven of the eight features in Professor Henneberg's description of the Offender could not be established from the CCTV footage.

A jury found Mr Honeysett guilty, after which Judge Bozic sentenced him to imprisonment for 8 years with a non-parole period of 3 years and 10 months. Mr Honeysett then appealed against his conviction.

On 5 June 2013 the Court of Criminal Appeal ("CCA") (Macfarlan JA, Campbell J & Barr AJ) unanimously dismissed Mr Honeysett's appeal. Their Honours held that the evidence of Professor Henneberg was admissible, as it was an opinion based on specialised knowledge in accordance with s 79(1) of the *Evidence Act* 1995 (NSW) ("the Act"). The CCA found that that evidence identified physical characteristics that Mr Honeysett had in common with the Offender, without stating any conclusions that might be drawn from those characteristics. It was not to the effect that the Offender and Mr Honeysett were similar in appearance. Their Honours also found that Professor Henneberg's detailed examination of the CCTV footage had rendered him an "*ad hoc"* expert such that his evidence went beyond obvious matters that the jury would have discerned for itself.

The grounds of appeal include:

- The Court of Criminal Appeal erred in the application of s 79 of the Act in holding that the evidence of Professor Hennenberg involved an area of specialised knowledge based on training, study or experience, and that his opinion was wholly or substantially based on that area of specialized knowledge.

- The Court of Criminal Appeal erred in holding that the evidence of Professor Hennenberg's consideration of the CCTV footage rendered him an "ad hoc" expert.

MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP v SZRNY & ANOR (S65/2014)

Court appealed from:	Full Court of the Federal Court of Australia [2013] FCAFC 104
Date of judgment:	11 September 2013
Special leave granted:	14 March 2014

SZRNY is a Pakistani citizen who arrived in Australia on a temporary business visa in February 2010. He then applied for a protection visa, which was refused by a delegate of the Appellant ("the Minister") in June 2010. An unsuccessful review of that decision by the Refugee Review Tribunal ("RRT") was later set aside by consent by the Federal Magistrates Court.

Upon reconsidering the delegate's decision, the RRT again affirmed it on 12 March 2012. On that same day, and in purported compliance with obligations imposed on it by the *Migration Act* 1958 (Cth) ("the Act"), the RRT sent a copy of its second decision to both the Secretary of the Minister's Department ("the Secretary") and to SZRNY. The latter's copy however was mistakenly posted to his previous address instead of to the last address he had provided to the RRT. On 28 May 2012 the RRT eventually carried out its obligation under the Act by posting a copy of its decision to SZRNY's correct address.

Meanwhile, on 24 March 2012 a "complementary protection ground" was introduced by s 36(2)(aa) of the Act, for the benefit of non-citizens without refugee status who would nevertheless face a risk of harm if they were deported from Australia. That ground was available to any applicant for a protection visa whose application had not been finally determined before 24 March 2012.

SZRNY sought judicial review of the RRT's second decision in the Federal Circuit Court. On 7 May 2013 Judge Barnes set that decision aside. Her Honour held that SZRNY's application had not been "finally determined" within the meaning of s 5(9) of the Act until 28 May 2012. This was on the basis that it was essential for a RRT's decision to be communicated to the relevant review applicant. Judge Barnes then remitted the matter to the RRT, for it to give SZRNY an opportunity to address the complementary protection ground.

On 11 September 2013 the Full Court of the Federal Court by majority (Griffiths & Mortimer JJ; Buchanan J dissenting) dismissed the Minister's appeal. The majority held that the review of SZRNY's visa application had not been finally determined until the RRT had notified him of its decision, as informing him was an important element of the review scheme. Justice Buchanan however found that the review process was at an end once the RRT's decision had been dispatched to the Secretary and to SZRNY's incorrect address, as the decision was then beyond further review by the RRT. That status was not affected by the outstanding obligation on the RRT to send its decision to SZRNY's correct address.

The grounds of appeal include:

- The Full Court erred in holding that SZRNY's visa application had not been "finally determined", within the meaning of s 5(9) of the Act, even though the RRT had sent copies of the statement prepared pursuant to s 430(1) outside of the RRT, including to the Secretary: Judgment [84], [92].

- The Full Court erred in holding that a visa application will not be finally determined until both a review applicant and the Secretary have been notified of the RRT's decision in accordance with the Act, even if they have received actual notification of the decision: Judgment [84], [98].

POLLENTINE & ANOR v. BLEIJIE & ORS (B39/2013)

Writ of summons filed: 29 July 2013

Date special case referred to the Full Court: 28 February 2014

In 1984 the two plaintiffs were jailed indefinitely pursuant to s 18(l)(a) of the *Criminal Law Amendment Act 1945* (Qld) ("the CLAA"). Section 18 empowered the District Court of Queensland to declare that a person convicted of a sexual offence against a child under 17 years of age is incapable of exercising proper control over his sexual instincts and to direct that the offender be detained during Her Majesty's pleasure. No power was conferred on the court to review the offender's detention or to revoke an order made under s 18. Rather, s 18 provided that the offender could not be released until the Governor in Council is satisfied on the report of two medical practitioners that it is "expedient" to release him or her.

The first plaintiff, Edward Pollentine, pleaded guilty on 24 July 1984 in the District Court of Queensland to two counts of attempted rape, four counts of carnal knowledge against the order of nature, two counts of indecently dealing with a girl under the age of 14 years, two counts of abduction and four counts of indecently dealing with a boy under the age of 14 years. Each offence to which he pleaded guilty was contained in the *Criminal Code* (Qld).

