SHORT PARTICULARS OF CASES

NOVEMBER 2016

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RP v THE QUEEN (S193/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 215

Date of judgment: 26 August 2015

Special leave granted: 21 July 2016

On 27 August 2014 RP was tried by a judge without a jury, on charges which relevantly included two counts of sexual intercourse with a child aged under 10 years (counts 2 and 3 on the indictment). The offences allegedly occurred between October 2004 and June 2005 (the count 3 incident a few weeks after the count 2 incident), when the complainant was aged 6 or 7 years and RP was aged 11 or 12.

After the prosecution evidence was admitted without objection, the sole issue at trial was whether the prosecution could rebut the presumption of *doli incapax* ("the Presumption"). The Presumption was that, since he was aged between 10 and 14 years at the relevant times, RP would not have known that his actions were seriously wrong. The evidence included a 2012 psychologist's report ("the Report"), which stated that RP's level of intelligence was very low, that he had been exposed to violence as a child and that he had possibly been molested.

RP's counsel accepted that if the Presumption were rebutted in relation to count 2 then it would necessarily be rebutted in relation to count 3, as that incident occurred later in time. RP's counsel also conceded that if count 2 were found proved then it would flow from that decision that a verdict of guilty would be entered in respect of count 3 ("the Concession").

Judge Letherbarrow found RP guilty on count 2. This was after assuming, on the basis of the Report, that RP's low intelligence meant that he had a lesser appreciation of the seriousness of his conduct. His Honour also expressly ignored the fact that RP had used a condom, after the parties both submitted that no conclusion could be drawn from that fact. Judge Letherbarrow found that in view of the circumstances the Presumption had been rebutted. Those circumstances included that RP had used force, he stifled the complainant's cries by putting his hand over the complainant's mouth, he ceased the assault only when he heard an adult arrive outside and he told the complainant not to say anything. Judge Letherbarrow proceeded to find RP guilty also on count 3, on the basis of the Concession "*and as a matter of logic*". His Honour then sentenced RP to imprisonment for two years and five months, with a non-parole period of 11 months.

RP appealed against his conviction, contending that the verdicts were unreasonable. In relation to count 2, this was on bases including that the evidence indicated that RP was highly sexualised and that it was consistent with his knowing that his behaviour was wrong but falling short of "seriously wrong". RP also submitted that the Concession should not have been made and that the circumstances of count 3 should have been considered separately from those of count 2.

The Court of Criminal Appeal ("CCA") (Johnson, Davies & Hamill JJ) unanimously dismissed RP's appeal in relation to count 2. The CCA held that the evidence did not support a finding that RP was highly sexualised. The Report did not detail the violence to which RP had been exposed or its effect on him, nor did it contain any basis for suggesting that RP might have been molested (other than his having symptoms of post-traumatic stress disorder). In respect of RP's use of a condom, their Honours held that evidence which was expressly disregarded by a trial judge should similarly be ignored by the CCA on appeal. The CCA held that the evidence did suffice for the Presumption to be rebutted and for Judge Letherbarrow to have found RP guilty.

In respect of count 3, the appeal was dismissed upon a majority decision (Johnson & Davies JJ; Hamill J dissenting). The majority held it could not be inferred, on the basis that the later assault was carried out less forcefully and with less resistance from the complainant, that RP could have believed that his behaviour was not seriously wrong. This was in light of count 3 involving essentially the same act as that in count 2, on which RP had been found to have the requisite level of knowledge. Hamill J however would have quashed the guilty verdict and acquitted RP of the count 3 charge. His Honour held that Judge Letherbarrow should have separately assessed the circumstances in relation to count 3, rather than finding RP guilty on the basis of the count 2 finding coupled with the Concession. Separate assessment was particularly important in this case, as the only circumstances which count 3 had in common with count 2 were the act of sexual intercourse and RP stopping when an adult arrived. Judge Hamill held that a knowledge of serious wrongdoing in respect of count 3 did not necessarily follow from RP having had such knowledge in respect of count 2. There was also no forensic reason for the Concession, which should not have been made.

The grounds of appeal are:

- The CCA erred in failing to find that the verdicts with respect to counts 2 and 3 were not unreasonable on the basis that the evidence at trial did not establish to the criminal standard that the presumption that RP was *doli incapax* had been rebutted.

- The CCA erred in failing to quash RP's conviction on count 3 on the basis that he had been denied a fair trial.

WESTERN AUSTRALIAN PLANNING COMMISSION v SOUTHREGAL PTY LTD & ANOR (P47/2016);
WESTERN AUSTRALIAN PLANNING COMMISSION v LEITH (P48/2016)

Court appealed from: Supreme Court of Western Australia Court of Appeal [2016] WASCA 53

Date of judgment: 24 March 2016

Date special leave granted: 1 September 2016

The respondents are each the registered proprietors of a piece of land, part of which has been reserved for a public purpose under the provisions of the Peel Region Scheme (the PRS), which is a planning scheme made pursuant to the provisions of the *Planning and Development Act* 2005 (WA) (the PD Act). Neither of them were the registered proprietor of the relevant land at the time it was reserved for that public purpose. The respondents' applications for approval to develop the land were refused because the land had been reserved for regional open space. Their claims for compensation pursuant to the provisions of the PD Act were rejected by the appellant ('the Commissioner') on the basis that compensation under the PD Act was only available to the owners at the time of the reservation.

