

SHORT PARTICULARS OF CASES
APPEALS

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QANTAS AIRWAYS LIMITED & ANOR v TRANSPORT WORKERS UNION OF AUSTRALIA (S153/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 71

Date of judgment: 4 May 2022

Special leave granted: 18 November 2022

On 30 November 2020, at a time when most commercial flights had been grounded due to the COVID-19 pandemic, a decision was made by Qantas Airways Ltd (“QAL”) to outsource the work of its ground handling operations at ten Australian airports to third-party providers (“the Decision”). Such work had long been carried out by employees of QAL and by employees of Qantas Ground Services Pty Ltd (“QGS”), a subsidiary of QAL. The Decision’s implementation in early 2021 resulted in affected employees of QAL and QGS being either redeployed or retrenched.

The Decision was the culmination of a series of decisions and steps that had commenced in June 2020. It followed the assessment of a competing in-house bid, made by the Transport Workers Union of Australia (“the TWU”), for the ground handling services to continue to be provided by employees of QAL and QGS. The Decision had the effect of preventing those employees from taking protected industrial action (“PIA”) under the *Fair Work Act 2009* (Cth) (“the Act”). In the case of QAL employees, this was because s 417 of the Act prohibited any industrial action before the passing of the nominal expiry date of an enterprise agreement (“EA”), the relevant date for those employees being 31 December 2020. QGS employees, who had commenced bargaining for a new EA, were rendered unable to take PIA because necessary preliminary events required under Part 3-3 of the Act, including a PIA ballot, had not occurred.

The TWU applied to the Federal Court for the reinstatement of the affected employees. The TWU’s grounds included an alleged contravention of s 340(1)(b) of the Act, which prohibits the taking of adverse action to prevent a person from exercising a workplace right. In its defence, QAL sought to overcome a rebuttable presumption prescribed in s 361(1) of the Act. That presumption, in its application to this case, was to the effect that the Decision had been made with an intention of depriving affected employees of the ability to take PIA.

The primary judge, Lee J, found that QAL had contravened s 340(1)(b) by taking adverse action for reasons which included to prevent the exercise, in 2021, of the workplace right of employees of QAL and QGS to engage in PIA or a PIA ballot for the purpose of advancing claims in relation to a proposed EA and to participate in enterprise bargaining. The adverse action was the prejudicial altering of the positions of the QAL employees and the prejudicial altering of QGS’s position in relation to a contract for services that it had with QAL. His Honour found that, although QAL faced a business calamity and the outsourcing of ground handling operations would enable large cost savings, QAL had not established that the Decision had not been made partly to prevent the exercise by the affected employees of their workplace right to engage in PIA and participate in bargaining in 2021.

QAL and QGS appealed, contending that the prohibition prescribed in s 340(1)(b) of the Act applied only to workplace rights which existed at the time the adverse action was taken, and therefore it could not apply in this case because the affected employees lacked a present entitlement to take PIA at the time of the Decision. The Full Court of the Federal Court (Bromberg, Rangiah and Bromwich JJ) unanimously dismissed the appeal. Their Honours held that the prohibition applied to indirect means of taking adverse action, and that neither the text of s 340(1)(b) nor the use of the present tense in the definition of “workplace right” in s 341(1) limited the prohibition to workplace rights which existed at the time of the adverse action.

The sole ground of appeal is:

- The Full Court erred in concluding that the prohibition in s 340(1)(b) of the Act extends to adverse action to prevent the exercise of a workplace right which does not presently exist at the time of the adverse action, including where such exercise is prohibited or restricted by the Act.

The TWU seeks an enlargement of time in which to file a Notice of Contention, to raise the following grounds:

- The affected employees had a presently existing right to take protected industrial action or participate in a protected action ballot as s 340(1)(b) of the Act extends to the prevention of the exercise of presently existing contingent rights including where the exercise of those rights is prohibited or restricted by the Act at the time the adverse action is taken; and
- The primary judge found QAL had taken the adverse action to, amongst other things, prevent affected employees from exercising a workplace right to engage in enterprise bargaining, which they had a present ability to engage in at the time the adverse action was taken.

