SHORT PARTICULARS OF CASES

APPEALS

COMMENCING TUESDAY, 4 DECEMBER 2012

****

ASSISTANT COMMISSIONER MICHAEL JAMES CONDON v. POMPANO PTY LTD (ACN 010 634 689) & ANOR (B59/2012)

Court from which cause removed: Supreme Court of Queensland

Date cause removed: 5 October 2010

Date special case referred to Full Court: 26 October 2012

On 1 June 2012 the applicant filed an originating application in the Supreme Court of Queensland seeking a declaration pursuant to s 8 of the *Criminal Organisation Act* 2009 (Qld) ("the Act") that the second respondent, the Finks Motorcycle Club, Gold Coast Chapter, was a 'criminal organisation' and that the first respondent, Pompano Pty Ltd, was part of that organisation.

The grounds of the application allege that the respondents jointly comprise an organisation consisting of a group of more than three people based inside Queensland, that its members associate for the purposes of engaging in or conspiring to engage in serious criminal activity as defined in ss 6 and 7 of the Act and that the organisation is an unacceptable risk to the safety, welfare and order of the community.

The originating application contains a large number of allegations with respect to each of the applicants and in respect of persons alleged to be members, former members and nominee members of the alleged organisation. Under the heading "Information Supporting the Grounds" the originating application pleads various allegations concerning, inter alia, the criminal and traffic histories of alleged members, former members and nominee members of the pleaded organisation and alleged interactions of those persons with police. The originating application further pleads that a number of those persons have engaged in and/or been convicted of identified criminal offences.

The questions stated for the opinion of the Court include:

- Is s 66 of the Act, by requiring the Court to hear an application that particular information is criminal intelligence without notice of the application being given to the person or organisation to which the information relates, invalid on the ground that it infringes Chapter III of the *Constitution*?

- Is s 70 of the Act, by requiring the Supreme Court to exclude all persons other than those listed in s 70(2) from the hearing of an application for a declaration that particular information is criminal intelligence, invalid on the ground that it infringes Chapter III of the *Constitution*?

- Is s 78 of the Act, by requiring a closed hearing of any part of the hearing of the substantive application in which the court is to consider declared criminal intelligence, invalid on the ground that it infringes Chapter III of the *Constitution*?

- Is s 76 of the Act, by providing that:
  - an informant who provides criminal intelligence to an agency may not be called or other required to give evidence;
  - an originating application and supporting material need not include any identifying information about an informant; and
  - identifying information cannot otherwise be required to be given to the court,

  invalid on the ground that it infringes Chapter III of the *Constitution*?

The first and second respondents have issued notices pursuant to section 78B of the *Judiciary Act*. The Attorney-General of the Commonwealth of Australia and the Attorneys-General for the States of Queensland, South Australia, New South Wales, Victoria, Western Australia and the Attorney-General for the Northern Territory are intervening.

HUYNH v THE QUEEN (A30/2012); SEM v THE QUEEN (A32/2012); DUONG v THE QUEEN (A31/2012)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia [2011] SASCFC 100

Date of judgment: 31 August 2011

Date special leave granted (Huynh): 7 September 2012

Application referred into a to Full Court (Sem & Duong): 17 October 2012

Kiet Huynh, Rotha Sem and Chansya Duong ("the accused") were convicted of the murder of Thea Kheav after a trial by jury in the Supreme Court of South Australia. Kheav was fatally stabbed in the course of a brawl that erupted at the end of a birthday party on 2 December 2007 at a house in Parafield Gardens ("the Nguyen house"). Huynh, Sem and Duong were involved in the brawl, although the extent of their participation in it was a matter of dispute.

In their appeals to the Court of Criminal Appeal (Doyle CJ, Vanstone and Peek JJ), the accused submitted, inter alia, that the trial judge erred in failing to direct the jury that an essential step in the proof of guilt was proof that each of them participated in some way in the joint enterprise, if the jury were satisfied that there was a joint enterprise. In rejecting that argument, the Court found that there was no risk at all that the jury found any one of the accused guilty without finding that that accused participated in the joint enterprise to kill or to cause really serious bodily harm to Thea Kheav. The three accused travelled to the Nguyen house together. There was evidence that each of them was armed, and in different ways joined in the brawl. There was evidence linking them with an attack on Thea Kheav on the roadway outside the house. There was evidence before the jury linking each of the accused closely with the stage of the attack at which Thea Kheav was stabbed.

