Supreme Court Notes

by Cameron Ford, Barrister at Law

SENTENCING - manifestly excessive only ground - desirability of statistics to ascertain tariff - approach where no statistics.

Butcher v Haymon (Kearney J) 30/8/91

Justices appeal against severity of sentence. The only ground was that the sentence was manifestly excessive. Held: where that is the only ground, appellant cannot range far and wide throughout the evidence and reasons for definite and specific errors. It is very desirable that meaningful statistics be provided as to sentences constituting the norm for the offence. Where a "tariff" is established, sentences imposed by different magistrates should fall within that range, subject to exceptional circumstances. Here no statistics were given to establish a tariff and the Court relied on its knowledge of the sentencing pattern of (1) the Supreme Court for more serious offences, (2) the Supreme Court on justices appeals, and (3) courts in other jurisdictions from the Australian Current Law Reporter.

Six months imprisonment for an aggravated assault constituted by a man punching his girlfriend once to the jaw, with no lasting effects, was excessive. Reduced to three months.

Counsel: J S Brown of CAALAS, Appellant; M D O'Loughlin of DPP, Respondent.

MA(C)A - referral to Tribunal de novo - evidence of reduced capacity to earn - no evidence of degree - for respondent to show degree.

Kantros v TIO Board (Martin J) 20/9/91

Referral against Board's determination that applicant's capacity to earn income was no longer reduced. Applicant satisfied Tribunal that his capacity was reduced, but no evidence was adduced by either side as to the amount of that reduction. Held: referral to the Tribunal is a hearing *de novo* and it is not confined to the evidence before the Board. No power to emit to the Board. Once the applicant has established a reduction in earning capacity, it is then for the respondent to show the amount of the loss, similar to a defendant in a personal injuries action having the burden of proving failure to mitigate. In the absence of any evidence as to amount, the respondent has not discharged its burden, and the applicant is entitled to the maximum, ie 85 per cent of average earnings. Refused applicaltion for payment of medical expenses for operation (occipital neurectomy) because preferred respondent's evidence that operation outdated, inappropriate and unwarranted.

Counsel: P Smith instructed by Dunstans, Applicant; D Farquhar of Cridlands, Respondent.

WORKER'S COMPENSATION - appeal against employer's cessation of payments - s111 or new claim under ss 82, 85 and 104 - estoppel

Foresight Pty Ltd t/a Bridgestone Tyre Service v Maddick (Mildren J) 2/10/91

Appeal by employer against decision of Work Health Court (Ms Thomas CSM) that: (1) worker entitled to appeal to WHC by s111 WHA where employer ceases weekly payments rather than make a fresh claim and then challenge the rejection of the claim under s104; (2) the obtaining of equally or better paid work does not necessarily mean that the worker is no longer incapacitated, and; (3) worker was not estopped from appealing the cessation. Held: (1) a worker may use either s111 or ss 82, 85 and 104 where payments have been cancelled. The word "appeal" in s111 was meant in its very broadest sense, and not confined to an appeal from one court or tribunal to another. Parliament did not intend s111 to have a narrow or restricted meaning, but to apply whenever the Court's jurisdiction was to be invoked and no other procedure specified. WHC given power by s94(1) and a dispute over cessation of payments under s69 fails within the very words of s94(1)(a); (2) the receipt, post-injury, of the same or higher wages than that received pre-injury has long been rejected as sufficient to deny the existence of a partial incapacity for work; (3) there was simply no evidence that the worker caused the employer to accept or adopt an assumption upon which an estoppel *in pais* could be based. *Quaere* whether common law or equitable estoppel available to prevent a party from exercising a statutory right to worker's compensation. Appeal dismissed with costs.

Counsel: S Southwood instructed by Ward Keller, Appellant; J Waters instructed by Elston & Gilchrist, Respondent.

CRIMINAL LAW AND PROCEDURE - no voire dire until arraignment and plea - fitness to plead to be ascertained before arraignment and plea and voire dire - onus and standard of proof of fitness to plead - admissibility of statements made to psuchiatrist not proved to be voluntary.