The Commonwealth’s Minister for Employment and Workplace Relations has filed submissions in the appeal, asserting a right to intervene under s 569(1) of the Act (and in the alternative seeking leave to intervene, should leave be necessary). The appellants filed a Notice of a Constitutional Matter. No Attorney-General is intervening in the appeal, however.

**AZC20 v MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ORS
(M84/2022 & M85/2022)**

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 52

Date of judgment: 5 April 2022

Special leave granted: 11 November 2022

The appellant (“AZC20”), a citizen of Iran, arrived by boat in Australia in July 2013 and has been in immigration detention ever since. After the Minister exercised his personal power conferred under s 46A of the *Migration Act 1958* (Cth) (“the Act”) in August 2015, AZC20 applied for a temporary protection visa. This was refused by a delegate of the Minister on 9 May 2018. The delegate’s decision was referred to the Immigration Assessment Authority (“the IAA”), which affirmed that decision in March 2019. (After a successful judicial review of the IAA’s decision, the IAA again affirmed the delegate’s decision).

AZC20 then began proceedings in the Federal Court (“VID89/2021”), seeking various orders, including relief for alleged false imprisonment and orders requiring his removal to Iran. He also sought a writ of habeas corpus, relying on the Federal Court decision of *AJL20 v Commonwealth of Australia* [2020] FCA 1305 (“AJL20 FCA”). The primary judge made orders by consent splitting VID89/2021 into two parts and expediting the hearing of the habeas corpus claim. In that claim, AZC20 contended that the failure to remove him as soon as reasonably practicable was a failure to perform the duty in s 198AD(2) of the Act. After the hearing of the habeas corpus application, and while judgment was reserved, the High Court delivered judgment in *Commonwealth of Australia v AJL20* [2021] HCA 21, overturning AJL20 FCA.

AZC20 then filed a new originating application seeking mandamus, requiring the Commonwealth to affect his removal to a regional processing country under s 198AD(2). The Commonwealth challenged the jurisdiction of the Federal Court to consider this application in its original jurisdiction; as a result, AZC20 began other proceedings in the Federal Circuit and Family Court of Australia which were then transferred by consent to the Federal Court, and to the docket of the primary judge. That mandamus application (“VID503/2021”) was heard by the primary judge, and his Honour then published orders and reasons dealing with both VID89/2021 and VID503/2021 on 13 October 2021. The primary judge dismissed the habeas corpus application, but made a declaration that s 198AD applied to AZC20 and there had been a failure to perform the duty required by s 198AD(2). The primary judge also granted mandamus requiring that AZC20 be taken to a regional processing centre and made orders concerning AZC20’s detention arrangements pending such removal (which at that time could only be to Nauru).

The respondents appealed to the Full Court of the Federal Court. The Full Court was informed that, shortly after the primary judge’s orders had been made, the Minister made a determination under s 198AE(1) of the Act that s 198AD(2) did not apply to AZC20. In effect, this quelled the controversy between the parties about the application of s 198AD(2) to AZC20. Nauru also advised Australia that it would not accept AZC20. These developments meant the mandamus order was

rendered inapplicable, and there was no basis for the detention arrangement orders to be carried into effect.

There were four issues before the Full Court:

- (a) Whether the Court should hear and determine the appeals in circumstances where the primary judge's orders had no continuing effect. The Court found that determination of the appeals had utility both for the parties and because of the ramifications for other proceedings raising similar issues.
- (b) Whether leave to appeal the (interlocutory) detention arrangement orders should be granted. The Court granted leave noting the issues of wider importance raised regarding the interpretation, application, and operation of the Act.
- (c) Whether s 198AD applied to AZC20. The Court found that s 198AD(2) does not apply to a person the subject of a favourable decision under s 46A(2) of the Act, and that such a person is instead subject to the removal powers in s 198 of the Act. (That conclusion is not challenged in the High Court appeals).
- (d) Whether s 23 of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act") conferred power on the primary judge to make the detention arrangement orders. The Court held that the primary judge erred in characterising the detention arrangement orders as within paragraph (a) of the definition of immigration detention in s 5. The Court further found that s 23 of the FCA Act did not confer the power to make those orders.

Following the hearing of the appeals, the respondents amended their notices of appeal to reflect their position at the hearing that they would not seek costs from AZC20 if their appeals succeeded. The Full Court granted the respondents leave to appeal the home detention order and allowed the appeals.

