SHORT PARTICULARS OF CASES
APPEALS

AUGUST 2018

No.	Name of Matter	Page No
	Tuesday, 7 August	
1.	Rodi v State of Western Australia	**1**
	Wednesday, 8 August	
2.	Comptroller General of Customs v Zappia	**3**
	Thursday, 9 August	
3.	McPhillamy v The Queen	**5**
	Friday, 10 August	
4.	Commissioner of Taxation for the Commonwealth of Australia v Tomaras & Ors	**7**
	Tuesday, 14 and Wednesday, 15 August	
5.	Work Health Authority v Outback Ballooning Pty Ltd & Anor	**9**
	Thursday, 16 August	
6.	SAS Trustee Corporation v Miles	**11**

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RODI v THE QUEEN (P24/2018)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2017] WASCA 81

Date of judgment: 21 April 2017

Date special leave granted: 20 April 2018

After a trial in the District Court of Western Australia before Eaton DCJ and a jury, the appellant was convicted of possessing a prohibited drug, namely cannabis, with intent to sell or supply it to another, contrary to s 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA) ("the MD Act"). The circumstances of the offence were that on 14 April 2012 police officers executed a search warrant, pursuant to the MD Act, at the appellant's home. They located a total of 925 grams of cannabis. The appellant admitted that he was in possession of the cannabis. His case was that he had cultivated it for his personal use from two plants which were growing outside the house.

At the trial a prosecution witness, Detective Sergeant Coen, gave evidence that cannabis plants typically yield between 100 and 400g of cannabis head materials. He said that he would expect the yield from the two plants located at the rear of the appellant's house to be on the lower end of the 100g to 400g scale. Detective Coen had previously given evidence, in other unrelated criminal proceedings, that he had experienced a range of 300g to 600g of head material to be produced by naturally grown cannabis plants. That range was consistent with the appellant's account of having harvested the head material found in his house from two plants. The officer's earlier testimony was not disclosed to the appellant at the time of trial, and was unknown to the appellant and his lawyers at that time.

In his appeal to the Court of Appeal (Buss P, Newnes & Mitchell JJ (dissenting)), the appellant submitted, inter alia, that, as a result of this fresh or new evidence, a miscarriage of justice had occurred.

The majority of the Court, after evaluating the additional evidence in the context of the whole of the trial record including the manner in which the appellant's case was run at the trial, was satisfied that a miscarriage of justice had not occurred. Relevant factors included: the appellant bore the onus of establishing on the balance of probabilities that he did not intend to sell or supply to another any of the 925g of cannabis; the appellant did not call any opinion evidence from a botanist or other expert as to the quantity of cannabis head material usually derived from a non-hydroponic cannabis plant; defence counsel did not object to Detective Coen giving opinion evidence about typical cannabis yields on the ground that Detective Coen was not qualified as an expert on that topic; and he did not object to Detective Coen giving opinion evidence about typical cannabis yields on the ground of non-disclosure or late disclosure of his evidence on the topic. Further, defence counsel did not challenge in cross-examination Detective Coen's evidence-in-chief as to the quantity of cannabis head material usually derived from a non-hydroponic female cannabis plant.

The majority held that even if the additional evidence as to Detective Coen's previous opinion on typical cannabis yields had been available to the appellant at the trial, the evidence of his previous opinion would have been admissible solely as a prior inconsistent statement and therefore would not have been evidence as to the validity or accuracy of the previous opinion. It was plain that Detective Coen would not have accepted the correctness of his previous opinion. His explanation in evidence at the hearing of the appeal about when and why he changed his opinion on typical yields of cannabis head material per female plant was credible and cogent.

The majority was satisfied that, to the extent the additional evidence was properly characterised as fresh evidence, there was no significant possibility that, on the whole of the trial record and the additional evidence, a fact-finding tribunal, acting reasonably, would be satisfied that the appellant had established on the balance of probabilities that he did not intend to sell or supply to another any of the 925g of cannabis.

Mitchell JA (dissenting) held that the appellant could not have reasonably anticipated that the State would adduce Detective Coen’s yield evidence, which had not previously been disclosed, at trial. Because of the unusual way in which the issue emerged during the course of the trial, the appellant did not have any opportunity, by the exercise of reasonable diligence, to discover the different testimony which the police officer had given on previous occasions. That fresh evidence was at least capable of calling into question an important aspect of the State's evidence, which was potentially influential in the jury's assessment of the appellant's evidence. There was a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the evidence of the previous testimony about cannabis yields had been available at the appellant's trial. In these circumstances, a miscarriage of justice had been established and the appeal should have been allowed.

