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R & ANOR v THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSIONER (M246/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria [2015] VSCA 271

Date of judgment: 30 September 2015

Date special leave granted: 13 November 2015

The appellants ('R and M') are members of Victoria Police. On 14 January 2015, a woman was arrested and taken into custody at Ballarat police station. R and M were involved in her arrest and dealt with her while she was in custody. These dealings were subsequently the subject of a Victoria Police criminal investigation into allegations of assault by R and M. On 20 March 2015, the Independent Broad-based Anti-corruption Commission ('IBAC') commenced an investigation pursuant to s 64(1)(c) of the *Independent Broad-based Anti-corruption Commission Act* 2011 (Vic) ('the IBAC Act') into the conduct of members of Victoria Police stationed at Ballarat. On 1 April 2015, the respondent issued witness summonses, pursuant to the IBAC Act, which required R and M to give evidence before IBAC at a public examination concerning investigations into, inter alia, allegations of serious police personnel misconduct on account of alleged unnecessary and/or excessive use of force towards vulnerable people at Ballarat police station.

On 15 April 2015, the appellants commenced judicial review proceedings, in the Supreme Court of Victoria, in which they sought to restrain IBAC from examining them, or from doing so in public. On 7 August 2015, the proceeding was dismissed by Riordan J.

In their appeal to the Court of Appeal (Priest, Beach and Kaye JJA) the appellants contended that the trial judge erred in finding that there was power to examine them about the ongoing facts of a criminal investigation of which they were subjects. The critical question was whether the IBAC Act had by express words or necessary intendment, demonstrated the intention to abrogate the privilege against self-incrimination to allow the examination of persons, who might be charged with an offence, about the circumstances of the alleged offence.

The Court of Appeal noted that the IBAC Act is highly prescriptive, setting out what IBAC can and cannot do in specified circumstances. They considered that in circumstances where the text of the IBAC Act would, on a plain reading, suggest that IBAC has power to conduct examinations of persons who are the subject of ongoing criminal investigations (and who have not been charged with any offence), the absence of any words of relevant limitation tended to suggest that no such limitation was contemplated or intended by the Parliament when the IBAC Act was enacted. It was clear that the IBAC Act was and is intended to permit the investigation by IBAC of serious criminal offences. In the Court's view, to construe the IBAC Act so as to deprive IBAC of a power to examine people who have not yet (and may not be) charged with any offence would significantly impede the intended operation of the IBAC Act. The Court therefore concluded that, on its proper construction, the IBAC Act empowered IBAC to examine the appellants in the present case.

The ground of appeal is:

- The Court below erred in failing to determine that the learned trial judge had erred in determining that IBAC was empowered to hold an examination under Part 6 of the IBAC Act of each of the appellants in connection with the subject matter of IBAC's "own motion" investigation referred to as Operation Ross.

IMM v THE QUEEN (D12/2015)

Court appealed from: Northern Territory Court of Criminal Appeal [2014] NTCCA 20

Date of judgment: 19 December 2014

Special leave granted: 16 October 2015

In August 2011 a girl aged 13 ("the Complainant") told three members of her family that the Appellant had been molesting her since she was little. The Complainant also told her best friend. After a police investigation, the Appellant was charged with one count of sexual intercourse with a child (when the Complainant was aged 6) and three counts of indecent dealing with a child (when the Complainant was aged 4, 5 and 11).

At the Appellant's trial, evidence of what the Complainant had told both her relatives and her friend ("the complaint evidence") was admitted into evidence above an objection by the Appellant's counsel. The basis of that objection was that none of that evidence was sufficiently specific to any of the alleged acts which formed the basis of the charges. The complaint evidence was admitted by Justice Blokland under s 66 of the *Evidence (National Uniform Legislation) Act* (NT) ("the Act"), as evidence of asserted facts that were fresh in the memory of the Complainant at the time, such evidence thereby not being prevented by the hearsay rule from being admitted to prove the truth of the matters complained about. Her Honour also refused to exclude the complaint evidence, under s 137 of the Act, as unfairly prejudicial to the Appellant. Justice Blokland's directions to the jury included, that if it was satisfied as to the complaint evidence, then that evidence could be used as "*some evidence that an offence did occur*".

Also admitted was the Complainant's testimony that the Appellant had once run his hand up her thigh while giving her a massage ("the tendency evidence"). Justice Blokland ruled, under s 97(1)(b) of the Act, that that evidence had significant probative value, as it was capable of demonstrating that the Appellant had a sexual interest in the Complainant.