The case was based on the conduct of the three accused from which the jury might infer an arrangement or understanding to kill Thea Kheav or cause him serious bodily harm, and the carrying out of that arrangement. The issue was whether, from what the accused did, the jury were prepared to find that the necessary arrangement or understanding was made. Any such finding was necessarily based on evidence that amounted to proof of the making of the arrangement or understanding and participation in it. The Court held that participation in any agreement or arrangement was not the issue in this case. The real issue was what the jury made of the conduct of the accused, and whether that conduct established the relevant agreement or arrangement. If it did, it did it by establishing conduct that amounted to participation.

The accused also made submissions regarding the contents of a document containing directions of law that the trial judge gave to the jury, at the request of the jury, after they had retired to consider their verdict. The Court of Appeal did not uphold any of the grounds of appeal relating to the written directions.

The grounds of appeal are:

- The Court below erred in holding that the provision of a written direction, in response to a question by the jury for redirections in relation to all the critical legal issues in the case, was not fatally flawed where it omitted an essential ingredient of joint enterprise liability and it failed to apply the substituted legal directions to the evidence against the [accused].

- The Court below erred in law in not holding that the trial judge erred in failing to direct that liability by way of “joint criminal enterprise” required proof of an act of participation in the joint enterprise by the applicant.

TAHIRI v MINISTER FOR IMMIGRATIONAND CITIZENSHIP (M77/2012)

Date Special Case referred to Full Court: 30 October 2012

At issue in this proceeding is the proper construction of clause 202.228 and Public Interest Criterion (PIC) 4015 of the *Migration Regulations*. Clause 202.228 provides:

*202.228 If a person (in this clause called the **additional applicant**):*
(a) is a member of the family unit of the applicant; and
(b) has not turned 18; and
(c) made a combined application with the applicant —
public interest criteria 4015 and 4016 are satisfied in relation to the additional applicant.

Public Interest Criteria 4015 provides:

4015 The Minister is satisfied of 1 of the following:
(a) the law of the additional applicant's home country permits the removal of the additional applicant;
(b) each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa;
(c) the grant of the visa would be consistent with any Australian child order in force in relation to the additional applicant.

The Plaintiff's family are citizens of Afghanistan and of Hazara ethnicity. The Plaintiff's father went missing in early 2003, when he travelled to another province and did not return. After the father's disappearance, the mother and the family left Afghanistan and travelled to Pakistan. In March 2009, the Plaintiff left Pakistan to travel to Australia and arrived at Christmas Island in May 2009, as an unaccompanied minor. Ultimately he was allowed to apply for a protection visa and, as part of his application, gave evidence that his father had been missing since early 2003 and his family had not heard of him since. The Plaintiff was granted a protection visa in September 2009 and, in his reasons for that decision, the delegate accepted that the father had been missing as claimed.

In November 2009, the mother applied for a Refugee and Humanitarian visa and the Plaintiff proposed his mother's entry into Australia. Each of the Plaintiff's 4 minor siblings was included in the application as a "dependent" child. The mother stated in the application that her current country of residence was Pakistan. Consideration of the mother's application included an interview with the mother and the children, DNA testing of two of the children and a letter to the mother, described as an "invitation to comment and respond" regarding the custody of the minor children and whether the law of Afghanistan permitted removal of the children. In response, the mother provided two documents, one entitled "Aram High Court, Kabul, Afghanistan" and written in English and the other a translation into Persian of the first document: there was a further interview with the mother in relation to those documents. On 2 January 2012 a Delegate of the Defendant made the decision to refuse the visa and advised the mother that cl 202.228 and Public Interest Criterion (PIC) 4015 were not satisfied.

The Plaintiff filed an application for an order to show cause and, on 30 October 2012, Hayne J referred the Special Case agreed by the parties to the Full Court.

The Plaintiff submits that the mother ought to have been found by the Delegate to be the sole person who could determine where her minor children could live; that the Plaintiff's father ought to have been presumed dead; and that there had been a breach of natural justice, in that the mother was not properly informed of the critical issue on which the decision might turn, namely whether the father was dead (as opposed to missing).

The Defendant submits that it was open to the Delegate to find that the home country of each of the children was Afghanistan and that on the material before him, it was open to him not to be satisfied that the law of Afghanistan would permit the removal of the children; that the consent of the mother alone was not sufficient. The Delegate had accorded procedural fairness to the mother by inviting her to comment and respond and the Delegate was not required to presume the father to be dead, as opposed to accepting he was missing, but alive somewhere.