The respondents each commenced proceedings in the Supreme Court of Western Australia asserting their entitlement. In each case the court directed the preparation of a Special Case presenting a question of law to the court for its determination. The question of law formulated and determined by Beech J was:

> *Whether a person to whom s 177(2)(b) of the PD Act would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act*.

Beech J answered the question in the affirmative, on the basis of the breadth and generality of the language of s 177(2)(b), the legislative history of the introduction of the predecessor provision, and the principles of statutory construction for compensatory legislation. His Honour construed Part 11 of the PD Act as giving rise to two independent alternative rights to compensation. The owner of the land at the date of reservation has a right to claim compensation when the land is first sold, or, alternatively, the owner of the land at the date a development application is made and refused (or granted on unacceptable conditions) has a right to compensation. However, once compensation has been paid, no further claim can be made by any party.

In his appeals to the Court of Appeal (Martin CJ, Newnes and Murphy JJA), the Commissioner contended that the only person entitled to compensation was the owner of land at the time that the planning scheme was made or amended.

The Court noted that the terminology of s 173(1) of the PD Act is capable of supporting the construction for which the Commissioner contended, by its reference to a person whose land is injuriously affected 'by the making or amendment of a planning scheme'. However, that view of s 173(1) is directly contrary to the plain and ordinary meaning of s 177(1) and (2) of the PD Act,

which explicitly provide that compensation is payable to the person who was the owner of the land at the date of an application for development approval which was refused or granted subject to unacceptable conditions. Further, the plain and ordinary meaning of s 177(1) and (2) could only be reconciled with the construction of s 173(1) for which the Commissioner contended if: (a) s 177(1) is read as deferring the entitlement to compensation only until the time at which the first of either of the two events to which it refers occurs, and should therefore be read as if the words 'whichever shall first occur' are to be found at the end of the subsection; and (b) if the reference in subsection (2) to the person who was the owner of the land at the date of the application for development approval is read as if it is restricted to a very limited and special class of owners - namely, owners at the date of reservation; or alternatively, to owners who were not the owner at the time of reservation but became an owner by some means other than purchase after the date of reservation.

The Court noted that s 177(2) of the PD Act, which is specifically directed to the question of the identification of the person entitled to claim compensation, expressly refers to the entitlement of two classes of persons - namely, the owner at the date of reservation, and the owner at the date of an application for development approval which is refused or granted subject to unacceptable conditions. The Commissioner's construction of the section could only be accepted if the entitlement conferred by the plain and ordinary meaning of the words used in s 177(1) and (2) was significantly constrained by implied limitations not found in the express words of the statute. The Court found that approach to the construction of statutes providing for compensation to landowners for the injurious affection of their land was contrary to well established principle and should not be accepted. Each appeal was dismissed.

The ground of appeal in each matter is:

- The Court of Appeal erred in law by ruling that a person to whom s 177(2)(B) of the *Planning and Development Act* 2005 (WA) would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act.

PALMER v MARCUS WILLIAM AYRES, STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) & ORS (B52/2016)

FERGUSON v MARCUS WILLIAM AYRES, STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN IN THEIR CAPACITIES AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) (B55/2016)

Dates writs of summons issued: 12 September and 27 September 2016

Question reserved for Full Court: 15 September and 12 October 2016

Mr Clive Palmer and Mr Ian Ferguson are former directors of Queensland Nickel Pty Ltd ("Queensland Nickel"), which is in the process of being wound up pursuant to a resolution made by its creditors under s 439C(c) of the *Corporations Act* 2001 (Cth) ("the Act"). Upon that resolution, the then administrators of Queensland Nickel became the company's liquidators ("the General Purpose Liquidators").

In the winding up of Queensland Nickel, the Federal Court appointed the First Defendants as additional liquidators for particular purposes. On 3 August 2016 summonses for examination were issued to Mr Palmer and Mr Ferguson under s 596A of the Act ("the Examination Summonses"), pursuant to orders made by a Registrar of the Federal Court upon an application by the First Defendants. The Examination Summonses require Mr Palmer and Mr Ferguson to attend the Federal Court, to be publicly examined on oath or affirmation about the affairs of Queensland Nickel. The men are also required to produce various documents.

Mr Palmer and Mr Ferguson (together, "the Plaintiffs") each commenced proceedings in this Court, challenging the validity of the power conferred on the Federal Court by s 596A of the Act (to the extent that that power is exercised in conjunction with s 511 of the Act). This was after the Plaintiffs had each undergone multiple days of examination before a Registrar of the Federal Court. The Plaintiffs remain subject to further examination in relation to the Examination Summonses, pursuant to an order made by the Federal Court Registrar upon an application by the General Purpose Liquidators. (The General Purpose Liquidators have been joined as defendants to proceeding B52/2016.)