The jury found the Appellant guilty of the intercourse offence and of two of the indecent dealing offences. Justice Blokland then sentenced the Appellant to imprisonment for 6 years, with a non-parole period of 4 years and 3 months.

The Appellant appealed against his conviction. This was on grounds that Justice Blokland had erred by admitting the complaint evidence and the tendency evidence, and that her Honour had misdirected the jury in relation to the former.

The Court of Criminal Appeal ("CCA") (Riley CJ, Kelly & Hiley JJ) unanimously dismissed the appeal. Their Honours held that Justice Blokland had not erred by admitting the complaint evidence, as it was referable to the charges and its probative value outweighed any danger of unfair prejudice to the Appellant. The CCA held that Justice Blokland's directions to the jury contained appropriate warnings about the use of evidence of conduct which was not the subject of the charges. That the complaint evidence was in general terms did not mean that it could not be used by the jury as "some evidence" that an offence had occurred. Their Honours held that a lack of corroborating evidence did not prevent the tendency evidence from being admitted under s 97 of the Act. They held that a

lack of corroboration was a matter of weight for the jury. It was not a matter of admissibility.

The grounds of appeal are:

- The CCA erred in holding that the trial judge did not err in admitting tendency evidence.
- The CCA erred in holding that the trial judge did not err in admitting complaint evidence.
- The CCA erred in holding that the trial judge did not misdirect the jury regarding the complaint evidence.

PACIOCCO & ANOR v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (M219/2015) & (M220/2015)

Court appealed from: Full Court of the Federal Court of Australia [2015] FCAFC 50

Date of judgment: 8 April 2015

Date special leave granted: 11 September 2015

The appellants brought a representative proceeding in the Federal Court in which they sought to set aside bank fees charged by Australia and New Zealand Banking Group Limited (ANZ) on various bases. The attack on the fees was that they were either penalties at common law or equity; or were the product of unconscionable conduct by ANZ within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) ('the ASIC Act'), ss 12CB and 12CC, or the *Fair Trading Act 1999* (Vic) ('the FT Act'), ss 8 and 8A; or were unjust under the National Credit Code in Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth); or as unfair contract terms under the FT Act, S 32W and the ASIC Act, s 12BG.

There were five kinds of fees charged: honour fees, dishonour fees, non-payment fees, late payment fees and overlimit fees. The primary judge (Gordon J) found the late payment fees to be penalties and the balance of the fees not to be penalties. Her Honour further found that none of the statutory provisions applied to impugn ANZ's conduct or the fees.

The appellants and the respondent each appealed and filed notices of contention in the other party's appeal. ANZ appealed the finding that the late payment fees were penalties and the appellants filed notices of contention on the basis of the primary judge's rejection of the statutory claims. They submitted, inter alia, that the primary judge impermissibly ran together and obscured the different legal tests for the different statutory provisions. The appellants appealed the findings in relation to the fees other than the late payment fees.

With respect to the claims of unconscionable conduct under the ASIC Act and the FT Act, the Full Court (Allsop CJ, Besanko & Middleton JJ), found it could not be concluded on the evidence before the primary judge that ANZ engaged in unconscionable conduct. In all the circumstances, (in particular, the lack of any proven predation on the weak or poor, the lack of real vulnerability requiring protection, the lack of financial or personal compulsion or pressure to enter or maintain accounts, the clarity of disclosure, the lack of secrecy, trickery or dishonesty, and the ability of people to avoid the fees or terminate the accounts), the Court, like the primary judge, did not consider the conduct of ANZ to have been unconscionable.

With respect to the claims for unjust transactions under the National Credit Code and unfair contract terms under the FT Act, the Court, like the primary judge, held that the transactions were not unjust and the terms were not unfair. The Court noted that s 76 of the National Credit Code and s 32X of the FT Act provided considerations relevant to the conceptions of unjustness and unfairness. Considering the terms of s 32W of the FT Act, at the time of entry into the arrangements, it was difficult to see why the provisions in question would have caused an imbalance in the parties' rights and obligations to the detriment of the

consumer. The provisions were clearly disclosed. In most instances the fees could be avoided. No trickery took place. Although set by the bank in contracts of adhesion, the contracts were terminable at the will of the customer; and the fee could be avoided by the conduct of the customer that was not unreasonable – keeping to her or his contractual limits.