R v P (Nader J) 14/10/91

Matter listed for hearing to determine admissibility of evidence on the *voire dire*. Argued by accused that should determine admissibility before arraignment and plea. Held: until arraignment and plea, there is no joinder of issues to be tried, so must occur before *voire dire*. Accused arraigned and pleaded not guilty. Crown then informed the Court that there was a question as to whether or not the accused was fit to plead. Held: on a proper construction of s357 *Criminal Code*, the Crown had a duty to inform the Court that there was a question of fitness upon the accused being called

upon to plead and before he had pleaded. A question as to fitness should be decided before any issue relating to the guilt or otherwise of the accused. As to fitness, the relevant question is does the prisoner have a "sufficient understanding to comprehend the nature of his trial, so as to make a proper defence to the charge." Here, the relevant inquiry was the sufficient intellect of the accused. It is not necessary that he be able to understand so as to make a proper defence unaided. His having counsel is relevant. It is enough if he can understand the evidence and instruct his counsel as to the facts. The burden of proof is on the party asserting unfitness. If the accused, the standard is on the balance of probabilities; if the Crown, the standard is beyond reasonable doubt. A psychiatrist may give evidence of incriminating statements made by the accused even though those statements are not proved to have been made voluntarily. This is because the question of guilt or innocence is irrelevant to an inquiry into fitness. Where the Court finds an accused unfit, it must state if it is because he is in a state of abnormality of mind or for some other reason. Here the Court was satisfied beyond reasonable doubt that the accused was unfit to plead because of abnormality of mind.

Counsel: J Karczewski of DPP, Crown; J Tippett instructed by NTLAC, Accused.

CRIMINAL LAW - evidence - confession obtained neglecting Anunga Rules - competing interests to be weighed - onus and stadard of proof of voluntariness of confessions.

R v Anderson (Martin J) 21/10/91

Aboriginal apprehended and spoken to about offence. Not cautioned or offered a friend. Had been spoken to and cautioned about one month before on an unrelated matter. This time admitted particulars of the offence. Went to the scene with officers and returned to the station where cautioned and allowed a friend. During course of interview, told by police that blood at the scene was his blood (biologist had told police that it could be the accused's blood). Thereafter made confessions. Held: reliance by police on the caution given one month before was not sufficient, so all of the material obtained before the formal caution on the second occasion was inadmissible. The confessions obtained after the caution on the second occasion and before the lie about the blood were not tainted with the absence of caution and were admissible. But the lie about the blood was a false representation on a critical matter such as would amount to undue pressure and deprive the confession of its voluntariness. The Court must balance the public need to convict offenders against protection of the individual from unlawful and unfair treatment. The improper conduct complained of here was sufficiently serious and frequent to warrant resolution in favour of the individial.

Counsel: C Roberts of DPP, Crown; D Ross QC instructed by CAALAS, Accused.

WORKMEN'S LIENS - contract price "accrued due" - firm evidence needed to remove lien for prejudice - estoppel in pais - insufficient evidence - mining lease is an estate or interest in land - s10 demands must be identified as such for time to run against demander for registration of lien.

Thiess Contractors Pty Ltd v White Range Gold NL (Martin J) 21/10/91

Application by defendant to cancel lien and strike out action. Plaintiff registered a lien over each of two mining leases (150 and 151) for money allegedly due to it under a contract. The money was for claims the plaintiff had made outside of the payments envisaged by the contract, ie as variations. They had not been accepted by the defendant nor had they been adjudicated upon in the manner prescribed by the contract to bind the defendant to pay. Held: since there was no acceptance or binding adjudication of the extra-contractual claims, the monies had not accrued due for the purposes of the *Workmen's Liens Act* and were not sufficient to support the liens. Mineral leases do create an estate or interest in land to work on M:151, and sought to justify its lien thereover by alleging the defendant represented to it that the work was being done over that lease. Estoppel rejected because there was insufficient evidence that the defendant knew the plaintiff was relying on the representation and when the defendant became aware of the true position as to where work was being done. So if there was a duty for it to speak out, it could not be said when that duty arose. Argued that lien registered too late because letters were sent by the plaintiff which constituted demands under s10 and from which time ran for registration. Held: the statutory scheme requires that any demand under s10 be identified as such, so the general letters did not trigger the 28 days for registration. Argued that the Court should exercise its discretion under s32 to cancel the liens because of prejudice to the defendant. Held: speculative evidence as to difficulties the defendant may face in financing its future operations if the lien remains was insufficient to exercise the discretion. Much firmer evidence was needed. Where a lien has been properly registered, the interests of the lienor must be preserved unless the lienee can show distance prejudice to a necessary degree.

Counsel: D Simpson instructed by Philip & Mitaros, Plaintiff; H Fraser instructed by Mildrens, Defendant.