The grounds of appeal include:

- The Court of Criminal Appeal erred in finding that if the fresh evidence before the Court was before the jury (with the evidence adduced at the trial) there was no significant possibility that the appellant would have been acquitted.

COMPTROLLER GENERAL OF CUSTOMS v ZAPPIA (S91/2018)

Court appealed from: Full Court of the Federal Court of Australia [2017] FCAFC 147

Date of judgment: 19 September 2017

On 23 May 2015 400,000 cigarettes were stolen from a warehouse ("the Warehouse") operated by Zaps Transport (Aust) Pty Ltd ("Zaps"). Zaps operated the Warehouse as a bonded warehouse pursuant to a licence ("the Licence") issued under Part V of the *Customs Act* 1901 (Cth) ("the Act"). At the time of the theft, Zaps was awaiting Customs permission to move the cigarettes stored at the Warehouse to other licensed premises. That followed a variation of the Licence, made by the appellant on 15 April 2015 (after previous instances of cigarette theft), such that Zaps was no longer authorised to store tobacco products at the Warehouse.

The respondent, Mr Domenic Zappia, was employed as both general manager and warehouse manager of Zaps. His father, Mr John Zappia, was a director of Zaps. On 27 August 2015 a statutory demand on the respondent ("the Statutory Demand") was issued and served by a Collector under s 35A of the Act. (Similar statutory demands were also served on Zaps and John Zappia.) The Statutory Demand required the respondent to pay $188,032.00, being the amount of duty payable on the 400,000 stolen cigarettes, on the basis that the respondent was "a person who has (or has been entrusted with) possession, custody or control over the goods stored at Zaps premises" who had failed to keep the goods safe.

The respondent sought a review by the Administrative Appeals Tribunal ("the Tribunal"), which affirmed the decision to issue the Statutory Demand. The Tribunal found that, because he directed what happened to goods at the Warehouse on a day-to-day basis, the respondent had "control" over the cigarettes within the meaning of s 35A(1) of the Act, which imposed strict liability for unpaid duty.

An appeal by Mr Zappia was allowed by the Full Court of the Federal Court. White and Moshinsky JJ held that the Statutory Demand must be set aside. This was because s 35A(1) of the Act was directed to persons having *the* control, as opposed to *some* control, of the relevant goods, and the respondent was an employee whose control over the cigarettes was incomplete. Their Honours found it improbable that the Act would impose liability on employees who acted as no more than the human agent of those who did have possession, custody or control of bonded goods.

Davies J also held that the appeal should be allowed, but would have remitted the matter to the Tribunal for redetermination. Her Honour held that whether s 35A(1) applied to a person was to be determined by the measure of control exercised, not merely by whether the person was an employee. The Tribunal had erred by failing to relate its finding that the cigarettes had not been kept safely to the nature and degree of control exercised by the respondent.

The grounds of appeal are:

- The Full Court of the Federal Court of Australia (White and Moshinsky JJ; Davies J dissenting) erred in holding that an employee of an entity holding a licence to warehouse dutiable goods could never be "a person who has, or has been entrusted with, the possession, custody or control of dutiable goods" within the meaning of s 35A(1) of the Act.

- The Full Court of the Federal Court of Australia (White and Moshinsky JJ; Davies J dissenting) erred in holding that, given the proper construction of s 35A(1) of the Act, the statutory demand issued by the appellant to the respondent employee was invalid and of no effect.

McPHILLAMY v THE QUEEN (S121/2018)

Court appealed from: New South Wales Court of Criminal Appeal [2017] NSWCCA 130

Date of judgment: 14 June 2017

Special leave granted: 20 April 2018

The appellant was convicted of six offences involving acts of indecency or sexual intercourse committed upon the complainant between November 1995 and March 1996. At the relevant time, the complainant was an altar boy at Bathurst Cathedral and the appellant was an acolyte responsible for supervising altar servers.

At trial, the Crown sought to rely upon the evidence of two other witnesses, TR and SL. That evidence related to sexual assaults committed upon them by the appellant 10 years earlier. Those assaults occurred while the appellant was an assistant house master at St Stanislaus' College, Bathurst. It was relied upon as tendency evidence to prove that the appellant had a sexual interest in early teenage boys, a tendency which he had acted upon with TR and SL. The trial judge admitted that evidence, but failed to deliver reasons for that ruling.