The grounds of appeal in this Court are:

- The Full Court of the Federal Court of Australia erred by:
 - (i) hearing and determining the respondents' applications and appeals in circumstances where there was no 'matter' within the meaning of Chapter III of the *Constitution*; or
 - (ii) in the alternative, granting leave to appeal an interlocutory order (being order 3 made by the Federal Court of Australia on 13 October 2021 in proceeding VID89/2021 and VID503/2021 ("the primary order")) that never came into operation and had no prospect of coming into operation, including by granting leave without considering or applying the 'substantial injustice' test.
- In the alternative to the first ground, the Full Court of the Federal Court of Australia erred in respect of orders 3 and 4 made on 5 April 2022 in proceedings VID659/2021 and VID660/2021 to the extent they relate to the primary order by:

- a. introducing an uncertain temporal element and/or a purposive element into paragraph (a) of the definition of 'immigration detention' in s 5 of the *Migration Act 1958* (Cth); or
- b. in the alternative to (a) above, concluding that the arrangement contemplated by the primary order did not satisfy the temporal and/or purposive element of paragraph (a) of the definition of 'immigration detention' in s 5 of that Act; and
- c. concluding that the primary order was beyond the power granted by s 23 of the *Federal Court of Australia Act 1976* (Cth) and/or failing to conclude that the primary order was within the power granted by s 22 of that Act.

LANG v THE QUEEN (B57/2022)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2022] QCA 29

Date of judgment: 8 March 2022

Special leave granted: 11 November 2022

In December 2017, the appellant was convicted of the murder of the deceased, with whom he had been in a romantic relationship. Upon a successful appeal to the Court of Appeal (on a different ground to the grounds in the present appeal), the appellant's conviction was quashed and he was granted a re-trial. On 30 November 2020, the appellant was again convicted of the murder of the deceased and sentenced to life imprisonment. The appellant then appealed that decision to the Court of Appeal on the basis that the verdict was unreasonable and unsupported having regard to the whole evidence, and that there was a miscarriage of justice due to the forensic pathologist, Dr Ong, being permitted to provide opinion that the deceased's fatal wound was more likely caused by another person rather than being self-inflicted. The Court of Appeal dismissed the appeal.

The deceased died in bed in her apartment as a result of blood loss from a knife wound to the abdomen. The knife was one of the deceased's kitchen knives, and only the deceased and the appellant were in the apartment around the time of her death. It was common ground at trial that there are only two possible explanations in this scenario – either suicide, or the appellant killed the deceased.

The Crown's position is that the appellant became enraged when he read text messages between the deceased and another man and stabbed her to death. An important part of the Crown's case is that the appellant lied about the manner and time by which the deceased's mobile phone was thrown off the balcony, demonstrating a consciousness of guilt.

The appellant's position is that the deceased died by suicide, after the appellant went to bed in a separate bedroom due to being in an already depressive state. When the appellant discovered her body, he called emergency services. The appellant submits there was no forensic evidence linking him to the deceased's death, and it was not open to the jury, acting rationally, to have eliminated all reasonable doubt with respect to his guilt when taking a holistic view of the available evidence, including that of the deceased's mental health in the lead-up to her death.

The central issue to this appeal is whether the Crown can exclude the reasonable possibility that the deceased died by suicide in circumstances where the crime scene was inconsistent with a struggle having taken place, the appellant's blood and DNA were not found on the knife, and where Dr Ong gave evidence that the deceased was capable of self-inflicting the injury, was not smothered or asphyxiated, and had the ability to fight off an attacker notwithstanding the presence of prescription drugs and alcohol in her system. That said, Dr Ong also gave evidence that it was more likely that the deceased's wound was caused by a second party due to the nature of the multiple stab wounds and rotation of the knife, although he could not exclude that it was a self-inflicted injury.