The second plaintiff, Errol George Radan, pleaded guilty on 4 May 1984 in the District Court of Queensland to seven counts of unlawfully and indecently dealing with a girl under the age of 14 years and one count of carnal knowledge against the order of nature. Each offence to which he pleaded guilty was contained in the *Criminal Code* (Qld).

Both plaintiffs remain detained at Her Majesty's pleasure under the orders made by the District Court pursuant to s 18(3)(a) of the CLAA.

A notice of constitutional matter was filed on 5 August 2013. The Attorneys-General for New South Wales, South Australia and Western Australia are intervening.

The questions stated in the Special Case for the opinion of the Full Court are:

- Is s 18 of the CLAA invalid on the ground that it is contrary to Chapter III of the Constitution, by way of infringing the principle identified in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, or otherwise?

- Who should pay the costs of the case stated?

BROOKFIELD MULTIPLEX LTD v OWNERS CORPORATION STRATA PLAN 61288 & ANOR (S66/2014)

Court appealed from:	New South Wales Court of Appeal [2013] NSWCA 317
Date of judgment:	25 September 2013
Special leave granted:	14 March 2014

Pursuant to a contract ("the Contract") made in 1997, the Appellant ("Brookfield") constructed a high-rise apartment building on land owned by Chelsea Apartments Pty Ltd ("Chelsea"). Under a prior Master Agreement between Chelsea and certain companies in the Stockland Group, Chelsea would lease the apartments on certain floors ("the apartments") to Park Hotel Management Pty Ltd ("Park") for it to operate as serviced apartments. Chelsea gave various warranties under the Master Agreement as to the quality of construction. Brookfield in turn gave similar warranties to Chelsea in the Contract. The Contract did not specifically address potential latent defects in the building.

In 1999 the building was completed and Brookfield registered the strata plan for the apartments, creating the First Respondent ("the Owners Corporation"). Chelsea sold each of the apartments to investors, who obtained title subject to the leases to Park (which held all of the voting rights in the Owners Corporation).

In 2008 the Owners Corporation sued Brookfield (and another company) in negligence, for the cost of rectifying alleged defects in the building.

On 10 October 2012 Justice McDougall dismissed the Owners Corporation's application. His Honour held that it was not appropriate for a judge at trial level to impose the novel duty of care sought, namely "*to take reasonable care to avoid a reasonably foreseeable economic loss to [the Owners Corporation] in having to make good the consequences of latent defects caused by the building's defective design and/or construction.*"

On 25 September 2013 the Court of Appeal (Basten, Macfarlan & Leeming JJA) unanimously allowed the Owners Corporation's appeal. Their Honours found that Chelsea had been sufficiently vulnerable in respect of latent building defects that it was owed a duty of care by Brookfield. The Court of Appeal then held that Brookfield's duty of care extended to the Owners Corporation (as the statutory agent of the subsequent owners, the investors), which was in a more vulnerable position than that of Chelsea. That duty covered any loss resulting from latent defects which were structural, dangerous or made the serviced apartments uninhabitable.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in finding that the Appellant owed the First Respondent a duty to exercise reasonable care in the construction of the building to avoid causing the First Respondent to suffer pure economic loss resulting from the latent defects in the common property.

FITZGERALD v THE QUEEN (A9/2014)

Court appealed from:	Court of Criminal Appeal Supreme Court of South Australia [2013] SASCFC 82
Date of judgment:	16 August 2013
Date special leave granted:	14 March 2014

The appellant, together with a co-accused, was convicted after trial by jury in the Supreme Court of South Australia of one count of murder and one count of "*aggravated causing serious harm with intent to cause serious harm*" contrary to s 23(1) of the *Criminal Law Consolidation Act* 1935 (SA). The Crown case was that both accused were part of a larger group of men that broke into a house in the early hours of 19 June 2011 and attacked and killed one person (Drover), and seriously injured another (Karpany) and that they were part of a joint enterprise to cause grievous bodily harm upon those inside the house. The attackers were seen to arrive in a number of cars, parking around the corner from the house; walk as a group to the house and then split into two groups, smashing their way through the front and back doors simultaneously and using weapons. It was not part of the prosecution case that either of the co-accused did the actual killing. None of the eyewitnesses identified the appellant as being present during the crimes. The Crown case against the appellant depended upon his DNA being found on a didgeridoo, which had been moved within the house, together with evidence that he had never previously been to the house. There was expert evidence given at trial regarding DNA identification and differences between "primary" and "secondary" transfer of DNA. Primary transfer occurs when a person's DNA is placed on an object by that person; secondary transfer is when the first person's DNA is placed on that object by a second person.

In his appeal to the Court of Criminal Appeal (Gray, Sulan and Blue JJ), the appellant's primary ground of appeal was that the verdict was unsafe or unreasonable and not supported by the evidence. The appellant submitted, inter alia, that the Crown had failed to exclude a reasonable hypothesis consistent with his innocence, namely the presence of his DNA on the didgeridoo being explained by secondary transfer via his co-accused. With respect to the DNA evidence, the Court found that the hypothesis that the appellant's DNA was transferred by secondary transfer onto the didgeridoo depended upon the occurrence of a succession of unlikely events. In the circumstances, it was open to the jury to conclude beyond reasonable doubt, as it did, that the appellant's DNA was deposited on the didgeridoo as a result of direct contact by him (and not as a result of secondary transfer).

The grounds of appeal include:

- The Court below erred in holding that the finding of the the appellant's DNA at the location of the crime was sufficient to establish beyond reasonable doubt the the appellant's presence at and participation in the joint enterprise alleged.