Upon appeal before the New South Wales Court of Criminal Appeal ("CCA"), the issue was whether the admission of the tendency evidence resulted in a miscarriage of justice.

On 14 June 2017 the CCA (Harrison & Hulme JJ; Meagher JA dissenting) dismissed the appellant's appeal. The majority held that both the earlier and the charged conduct concerned the appellant taking advantage of his position of responsibility for early teenage boys. They found that any differences between the precise circumstances of each incident did not detract from an overriding similarity between the sets of conduct. The majority further held that the passage of time between the earlier and the charged conduct did not fatally imperil the strength of the tendency evidence relied upon. Furthermore, that tendency was capable of being regarded by a jury as enduring rather than temporary. If it was the latter, then it would have no relevant bearing upon the proof of the charged conduct.

Justice Meagher however found that whilst the earlier conduct manifested a sexual interest in young boys, it did not show that the appellant was prepared to act on that interest in circumstances similar to those in which the charged offences occurred. His Honour found that the absence of a sufficient similarity between the earlier and the charged conduct prevented the earlier evidence from having any significant probative value.

All Justices found however that a failure to give reasons (to admit the tendency evidence) would not ordinarily result in a substantial miscarriage of justice. This was in circumstances where there was no significant procedural unfairness resulting from the absence of reasons, and where the appellate court was able to assess for itself whether the evidence was properly admitted.

The grounds of appeal are:

- The majority of the CCA erred in holding that the tendency evidence had significant probative value.

- The majority of the CCA erred in holding that the probative value of the tendency evidence substantially outweighed its prejudicial effect.

COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA v TOMARAS & ORS (B9/2018)

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

Date of judgment: 13 October 2017

In July 2009 the first respondent ("the Wife") and the second respondent ("the Husband") separated after 17 years of marriage. In November 2009 a Deputy Commissioner of Taxation obtained a default judgment against the Wife in the amount of $127,669.36 (including costs and interest) for unpaid debts comprising income tax, the Medicare Levy, penalties and general interest charge ("GIC"). The Wife did not pay the judgment debt and in the ensuing years GIC continued to accrue.

In December 2013 the Wife commenced proceedings against the Husband in the Federal Circuit Court, seeking an alteration of their property interests under s 79 of the *Family Law Act* 1979 (Cth) ("the Act"). The orders sought by the Wife included an order that the Husband execute documents to release her from and indemnify her against certain tax and bank liabilities, and an order that the Husband be responsible for all tax payable on income that would come to be received by the Wife to a particular point in time. The appellant ("the Commissioner") then intervened in the proceedings.

On 22 August 2016 Judge Purdon-Sully stated the following question ("the Question") for the opinion of the Full Court of the Family Court:

> *Does s 90AE(1)-(2) of the Act grant the court power to make Order 8 of the final orders sought in the amended initiating application of the Wife?*

Order 8 in its amended form was in effect as follows:

8. *Pursuant to s 90AE(1)(b) of the Act, in respect of the Wife's indebtedness to the Commissioner for taxation-related liabilities in the amount of $256,078.32 as at 9 August 2016 plus GIC, the Husband be substituted for the Wife as the debtor and the Husband be solely liable to the Commissioner for the said debt.*

Before the Full Court of the Family Court (Thackray, Strickland and Aldridge JJ), the Commissioner's position was argued on the basis that a Presumption that statutory provisions expressed in general terms do not bind the Crown ("the Presumption") applied in respect of s 90AE and that the Presumption was not rebutted by any discernible legislative intention that the Crown be bound.

The Full Court answered the Question as follows:

> *Yes, but with the proviso that s 90AE(1) confers power only to make an order that the Commissioner be directed to substitute the Husband for the Wife in relation to the debt owed by the Wife to the Commissioner.*

In construing s 90AE, the Full Court took the Commissioner to be a "creditor" of a party to a marriage in respect of any tax-related liability of the party that was due and payable. In that regard, their Honours noted that the *Taxation Administration Act* 1953 (Cth) provided (in Sched 1, s 255-5) that such a liability was a debt due to the Commonwealth, payable to the Commissioner.