Supreme Court Notes
(continued)

INJUNCTION - payment on "bank guarantee" - whether performance bond - duty of counsel where fraud alleged - duty of counsel on ex parte applications.

Perkins Maritime International Pty Ltd v Commonwealth Bank & Anor (Angel J) 22/10/91

Plaintiff applied for injunction restraining bank from paying out on "bank guarantee" to second defendant. Held: if the bank was entitled to pay, the plaintiff had no complaint. If the bank was not, damages would be an adequate remedy for the plaintiff and the balance of convenience favoured the honouring by the bank of its obligations to others. Unnecessary to decide, but the document was a performance bond and not a bank guarantee. Plaintiff alleged fraud against second defendant, but not developed, evidenced or particularised. Held: Counsel must act with the most scrupulous care in making allegations of fraud; he must insist on all material from the client and then make his own judgment as to whether the charge can be justifiably made. Counsel who does not do so is not worthy of the protection against actions for slander which the law provides. In matters of reputation, Counsel must not go a hair's-breadth beyond what the duly vouched and tested facts will justify. The plaintiff had obtained an interim injunction from the Chief Justice, *ex parte* the second defendant. It was not fully frank before His Honour. Held: a party must be very frank with the Court, not only to put its own case, but to put all the relevant matters against the granting of the order sought. Injunction refused.

Counsel: T Riley QC instructed by Cridlands, First Defendant; J Waters instructed by Ward Keller, Second Defendant.

CRIMINAL LAW - exclusion of confessions - right to silence paramount - application and basis of Anunga Rules - desirable characteristics of "prisoner's friend" - onus and standard of proof of voluntariness - Commissioner's General Orders wrong - practice on voire dire.

R v Jimmy Butler (No 1) (Kearney J) 4/11/91

Aboriginal man submitted to record of interview and later had brief conversation with police. Application to exclude record because (1) accused did not understand right to silence so should be excluded as matter of law, and (2) accused did not have a proper "prisoner's friend" so should be excluded as matter of discretion. Held: (1) satisfied from accused's answers on the record and the *voire dire* that he understood his right to silence. It is "absolutely vital" that those interrogated understand and are accorded the right to silence. It is a right, not a privilege, and must be protected as such. Right to silence is a fundamental principle and is not to be overridden by any other doctrine or principle; (2) in addition to the qualities set out in *Anunga* guideline no 2, it is desirable that the "prisoner's friend" be aware of the rights and duties of police and accused, be seen to be independent of police, have a temperament such that he is not intimidated by the interviewing environment, and be able to speak the accused's principal language. A "prisoner's friend" is intended to enhance accused's ability to choose freely whether to speak or be silent. The friend is to be chosen solely by the accused, but the police may assist in location and securing his attendance. Here, the friend's poor hearing did not detract from his ability to properly assist the accused. Record of interview admitted.

Challenge was also made to the brief conversation after the record. Police told accused co-suspect had said one thing when he had said another. No caution given but not put literally in the form of a question. Accused responded as if a question. Held: where accused in custody under arrest, it is wrong to put questions without a caution, and admissions secured thereby will usually be excluded. Improper to put to accused something co-suspect had never said. Amounted to old "play one against another" technique of interrogation. Answer excluded. Accused has onus of proving lack of voluntariness, on balance of probabilities. While it is sound and fair practice that the Crown should begin on the *voire dire*, that does not alter the onus. It is in the court's discretion as to who commences - no statute regulating in the NT. The statement in Commissioner's General Order Q2.7.2 that where the accused alleges breach of the Anunga Rules the onus is on the Crown is wrong. Anunga Rules do not change the general law. They are factors which the court will take into account in considering confessions by Aborigines. There are three primary considerations: relevance, voluntariness and fairness. Rules will be taken into account in deciding those considerations. The basic reason for the Rules is to provide the practical conditions to ensure the right to silence is freely enjoyed and exercised, and any waiver is by free and genuine choice.

Counsel: R J Wallace of DPP, Crown; G Bauman of NAALAS, Accused.

SUPREME COURT COST RULES - COST VARIATION

There will be no increase in the unit rate as fixed in paragraph 3 of part 1 of the appendix to order 63.

The Acting Master, Jane Godtschalk, informed the Society that Treasury has calculated no variation on the basis of the CPI and average weekly earnings.

Therefore the unit rate applicable for solicitors will be $13 per unit. The rate for clerks remains $7 per unit.

The Chief Justice has directed that those rates will apply from 1 January 1992.