On 15 September 2016, in proceeding B52/2016, Justice Kiefel reserved the following question for the consideration of a Full Court:

- Is s 596A of the *Corporations Act* 2001 (Cth) invalid as contrary to Chapter III of the Constitution in that it confers non-judicial power on federal courts and on courts exercising federal jurisdiction?

On 12 October 2016 Justice Kiefel ordered by consent that the same question be reserved for the consideration of a Full Court in proceeding B55/2016.

The Plaintiffs have each filed a notice of a constitutional matter. Notices of intervention have been filed in proceedings B52/2016 and B55/2016 by the Attorneys-General of the Commonwealth of Australia, Queensland, Victoria and South Australia.

PERARA-CATHCART v THE QUEEN (A39/2016)

Court appealed from: Supreme Court of South Australia Court of Criminal Appeal [2015] SASCFC 103

Date of judgment: 30 July 2015

Date special leave granted: 1 September 2016

The appellant was convicted, after a trial by jury in the District Court of South Australia, of rape and threatening to kill. The prosecution alleged the appellant was a drug dealer who approached the complainant, her boyfriend and a friend at a bus stop to sell them drugs. They went to the complainant's house and consumed methylamphetamine. The next day, the complainant and the appellant again consumed methylamphetamine at her home. The appellant propositioned the complainant, who refused his advances and went to the bathroom. He became angry and followed her to the bathroom, where he grabbed her by the throat, inserted his fingers into her vagina and threatened to kill her. Some time later, the complainant's boyfriend had an altercation with the appellant. The police were called and the rape was reported. The defence case was that the appellant was not a drug dealer and he had sought to purchase drugs from the complainant's boyfriend, who was a drug dealer: the allegations made against the appellant were an attempt to distract from the complainant's boyfriend's own criminal activity.

In his appeal to the Court of Criminal Appeal (Kourakis CJ, Gray and Stanley JJ) the appellant complained of the trial judge's refusal to exclude a passage from his police interview in which he admitted possessing amounts of cannabis that had been found at his home. It was further contended that the trial judge failed to properly direct the jury in respect of this evidence, once it had been admitted. All three judges held that the evidence of the appellant possessing and trafficking cannabis was relevant and admissible. They differed, however on the issue of the adequacy of the trial judge's directions in respect of that evidence, once admitted.

Stanley J considered that the direction given on this topic did not satisfy the requirements of the *Evidence Act* 1929 (SA). The trial judge was obliged to identify and explain the purpose for which the evidence admitted could, and could not, be used. While the direction given adequately explained that the jury could not use the evidence of the appellant's drug use for propensity reasoning, his Honour was not persuaded that the direction adequately explained the permissible use of that evidence. The trial judge was required to direct the jury that the evidence explained the circumstances by which the appellant met the complainant and her boyfriend and further was evidence they could use to find he was providing drugs to the complainant and using the provision of those drugs to pressure her for sex.

However, in considering the application of the proviso, Stanley J was satisfied that no substantial miscarriage of justice had actually occurred. He considered that the absence of the requisite directions would have had no significance in determining the jury's verdict. The jury's verdict necessarily involved the acceptance of the evidence of the complainant and her boyfriend on the central allegations underpinning the charges the jury had to consider. His Honour's own

independent assessment of the whole of the evidence coupled with the fact that the jury in returning guilty verdicts must have accepted the evidence of the complainant and her boyfriend, satisfied him that no substantial miscarriage of justice had occurred in this case.

Gray J thought it was important that the summing up be considered in its entirety. He did not consider that the jury would have been under any misunderstanding as to the purpose of the evidence of discreditable conduct. In the circumstances of the trial, it was an item of circumstantial evidence to be considered by the jury with other evidence from which they would be entitled to reach the conclusion that the appellant was a dealer in drugs and made use of his supply of drugs to influence and put pressure on the complainant. His Honour did not consider that in the circumstances of the trial there was any inadequacy in the directions of the judge in explaining and identifying the purpose of the impugned evidence.

Kourakis CJ (dissenting) noted that the trial judge failed to give any directions on the proper use of the evidence of the appellant's possession of cannabis. The judge did not direct the jury that the evidence of the possession of, or even trading in, cannabis could not be used as a basis from which to reason that the defendant trafficked, or was more likely to trade, in methylamphetamine. The general direction, against reasoning that the appellant was guilty of the offences charged because he was a drug trafficker, was insufficient for these purposes. His Honour noted that the prosecution case depended on the acceptance of the testimony of the complainant and her boyfriend, and the Court was not in a position to evaluate their credibility on the face of the transcript. His Honour considered that the proviso could not be applied so that the appeal should be allowed and the matter remitted to the District Court for retrial.

The proposed grounds of appeal include:

- The Full Court (in the dispositive reasoning of Stanley J) erred in applying the proviso where the jury's verdict depended upon the assessment of the credibility of prosecution witnesses, and may have been affected by the failure of the trial judge to give the jury directions that were required by law to be given.