Looking at s 76 of the National Credit Code, the same conclusion could be reached. Whilst the ANZ had the bargaining power to proffer the terms un-negotiated, the customer could terminate the account at will, could (in most cases) avoid the fee by turning off shadow limits, or in all cases, by adhering to contractual arrangements. The terms were not unreasonably difficult to comply with. Further, the terms were clear, intelligible, and openly disclosed. There was no unfair pressure, undue influence or unfair tactics. There was no evidence of hardship on the part of the appellants and it was not proved that the ANZ inflicted hardship on others by the fees.

The Court dismissed the appellants' appeal and allowed the respondent's appeal.

The ground of appeal in M219/2015 is:

- the Full Court erred in determining that the charging of the "late payment fees" by the respondent was not unconscionable in terms of s 12BC and /or s 12CC of the ASIC Act and or s 8 of the FT Act, and in determining that the contractual terms providing for them were not unfair terms for the purposes of s 32W and s 32X of the FT Act, or unjust for the purposes of s 76 of the National Credit Code.

The grounds of appeal in M220/2015 include:

- The Full Court erred in taking the view that the "late payment fees" were not penalties

The respondent has filed a Notice of Contention in M220/2015, on the ground that the Full Court should have found that s 27 of the *Limitation of Actions Act* 1958 (Vic) did not apply to the first appellant's claim for restitution in respect of exception fee 4.

ZABURONI v THE QUEEN (B69/2015)

Court appealed from: Queensland Court of Appeal [2014] QCA 77

Date of judgment: 15 April 2014

Special leave granted: 13 November 2015

Mr Godfrey Zaburoni was diagnosed with HIV in 1998. He and the Complainant met on the Gold Coast on New Year's Eve 2006/2007 and they commenced a sexual relationship soon afterwards. When asked by the Complainant at the time about whether he had any STDs, Mr Zaburoni denied being HIV positive. For the first 6 weeks of their relationship, Mr Zaburoni and the Complainant practised safe sex. Thereafter Mr Zaburoni stopped using a condom, with the relationship itself ending in September 2008.

In September 2009 the Complainant was diagnosed with HIV. On the day before her diagnosis, Mr Zaburoni admitted to her that he was HIV positive and that he had known about it for about "six months".

Mr Zaburoni was subsequently charged, pursuant to s 317(b) and (e) of the *Criminal Code* 1899 (Qld) ("the Code"), that between 1 January 2007 and 30 September 2008 he intended to (and actually did) transmit a serious disease (HIV) to the Complainant. On 18 April 2013 a jury found him guilty and Judge Dick later sentenced him to nine years and six months imprisonment.

The live issue upon Mr Zaburoni's subsequent appeal was whether he had actually intended to infect the Complainant with HIV.

On 15 April 2014 the Court of Appeal (Gotterson & Morrison JJA; Applegarth J dissenting) dismissed Mr Zaburoni's appeal. Justice Gotterson (with whom Justice Morrison broadly agreed) noted that the evidence had clearly established:

a) that Mr Zaburoni was well aware of his infectious status; and

b) that he had transmitted HIV to the Complainant.

His Honour then held that it was open to the jury, when considering the evidence of consistent unprotected sexual activity over several months, to conclude that Mr Zaburoni's behaviour was beyond reckless when it came to the risk of HIV transmission to the Complainant.

Justice Applegarth however held that the requisite intent to transmit HIV was not present. His Honour noted that the evidence left open the reasonable hypothesis that Mr Zaburoni, not knowing the degree of risk of HIV transmission, was both extremely reckless and also callous. As appalling as that behaviour was however, his Honour found that it could not be equated with a subjective, actual intent to transmit HIV. Justice Applegarth held that in the absence of any evidence of malice, or knowledge of the degree of risk of transmission, a subjective intent to inflict HIV had not been proven beyond reasonable doubt.

The grounds of appeal include:

- The Court erred in concluding that the jury could infer that Mr Zaburoni had the requisite intent on the basis of his frequent engagement in conduct over a substantial period of time reckless as to the consequences of that

conduct.

- The Court erred in finding that the jury could infer that Mr Zaburoni had the requisite intent from the first act of unprotected sexual intercourse to the last act of unprotected sexual intercourse and hence that the requisite intent occurred at the same time as the transmission of the disease.

ALQUDSI v THE QUEEN (S279/2015)

Court from which cause removed: Supreme Court of New South Wales

Date cause removed: 15 December 2015

The Applicant has been charged on indictment with offences against s 7(1)(e) of the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth) ("the Act"). The charges allege that between 25 June and 14 October 2013 the Applicant performed services to support the commission of offences against s 6 of the Act, being the entry into Syria of seven persons with intent to engage in armed hostilities in that country.

