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GNYCH & ANOR v POLISH CLUB LIMITED (S58/2015)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 321 and [2014] NSWCA 351

Dates of judgments: 16 September 2014 and 17 October 2014

Special leave granted: 13 March 2015

The Respondent (“the Club”) holds a club liquor licence under the *Liquor Act 2007* (NSW) (“the Act”). Within the Club’s premises is a restaurant with a kitchen and an adjoining office (together, “the restaurant area”). A moveable wall separates the restaurant area from an adjacent hall.

In late 2011 the Club agreed in principle to grant the Appellants both a lease of the restaurant area and a non-exclusive licence to use the hall for customer overflow and for large functions. The Appellants then renovated the restaurant area and in March 2012 they commenced operating a restaurant there. In the ensuing months the Club negotiated with the Appellants over terms of the proposed lease and licence but documents that had been drafted were never finalised and signed.

Relations between the Appellants and the Club’s management committee later soured. In July 2013 the Club purported to terminate its arrangement with the Appellants and the following month it excluded them from the premises. The Appellants then sued the Club, seeking a declaration that they had a five-year lease of the restaurant area and the hall. This was on the basis of their asserted exclusive occupation of those areas from March 2012, along with the minimum term prescribed by s 16(1) of the *Retail Leases Act 1994* (NSW) (“the Leases Act”).

On 30 September 2013 Justice Ball declared and ordered that the Appellants had the benefit of a lease of the restaurant area for five years from 31 March 2012. His Honour also ordered the Club to grant the Appellants a non-exclusive licence to use the hall for the same five-year period, with the Appellants having exclusive use of the hall on Fridays and weekends. Justice Ball held that the Appellants were entitled to the lease despite a consequent breach of s 92(1)(d) of the Act, which prohibits any leasing by a liquor licence holder of a part of licensed premises without the approval of the Independent Liquor and Gaming Authority (“the Authority”), which the Club had not obtained.

The Court of Appeal (Meagher & Leeming JJA, Tobias AJA) unanimously allowed an appeal by the Club and set aside the declaration and order in respect of the lease. Their Honours held that in light of s 92(1)(d) of the Act, the lease of the restaurant area must be rendered void and unenforceable. This was because the lease necessarily involved the exclusion of the licensee from part of its licensed premises. Such an effect ran counter to the purpose of the Act, in particular to the overarching responsibility of a licensee to supervise the conduct of its premises. The Court of Appeal then also set aside the order for a licence over the hall, as the utility of such a licence was undermined by the absence of an enforceable lease of the restaurant area.

The grounds of appeal include:

- The Court of Appeal erred in holding that, upon the true construction of s 92(1)(d) of the Act, the failure of the Club to obtain the approval of the Authority constituted under the *Gaming and Liquor Administration Act 2007* (NSW) had the effect of rendering void the five year lease created in favour of the Appellants by operation of ss 8 and 16 of the Leases Act.

POLICE v. DUNSTALL (A19/2014)

Court appealed from: Full Court, Supreme Court of South Australia
[2014] SASCF 85

Date of judgment: 25 July 2014

Special leave granted: 13 March 2015

The respondent was driving a motor vehicle on a road in Adelaide when he was stopped by police at 12.30 a.m. on 8 January 2012. He submitted to a breath analysis test which showed a blood alcohol reading of 0.155 grams in 100 millilitres of blood. The respondent then requested a blood test kit, and was conveyed to the Noarlunga Hospital, where sometime between 1.18 a.m. and 2.24 am a doctor took two samples of blood, using the kit. Both samples of blood were later found to be denatured and unsuitable for analysis for alcohol.

The respondent was charged with driving when there was present in his blood the prescribed concentration of alcohol contrary to s 47B(1)(a) of the *Road Traffic Act 1961 (SA)* ('the RTA'). At his trial, the Magistrate excluded evidence of the breath analysis, ruling that its admission would operate unfairly. The Magistrate found on the balance of probabilities that the blood samples had denatured because of the failure of the doctor to take a sufficient sample.

An appeal by the appellant (the Police) to the Supreme Court of South Australia (Kelly J) was dismissed. In its subsequent appeal to the Full Court of the Supreme Court (Kourakis CJ dissenting, Gray and Sulan JJ), the Police contended that the Judge erred in concluding that the unfairness discretion to exclude evidence was enlivened in this case.