Thackray and Strickland JJ held that there was no question of whether the Presumption was rebutted, as the Presumption did not apply to s 90AE at all. This was because the Presumption applied only to provisions that imposed an obligation or restraint on the Crown, and an order made under s 90AE would not inevitably have such an effect. Rather, an order under s 90AE would have an adverse effect on the Crown (in this case, the Commissioner) only in the event of an unforeseeable default by the substitute debtor.

Aldridge J generally agreed with Thackray and Strickland JJ and concurred with their answer to the Question. His Honour however considered that although an order made under s 90AE in relation to tax liabilities would impose an obligation or restraint on the Crown, that impact was a relevant consideration rather than a threshold issue in determining whether the Crown was bound. Aldridge J also considered that a substitution of debtor did not sit well with the right of objection to an assessment for tax that was available to the "taxpayer" under s 175A of the *Income Tax Assessment Act* 1936 (Cth), "taxpayer" being defined in that Act as a person deriving income, profit or capital gains. His Honour however found no practical difficulty for the Commissioner and considered that the issue was not of critical significance.

The grounds of appeal are:

- The Full Court erred at [16]-[20] (Thackray and Strickland JJ) in concluding that the Presumption that the Crown is not bound by a statute did not apply in the construction of s 90AE of the Act.

- The Full Court erred, in obiter, in concluding at [59] (Thackray and Strickland JJ) and [61] (Aldridge J) that, if the Presumption had applied, it would have been rebutted in respect of s 90AE of the Act.

- The Full Court should have held, particularly having regard to the detailed code constituted by the taxation laws, that "creditor" in s 90AE(1) and "third party" in s 90AE(2) does not include the Commissioner or the Commonwealth and that "debt" in s 90AE(1) does not include tax-related liabilities.

WORK HEALTH AUTHORITY v OUTBACK BALLOONING PTY LTD & ORS (D4/2018)

Court appealed from: Court of Appeal of the Northern Territory [2017] NTCA 7

Date of judgment: 19 October 2017

Special leave granted: 20 April 2018

On 13 July 2013 Ms Stephanie Bernoth was among passengers boarding a hot air balloon operated by the First Respondent ("Outback"). As Ms Bernoth was boarding, her scarf was sucked into the balloon's inflation fan. Ms Bernoth sustained neck injuries from which she later died.

The appellant ("the WHA") laid a complaint charging Outback with an offence under s 32 of the *Work Health and Safety (National Uniform Legislation) Act* 2011 (NT) ("the NT Act") of failing to comply with a duty of care (imposed by s 19(2) of the NT Act) to ensure, so far as was reasonably practicable, that Ms Bernoth's health and safety were not put at risk. On 6 November 2015 a magistrate dismissed the complaint, holding that the NT Act could not operate because Commonwealth civil aviation legislation "covered the field" of all aspects of the safety of air operations.

The WHA sought judicial review by the Supreme Court and on 24 April 2017 Barr J quashed the magistrate's decision. His Honour found that the Commonwealth legislative and regulatory scheme for air safety in Australia did not evince an intention to completely state the law governing the pre-flight operations of balloon aircraft. The magistrate therefore had jurisdiction to hear and determine the complaint under the NT Act.

The Court of Appeal (Southwood, Blokland & Riley JJ) unanimously allowed an appeal by Outback, after reviewing relevant Acts, regulations and legislative instruments. Their Honours observed that the Civil Aviation Regulations 1988 (Cth) ("the CA Regulations") empowered the Civil Aviation Safety Authority ("CASA") to give directions on the loading of persons on aircraft and that CASA had given such a direction in relation to manned balloons. Southwood and Blokland JJ found that under Commonwealth law Outback's pilot was obliged to take all reasonable steps to point out the dangers of the balloon's inflation fan and to supervise the area around it. That was pursuant to duties imposed by the operation of ss 20A, 28BA(1), 28BD(1), 28BE(1), 29(1) and (3), and 98(5) of the *Civil Aviation Act* 1988 (Cth) ("the CA Act"), regs 215 and 235(7) and (7A) of the CA Regulations, and Appendix 2 of Civil Aviation Order 82.7. The pilot was amenable to prosecution under s 29 of the CA Act for any failure to carry out those duties or for carrying them out recklessly. The Court of Appeal held that the Commonwealth law was a complete statement of the law governing the loading of passengers on to a passenger balloon. Consequently the NT Act did not operate through s 19(2) to impose a duty on Outback.

The WHA and Outback have each filed a notice of a constitutional matter. The Attorneys-General of the Commonwealth, Victoria, Queensland, Western Australia and Tasmania are all intervening in the appeal.