The questions reserved by the Special Case signed by the parties include:

- Did the Delegate make a jurisdictional error in finding that paragraph (a) of PIC 4015 was not satisfied in relation to each additional applicant?

- Did the Delegate make a jurisdictional error in finding that paragraph (b) of PIC 4015 was not satisfied in relation to each additional applicant?

- Was the decision made in breach of the rules of natural justice?

MALONEY v. THE QUEEN (B57/2012)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2012] QCA 105

Date of judgment: 20 April 2012

Date of grant of special leave: 5 October 2012

The appellant, Joan Maloney, is an Aboriginal woman who resides on Palm Island. On 31 May 2008 the appellant was charged with an offence under s 168B(1) of the *Liquor Act 1992* (Qld) ("the Liquor Act"), namely, having in her possession a 1125 ml bottle of Jim Beam bourbon and a 1125 ml bottle of Bundaberg rum (three-quarters full) in a public place on Palm Island within a restricted area declared under s 173H of the Liquor Act. As at 31 May 2008 section 168B(1) of the Liquor Act provided: "(1) A person must not, in a public place in a restricted area to which this section applies because of a declaration under section 173H, have in possession more than the prescribed quantity of a type of liquor for the area, other than under the authority of a restricted area permit." Section 168B(1) in combination with ss 37A and 37B of the *Liquor Regulation 2002* (Qld) and schedule 1R thereof ("the Liquor Regulation") prohibit the possession of more than a certain quantity of liquor by any person while in a public place or the canteen on Palm Island.

The appellant was convicted and she appealed her conviction to the Townsville District Court. She contended that the relevant Queensland legislation was not applicable because it was invalid pursuant to the operation of s 10 of the *Racial Discrimination Act 1975* (Cth) ("the RDA") and s 109 of the *Constitution*. Section 10(1) of the RDA relevantly provides:

> "If, by reason of, or of a provision of, a law ... of a State ..., persons of a particular race, ... do not enjoy a right that is enjoyed by persons of another race, ... or enjoy a right to a more limited extent than persons of another race, ... then, notwithstanding anything in that law, persons of the first-mentioned race, ... shall, by force of this section, enjoy that right to the same extent as persons of that other race..."

The District Court dismissed her appeal with costs.

The Court of Appeal held by majority (Chesterman JA and Daubney J) that s 10 of the RDA was not engaged**.** McMurdo P, dissenting, held that the appellant's enjoyment of rights to equal treatment before the law and of access to a service intended for use by the general public, namely the Palm Island licensed canteen were compromised by the provisions of the Liquor Act and Liquor Regulation. The Court held unanimously that the impugned provisions of the Liquor Act and Liquor Regulation were a special measure within the meaning of s 8 of the RDA even if under s 10 of the RDA they were racially discriminatory.

The grounds of appeal include:

- The Court erred in failing to find that Schedule 1R of the Liquor Regulation was inconsistent with s10 of the RDA and therefore invalid by reason of s 109 of the Constitution.

- A majority of the Court (Chesterman JA and Daubney J) erred in failing to find that the Liquor Restrictions contravened the appellant's rights under Articles 5(a) and 5(f) of the United Nations *Convention on the Elimination of All Forms of Racial Discrimination* namely:
    - The right to equality before the tribunals and organs administering justice (Article 5(a));
    - The right to access to goods and services (Article 5(f)),

  and, by reason of such contraventions, offended s 10 of the RDA and were invalid unless they were "*special measures"* within the meaning of s 10 of the RDA.

The respondent seeks to rely on a notice of contention. The respondent contends that the decision of the Court below should be affirmed on the ground that: "The Court of Appeal should have concluded that schedule 1R of the Liquor Regulation was not a law to which s 10 of the RDA applies because it did not, by its operation in conjunction with s 168B(1) of the Liquor Act have the effect that persons of a particular race, colour or national of [*sic*] ethnic origin did not enjoy a right that is enjoyed by persons of another race colour or national of [*sic*] ethnic origin, nor have the effect that any such persons enjoy any such rights to lesser extent than the said persons."

The appellant has issued notices pursuant to section 78B of the *Judiciary Act* and the Attorney-General of the Commonwealth of Australia and the Attorneys-General for the States of South Australia and Western Australia are intervening. The Australian Human Rights Commission and the National Congress of Australia's First Peoples Limited are seeking leave to intervene.