The majority found that the safeguards provided by the statutory regime were rendered nugatory in this case as a result of the medical practitioner taking insufficient blood. The respondent was placed in the same position as if a police officer had not informed him of his rights, or had inadequately informed him of those rights, or had provided a defective blood kit. A review of the relevant authorities allowed the conclusion that the Magistrate was entitled to consider the exercise of the general unfairness discretion when considering the admissibility of the breath analysis evidence, and the Magistrate was entitled as a matter of discretion to exclude the evidence.

Kourakis CJ (dissenting) would have allowed the appeal on the grounds that, first, reg 11 of the *Road Traffic (Miscellaneous) Regulations 1999 (SA)*, which governs the procedure for a voluntary blood test, does not confer a procedural right to adduce evidence of a blood sample analysis. Secondly, the failure to obtain a sample was not caused by any police misconduct. Thirdly, the Police carried no responsibility for the respondent's choice of doctor or that doctor's failure to obtain adequate samples. Fourthly, there was no evidence casting doubt on the breath analysis. Finally, the trial of the elements which the Police were required to prove pursuant to s 47K of the RTA had not been compromised in any relevant way.

The grounds of appeal include:

- The Full Court erred in determining that the evidence of breath analysis obtained lawfully and without any impropriety on the part of the police should be excluded in the exercise of the common law general unfairness

discretion, where the respondent was denied, through no fault of his own, the sole means of challenging that analysis, namely, by adducing the results of an analysis of a sample of the blood taken from him in accordance with the requirements of the *Road Traffic Act 1961* (SA), because that sample, taken voluntarily by a medical practitioner of the respondent's choice, who was not an agent or employee of the police, was insufficient and in consequence denatured and could not be analysed.

The appellant has recently given Notice of a Constitutional Matter, but at present it is unclear if any Attorney-General intends to intervene. Notice has been given on the basis that in considering the source and rationale underpinning the general or residual unfairness discretion in a criminal trial to exclude admissible non-confessional evidence on grounds of unfairness, one of the possible sources is that it inheres in the judicial process entrenched by Ch III of the Constitution.

FILIPPOU v THE QUEEN (S59/2015)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 92

Date of judgment: 2 May 2013

Special leave granted: 13 March 2015

The Appellant and his victims (brothers, Sam and Luke Willis) were neighbours who lived in Newcastle. Following an extended period of intermittent conflict between the two parties, the Appellant shot and killed the Willis brothers on the footpath outside his home on 27 June 2010. The Appellant was charged with two counts of murder and was tried by a judge sitting alone. The sole issue at his trial was provocation.

Section 23 of the *Crimes Act* 1900 (NSW) ("the Act") provides the legal structure within which the partial defence of provocation may be established. The trial judge, Justice Mathews, identified the relevant elements of both s 23(2) and s 23(3) of the Act in her judgment. Her Honour also noted that the Crown bears the onus, if provocation has been raised, of disproving it beyond reasonable doubt.

Justice Mathews noted that the partial defence of provocation requires a loss of self-control by an accused, involving a temporary suspension of the capacity to reason or to think rationally and sensibly. Her Honour found however that the particular facts of this case pointed the other way. She held that it was the Appellant's inherently angry nature which led to him firing the fatal shots, not his loss of control. Justice Mathews also went on to consider the issues raised by s 23(2)(b) of the Act, being the "ordinary person test." Her Honour however concluded that an ordinary person, confronted with the situation the Appellant found himself in (being abused by the Willis brothers on the street outside his house), would not have lost self-control so as to form an intention to kill or to inflict grievous bodily harm.

On 18 November 2011 Justice Mathews convicted the Appellant of two counts of murder. Her Honour then sentenced him to an effective sentence of 25 years imprisonment, with an additional term of 6 years. The Appellant duly appealed against both his conviction and his sentence.

On 9 May 2013 the Court of Criminal Appeal (McClellan CJ at CL, Fullerton and Campbell JJ) ("CCA") unanimously dismissed the Appellant's appeal. The CCA was not persuaded that her Honour had erred with respect to provocation and held that no miscarriage of justice had occurred. The CCA also rejected the Appellant's appeal against sentence, finding that Justice Mathews had also not erred in the sentencing process. Their Honours noted that there was nothing in the Appellant's subjective circumstances that could adequately explain the seriousness of his offending. The only mitigating factor in his favour was that the offences appeared to have been unplanned.