After being committed for trial in the Supreme Court of New South Wales, the Applicant applied for an order that he be tried by a judge alone ("the Application"). Section 80 of the Commonwealth Constitution however provides that any trial on indictment for an offence against laws of the Commonwealth shall be by jury.

After being served with a Notice of a Constitutional Matter by the Applicant, the Attorney-General of the Commonwealth applied to this Court for it to remove from the Supreme Court of New South Wales the question whether the Application could properly be granted despite s 80 of the Constitution. On 15 December 2015 Chief Justice French ordered that the Application be removed into this Court.

The Attorney-General of the Commonwealth, who is taken to have intervened in the removed cause, has filed a Notice of a Constitutional Matter in this Court. At the time of writing, the Attorneys-General of Victoria, South Australia and Tasmania had given notice that they were intervening in the removed cause.

The following question has been stated by Chief Justice French for the consideration of the Full Court:

1. Are ss 132(1) to 132(6) of the *Criminal Procedure Act* 1986 (NSW) incapable of being applied to the Applicant's trial by s 68 of the *Judiciary Act* 1903 (Cth) because their application would be inconsistent with s 80 of the Constitution?

MOK v DIRECTOR OF PUBLIC PROSECUTIONS (NSW) (S246/2015)

Court appealed from: New South Wales Court of Appeal [2015] NSWCA 98

Date of judgment: 17 April 2015

Special leave granted: 13 November 2015

In March 2004 Mr Yau Ming Matthew Mok was remanded on bail by a Local Court Magistrate to appear in the District Court of NSW for sentence (on a number of fraud related charges) on 13 April 2006. He failed to appear on that date and a bench warrant was issued for his arrest.

In December 2011 Mr Mok was arrested in Victoria on unrelated charges for which he was subsequently sentenced to six months imprisonment on 26 February 2013. On that day he was also arrested (by a Victorian detective) in execution of the NSW bench warrant.

While in the process of being extradited to New South Wales on 28 February 2013, Mr Mok briefly escaped from lawful custody (and was recaptured) while at Tullamarine airport. Tullamarine airport is a Commonwealth place for the purposes of s 52(i) of the Constitution. Mr Mok was then charged in New South Wales with the offence of attempting to escape from custody contrary to s 310D of the *Crimes Act* 1900 (NSW) (“the Crimes Act”).

Local Court Magistrate Buscombe dismissed the charge against Mr Mok as failing to disclose a prima facie case. Justice Rothman however allowed the Director of Public Prosecutions’ (NSW) subsequent appeal and remitted the matter for further hearing.

On 17 April 2015 the Court of Appeal (Meagher, Hoeben & Leeming JJA) dismissed Mr Mok’s subsequent appeal. Their Honours found that Justice Rothman was correct to conclude that Mr Mok must have been taken to have been charged with a federal offence, namely, a contravention of s 310D of the Crimes Act as made applicable by reason of s 89(4) of the *Service and Execution of Process Act* 1992 (Cth) (“SEP Act”), giving rise to a prima facie case.

The ground of appeal is:

- The Court of Appeal erred in concluding that a person could be guilty of an offence contrary to s 310D of the Crimes Act, as applied by operation of s 89(4) of the SEP Act, even if that person was not an “inmate” as required by s 310D, so long as that person was being taken to another place in compliance with an order under s 83(8) of the SEP Act.

On 17 December 2015 the Respondent filed an Amended Notice of Contention, the grounds of which are:

- The Court of Appeal erred in failing to find that Mr Mok was an “inmate” within the meaning of s 310D of the Crimes Act and ss 4(d) and/or 4(e) of the *Crimes (Administration of Sentences) Act* 1999 (NSW) (“the Administration of Sentences Act”), as applied by the SEP Act in that:

a) the warrant issued by the Victorian magistrate under the SEP Act was a warrant or order which committed Mr Mok to a "correctional centre" within the meaning of ss 4(1)(d) and/or 4(1)(e) of the Administration of Sentences Act, namely the Sydney Police Centre; and

b) the Victorian magistrate was a *"competent authority"* within the meaning of ss 4(1)(d) and/or 4(1)(e) of the Administration of Sentences Act; or

c) in the alternative to (b) above, the Victorian magistrate was a *"court"* within the meaning of ss 4(1)(d) and/or 4(1)(e) of the Administration of Sentences Act.