HUNT & HUNT LAWYERS v MITCHELL MORGAN NOMINEES PTY LTD & ORS (S95/2012)
HUNT & HUNT LAWYERS v MITCHELL MORGAN NOMINEES PTY LTD & ORS (S270/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 38

Date of judgment: 15 March 2012

Application referred into a Full Court/granted: 7 September 2012

In 2005 Mr Angelo Caradonna (also known as Antonio or Tony Caradonna) and Mr Allessio Vella entered into a business venture to sell tickets to a boxing event (a bout between Anthony Mundine and Danny Green, and a dinner to be hosted by Joe Frazier). In aid of that venture they opened a joint bank account ("the joint account") which required both signatures to effect withdrawals. Mr Caradonna later obtained the certificate of title to a property owned by Mr Vella and used it (without Mr Vella's knowledge) to apply for a loan from Mitchell Morgan Nominees Pty Ltd and Mitchell Morgan Nominees (No.2) Pty Ltd (together, "Mitchell Morgan"). Mr Caradonna then forged Mr Vella's signature on various documents, including a loan agreement and a mortgage on the property. Mr Caradonna's solicitor (who was also his cousin), Mr Lorenzo Flammia, misrepresented to Mitchell Morgan's solicitors, Hunt & Hunt, that he had witnessed Mr Vella signing the required documents. On 19 January 2006 the mortgage was registered and Mitchell Morgan lent $1M, which was paid into the joint account. On the same day, Mr Caradonna withdrew $1M from that account by forging Mr Vella's signature on cheques. In May 2006 Mr Vella discovered Mr Caradonna's fraud. Mr Vella then sued (inter alia) Mitchell Morgan, which cross-claimed against Hunt & Hunt. By the time of the trial, both Mr Caradonna and Mr Flammia had gone bankrupt.

On 3 July 2009 Justice Young ordered that the loan agreement be cancelled, the mortgage be discharged and Hunt & Hunt pay Mitchell Morgan 12.5% of $1M (plus interest). This was after finding that the mortgage had secured nothing, as it was expressed to secure all monies payable by Mr Vella to Mitchell Morgan (which amounted to nothing because the loan had been fraudulent). His Honour found that Hunt & Hunt had been negligent and that, to safeguard against fraud, it should have prepared a mortgage which referred to a stated amount. Justice Young held, on Mitchell Morgan's cross-claim, that Hunt & Hunt had been a concurrent wrongdoer with Mr Caradonna and Mr Flammia. His Honour then apportioned the liability to Mitchell Morgan (for the $1M it had lent), at 72.5% for Mr Caradonna, 15% for Mr Flammia and 12.5% for Hunt & Hunt.

On 15 December 2011 the Court of Appeal (Bathurst CJ, Giles, Campbell & Macfarlan JJA, Sackville AJA) unanimously allowed Mitchell Morgan's appeal. Their Honours held that, although the fraud of Mr Caradonna and Mr Flammia had caused a loss to Mitchell Morgan, the negligence of Hunt & Hunt had caused a loss of a distinctly different nature. That loss resulted from Mitchell Morgan's lack of security over the property, which was due to the deficient mortgage. The Court of Appeal found that the fact that the mortgage would not have existed but for the fraud did not make the fraudsters jointly responsible (with Hunt & Hunt) for the loss caused by Hunt & Hunt's negligence. Their Honours therefore held that

Hunt & Hunt's liability should not have been limited to a portion of Mitchell Morgan's loss.

On 15 March 2012 the Court of Appeal (Macfarlan JA & Sackville AJA) ordered Hunt & Hunt to pay Mitchell Morgan damages of $2.3M including interest. Their Honours found it appropriate to calculate interest (on $1M) based partly upon the (high) rates contained in the loan agreement, as Hunt & Hunt had been aware of those rates when preparing the mortgage.

In matter number S95/2012, the following ground of law was referred into the Full Court so that it may be argued as if it were on appeal:

- The Court of Appeal erred in finding that the part of the Respondent's claim to damages that related to interest in the period 19 January 2006 to 5 September 2006 ought to be compensated by reference to the rates of interest specified in the loan document forged by Mr Caradonna, rather than interest pursuant to section 100 of the *Civil Procedure Act* 2005 (NSW).

In matter number S270/2012 the ground of appeal is:

- The Court of Appeal erred in failing to find that Mr Angelo Caradonna and Mr Lorenzo Flammia were concurrent wrongdoers within the meaning of s 34(2) of the *Civil Liability Act* 2002 (NSW) with the Appellant in respect of the damage or loss suffered by the Respondents as a result of the Appellant's breach of duty.