The grounds of appeal include:

- The CCA erred in failing to apply s 6(1) of the *Criminal Appeal Act* 1912 (NSW) in its determination of an appeal against conviction by judge alone,

which itself was governed by s 133 of the *Criminal Procedure Act* 1986 (NSW).

ASTRAZENECA AB & ANOR v APOTEX PTY LTD (S54/2015)
ASTRAZENECA AB & ANOR v WATSON PHARMA PTY LTD
(S55/2015)
ASTRAZENECA AB & ANOR v ASCENT PHARMA PTY LTD
(S56/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 99

Date of judgment: 12 August 2014

Special leave granted: 13 March 2015

The Appellants (“AstraZeneca”) own Australian Patent Number 200023051 (“the Patent”). The Patent is over a method of treating high cholesterol using the compound rosuvastatin, which is contained in AstraZeneca’s pharmaceutical product known as “Crestor”. Rosuvastatin itself is not patented in Australia.

Rosuvastatin was invented by Shionogi & Co Ltd (“Shionogi”), whose employees also discovered that low doses of rosuvastatin reduced lipid levels in the blood. Shionogi granted AstraZeneca an exclusive licence for the use of rosuvastatin. AstraZeneca then conducted further trials to ensure the efficacy and safety of rosuvastatin, before obtaining both the Patent and regulatory approval for Crestor.

The Respondents, each wishing to supply generic products similar to Crestor, challenged the validity of the Patent.

On 19 March 2013 Justice Jagot ordered that the Patent be revoked, after holding all three of its claims invalid. Her Honour held that AstraZeneca was not entitled to the Patent, as any invention claimed by it had in fact been invented by Shionogi. Justice Jagot found that the claimed invention was not novel when compared with the art base in existence before the priority date of the Patent’s claims. This was because the integers of the claims were disclosed in both a European patent application filed in 1992 and a scientific article published in 1997 (together, “the Publications”). After finding that rosuvastatin was not part of common general knowledge (“CGK”) at the relevant time, her Honour held that the invention lacked an inventive step. This was upon finding that the invention would have been obvious to a suitably skilled person, in light of the CGK in conjunction with either of the Publications.

AstraZeneca appealed.

On 15 April 2013, s 22A of the *Patents Act* 1990 (Cth) (“the Act”) commenced operation. It provides that a patent is not invalid merely because it was granted to a person who was not entitled to it. Pursuant to transitional provisions of the amending legislation, s 22A applies to patents granted before 15 April 2013.

In June 2013 AstraZeneca entered into a deed with Shionogi (“the Deed”), under which Shionogi assigned to AstraZeneca any rights it had to the invention claimed in the Patent. AstraZeneca then argued on appeal that it did not lack entitlement, on account of s 22A of the Act along with the Deed.

The Full Court of the Federal Court (Besanko, Jessup, Foster, Nicholas & Yates JJ) unanimously dismissed AstraZeneca's appeal. Their Honours held that although Justice Jagot had erred in finding that the integers of the Patent's claims were disclosed in the Publications, her Honour's finding of the lack of an inventive step was nevertheless open on the evidence. In particular, the evidence established obviousness in that a hypothetical skilled person would have tried the methods claimed in the European patent application to produce a useful alternative, if armed only with the CGK and either of the Publications. In respect of AstraZeneca's claimed capacity of entitlement to the Patent, the Full Court held that Justice Jagot had not erred. Their Honours then refused AstraZeneca leave to rely on its argument founded upon s 22A of the Act, because the Patent was invalid in any event.

In each of these matters the grounds of appeal include:

- The Full Court erred in upholding the finding of the primary judge that the Patent was invalid on the ground that the claimed invention was obvious in the light of the CGK considered together with each of the documents referred to as Watanabe and the 471 Patent under the provisions of sections 7(2) and (3) of the Act (at [228] - [229], [516] - [552]).

In each of these matters a notice of contention has also been filed, the grounds of which include:

- The Full Court ought to have exercised its discretion to refuse to allow the Appellants to amend their notice of appeal to that Court in order to raise s 22A of the Act on the additional ground that the Respondent would have conducted the trial differently, if the intended reliance on an assignment from Shionogi had been raised in a timely manner, and the Respondent would therefore have been disadvantaged if the amendment were permitted.