The Crown's case was entirely circumstantial. The appellant challenges the manner in which the Court of Appeal considered the evidence in a circumstantial case, including their acceptance that the appellant's lie regarding the deceased's mobile telephone showed a consciousness of guilt of murder, and their failure to undertake any meaningful analysis of the evidence which pointed to the death being a suicide, thereby failing to ask the ultimate question of whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt upon the whole of the evidence. The appellant also challenges the admissibility of Dr Ong's opinion that the deceased's wound was more likely caused by another party in that it was substantially based on his personal, subjective view, rather than on expert knowledge gained by reason of his training, study and experience, which had the effect of giving rise to a risk that the jury would have placed undue weight on inadmissible evidence.

The grounds of appeal are:

- The Court of Appeal erred in finding that the guilty verdict was not unreasonable as, on the whole of the evidence, there is a reasonable possibility that the deceased committed suicide.
- The Court of Appeal erred in finding that the forensic pathologist's opinion that the deceased's wound was more likely inflicted by a second person than by the deceased herself was admissible because it was not an opinion based on his expert knowledge.

McNAMARA v THE KING (S143/2022)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
New South Wales
[2021] NSWCCA 160

Date of judgment: 16 July 2021

Special leave granted: 21 October 2022

In 2016, a jury found Mr Glen McNamara and Mr Roger Rogerson guilty of the 2014 murder of Mr Jamie Gao, after a joint trial of the two accused. Mr Gao had been shot dead in a self-storage unit during a meeting with Messrs McNamara and Rogerson. Six days later, Mr Gao's body was found at sea.

The prosecution case against Mr McNamara and Mr Rogerson was that the two had participated in a joint criminal enterprise that involved luring Mr Gao to the storage unit, stealing drugs from him, killing him, and disposing of his body. The defence of each of the accused was that the other man had arranged to meet Mr Gao and had shot him.

On the 49th day of the trial, Mr McNamara's counsel foreshadowed evidence intended to be led from Mr McNamara of a conversation between the two accused three months prior to the killing of Mr Gao ("the Conversation"). The Conversation, along with evidence of an alleged verbal exchange between the two accused immediately after Mr Gao had been shot ("the Exchange"), was intended to support Mr McNamara's case that he had cooperated in the disposal of Mr Gao's body under duress because he feared Mr Rogerson. The Conversation involved Mr Rogerson recounting his having killed certain people and his having been involved in the deaths of others. Mr Rogerson also allegedly said that he had shot a Mr Drury (who, like Mr Rogerson and Mr McNamara, was a former police officer). The Exchange was said to have occurred immediately after Mr Gao had been shot, Mr McNamara asking "Why? Why? Why?", to which Mr Rogerson allegedly replied that he had "done" Drury and that he would kill him (Mr McNamara) and his daughters unless Mr McNamara cooperated.

The trial judge, Bellew J, excluded from the trial evidence of both the Conversation and the alleged remark by Mr Rogerson in the Exchange that he had "done" Drury. This was under s 135(a) of the *Evidence Act 1995* (NSW) ("the Evidence Act"), on the basis that any probative value of the proposed evidence was substantially outweighed by the danger that it might be unfairly prejudicial to Mr Rogerson. His Honour considered that the admission of the proposed evidence would leave the jury with the impression that Mr Rogerson had been complicit in other murders and that the danger of unfair prejudice was so great that it could not be cured by a direction to the jury. This was after Bellew J had concluded that, although the proposed evidence was relevant to the issue of duress, it added little because the real basis of the duress asserted by Mr McNamara was the combination of the shooting and the threat made by Mr Rogerson immediately afterwards.

Section 135 of the Evidence Act, which is applicable to both civil and criminal proceedings, relevantly provides that:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—
(a) *be unfairly prejudicial to a party, ...*

On an appeal against his conviction, Mr McNamara contended that evidence in his case could not properly be excluded under s 135(a) with reference to Mr Rogerson's case, because in a criminal proceeding a co-accused was not relevantly a party.

The Court of Criminal Appeal ("CCA") (Bell P, R A Hulme and Beech-Jones JJ) unanimously dismissed Mr McNamara's appeal. Their Honours made their own evaluation of the probative value and the danger of unfair prejudice, and held that the evidence proposed to be led by Mr McNamara had correctly been excluded from the trial. The CCA considered that although it was more common to speak of "a party" to civil proceedings, other provisions in the Evidence Act applicable to criminal proceedings used the term, and the term was apt to describe each of those persons participating in a proceeding whose rights and liabilities may be affected by the evidence adduced. The reference in s 135(a) to "a party" therefore extended to a co-accused in a joint trial. Their Honours further considered that the question of whether a joint trial should be severed formed no part of the analysis of s 135, and they observed that Mr McNamara had not applied for severance after the trial judge's exclusion of the proposed evidence.