The grounds of appeal include:

- In erroneously deciding that, by the *Air Nagivation Act* 1920 (Cth), the CA Act, the CA Regulations, Civil Aviation Safety Regulations 1998 (Cth), Civil Aviation Orders, and various "normative instruments" (being instruments issued by CASA under s 98(5A) and falling within s 98(5AA) of the CA Act) ("Civil Aviation Law"), the Parliament intended to deal completely and exclusively with the law governing the use by Outback of the inflation fan, used to inflate its hot air balloon, into which the deceased's scarf was drawn, causing her death, whilst approaching the balloon's basket for the purpose of embarking as a passenger, with the effect that the NT Act had no operation in respect of the incident, the Court of Appeal failed to take into account the *Work Health and Safety Act* 2011 (Cth), which comprises the Commonwealth's contribution to a national legislative scheme (of which the NT Act was part) to regulate the health and safety in workplaces, including aircraft, and so confirms the Parliament's intention not to deal completely and exclusively by the Civil Aviation Law with the law governing the use of the fan in Outback's workplace.

Outback has filed a notice of contention, the grounds of which include:

- The Court of Appeal should also have found that ss 19(2), 27 and 32 of the NT Act in their application to flight operations of the holder of an Air Operator's Certificate varied, detracted from or impaired the operation of ss 28BD and 29(1) of the CA Act together with reg 215 of the CA Regulations and Civil Aviation Order 82.7.

SAS TRUSTEE CORPORATION v MILES (S260/2017)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 86

Date of judgment: 4 May 2017

Special leave granted: 20 October 2017

In September 2003 Mr Peter Miles was medically discharged from the NSW Police Force, due to infirmities in his spine (both lumbar and cervical), his left shoulder and his right knee. At that time, a delegate of the Commissioner of Police certified that those infirmities made Mr Miles incapable of performing police duties and that they were caused by Mr Miles having been "hurt on duty".

The delegate's certification entitled Mr Miles to an annual superannuation allowance equal to 72.75% of his "attributed salary of office" ("salary") under s 10(1A)(a) of the *Police Regulation (Superannuation) Act* 1906 (NSW) ("the Act"). Between 2004 and 2011 Mr Miles made several applications to the appellant ("STC"), and one to the District Court, for an addition to his salary percentage under s 10(1A)(b) of the Act such that he would be entitled to an allowance at the maximum rate of 85% of salary. Experiencing mixed success, Mr Miles was left with an annual allowance of 82.55% of salary (payable from September 2003), pursuant to a District Court order made in 2006. From 2008 onwards, the increase sought by Mr Miles was on the basis that he suffered from post-traumatic stress disorder ("PTSD") in addition to the infirmities certified in 2003.

After another application to STC was refused in 2015, Mr Miles again applied to the District Court. Judge Neilson found that PTSD had increased Mr Miles' incapacity to work but nevertheless confirmed STC's decision. His Honour held that, although s 10(1A)(b) of the Act required that any additional allowance be commensurate with incapacity for work outside the police force, only those infirmities of body or mind specified in a certification pursuant to s 10B of the Act could be taken into account.

The Court of Appeal by majority (Payne JA and Sackville AJA; Schmidt J dissenting) allowed an appeal by Mr Miles and remitted the matter to the District Court for redetermination. The majority considered that the structure of s 10(1A) as a whole supported the view that the relevant consideration was incapacity for work outside the police force. Their Honours held that the terms of s 10(1A)(b) of the Act did not imply that an additional entitlement was to be based only on those infirmities which created the entitlement to the minimum allowance under s 10(1A)(a).

Justice Schmidt however found that the additional entitlement under s 10(1A)(b) sought by Mr Miles could be granted only upon a certification by STC under s 10B(2)(c) of incapability of exercising the functions of a police officer due to specified infirmities, coupled with a decision by the Commissioner of Police under s 10B(3) that those infirmities were caused by Mr Miles having been hurt on duty.

The grounds of appeal are:

- The Court of Appeal erred in its construction of s 10(1A)(b) of the Act by failing to construe the provision in its context.

- The Court should have held that, properly construed, the provision did not authorise the payment of additional amounts of superannuation allowance unless the claimant's incapacity for work outside the police force is due to an infirmity determined by the Commissioner under s 10B(3) to have been caused by the claimant having been hurt on duty.