The sole ground of appeal is:

- That the CCA erred in law by holding that in s 135(a) of the Evidence Act the expression "... *unfairly prejudicial to a party*" – the word "*party*" extends to and includes a co-accused in a joint trial.

BROMLEY v THE KING (A40/2021)

Court appealed from: Supreme Court of South Australia
Court of Criminal Appeal
[2018] SASCF 41

Date of judgment: 29 May 2018

Application for special leave referred: 16 September 2022

In March 1985, the applicant (“Bromley”) and his co-accused (“Karpany”) were convicted by a jury of murder. At trial, the prosecution led evidence from an eyewitness (“Carter”), who suffered from schizoaffective disorder. He gave evidence of having accompanied Bromley, Karpany and the deceased to the banks of the River Torrens in the early hours of the morning of 4 April 1984, and of having witnessed the deceased refuse demands by Bromley and Karpany for sexual intercourse, and the subsequent infliction by them of violence upon the deceased. The prosecution led substantial circumstantial evidence inculpating Bromley, including pathological evidence given by Dr Manock, who conducted the post-mortem. He considered that: the cause of death was drowning; that there were bruises on the deceased’s body which were caused within 24 hours of his death; and that there was evidence suggesting that the deceased was unconscious prior to his death. Bromley’s position has always been that he was not present with the other three men at any time. He has maintained his innocence throughout.

Both Bromley and Karpany appealed against their convictions. One of Bromley’s grounds was that it was unsafe to convict him on the basis of Carter’s evidence, in light of his mental illness. In July 1985, both appeals were dismissed by the Court of Criminal Appeal (“CCA”). The High Court dismissed Bromley’s application for special leave to appeal in September 1986. Later petitions for mercy submitted by Bromley in 2006 and 2011 were refused. Bromley sought permission to appeal a second time, pursuant to s 353A of the *Criminal Law Consolidation Act 1935* (SA) (“the CLCA Act”), against his conviction for murder. He adduced expert evidence concerning the reliability of Carter in the light of his mental illness (the “new psychiatric evidence”); and concerning the reliability of Dr Manock’s evidence (the “new pathological evidence”). Bromley also sought to rely on further evidence concerning certain other matters. The respondent sought to adduce further evidence relevant to the assessment of whether Bromley had established the requirements of s 353A of the CLCA Act.

The CCA refused permission to appeal, finding that the new psychiatric and new pathological evidence, considered separately or as a cumulative whole, did not satisfy the requirement that the evidence be “compelling”, as it was not “highly probative in the context of the issues in dispute at the trial of the offence” (as required by s 353A(6)(b)(iii) of the CLCA Act). In the alternative, it was not “in the interests of justice”, as required by s 353A(1) of the CLCA Act, for Bromley’s evidence to be considered on a substantive appeal as it was not “compelling” when viewed in conjunction with the respondent’s further evidence which established that there was no significant possibility that a jury in the trial of Bromley, acting reasonably, would have acquitted him had the totality of the evidence proffered by both Bromley and the respondent been before it. In the further alternative, if permission to appeal should be granted, then having regard to the cumulative effect of all of the evidence and facts and circumstances, Bromley had not, by reference to the test in *R v Mickelberg* [1989] HCA 35

(endorsed in *R v Van Beelen* [2017] HCA 48), demonstrated that a substantial miscarriage of justice had occurred.

Bromley's application for special leave to appeal has been referred to an expanded Full Court to be argued as on appeal on only two of the proposed grounds in the special leave application.

The proposed grounds of appeal are:

- That the Court of Criminal Appeal erred in finding that the new psychiatric and psychological evidence was not "compelling" because it was not "highly probative in the context of issues in dispute at the trial of the offence."
- That the Court of Criminal Appeal erred in finding that it was not in the "interests of justice" to consider the applicant's evidence on the basis that such evidence was not "compelling" when viewed in light of the respondent's additional evidence.