Supreme Court Notes

by Anita Del Medico

APPEAL - Criminal Law - Whether Trial Judge erred in law in failing to leave alternative verdict to jury of guilty of breach of section 154(1) and (3) of the *Criminal Code*.

Michael Anthony Lewis v R -- (5/8/92) Angel, Mildren and Priestly JJ - *ex tempore*

The appellant (self represented) appeal inter alia against a conviction for manslaughter on his trial for murder on the basis that the trial judge had erred in law in failing to leave an alternative verdict to the jury of doing a dangerous act causing death [s154(1) and (3)]. In doing so the trial judge had followed the decision of *R v Campbell* (1990) 99 FLR 107. The facts before the jury: the victim was the appellant's brother who had died from knife wounds incurred in a scuffle with the appellant during a domestic altercation. The mother of both the appellant and the victim had tried to break up the altercation: on the evidence she was at least potentially endangered by the presence of the knife.

Held, per curiam: (1) Because s 154 of the *Criminal Code* had not been left to the jury, there was a miscarriage of justice. The appellant had lost the opportunity of the jury considering not only murder and manslaughter but dangerous act as a possible alternative verdict.

Mraz v R (1955) 93 CLR 492, applied.

Attorney-General v Wurrabadlumba (1990) 74 NTR 5, distinguished.

This was not a case where there was no person, other than the intended victim actually or potentially endangered. Accordingly, it was held that it was not necessary to consider the validity of the 1991 amendment to s154 of the *Criminal Code*, nor the scope of its retrospective operation, if valid.

(2) On the evidence before the jury, the conviction of the appellant had been unsafe and accordingly the appellant could not properly be convicted of manslaughter in terms of s412 of the *Code*. Even though there was evidence capable of supporting a verdict of guilty of manslaughter such that the trial judge was bound to leave the issue to the jury, the jury, acting reasonably, ought to have entertained the reasonable doubt as to the guilt of the appellant. There was insufficient evidence of actual foresight on the part of the appellant of the death of the victim as a possible consequence of his conduct (ss 31, 163 *Criminal Code*).

Doney v R (1990) 171 CLR 207; *Morris v R* (1987) 163 CLR 454, *Chidiac v R* (1990-91) 171 CLR 432, followed.

Appeal against conviction and sentence allowed. Pursuant to s412 of the *Criminal Code*, conviction under s154 substituted and appellant resentenced.

MA Lewis, self-represented, appellant; *WJ Karczewski*, instructed by Solicitor to the Director of Public Prosecutions, for the respondent.

ESTOPPEL - Common Law, equitable or one doctrine - Proof by representee of detrimental reliance - Requirement that detriment be positive, real or material and entail a loss in monies worth rather than be a mere or speculative possibility - Time at which detriment must arise.

TIO v Adington (20/8/92) Asche CJ, Martin and Mildren JJ

The respondent (R) was in a partnership with W in 1980, which conducted a business in Alice Springs concerned with the construction of swimming pools, garages and carports. R and W obtained, inter alia, public liability insurance effective for approximately 12 months and which contained an indemnity to goods sold by the business with a limit of $200,000. In a conversation R had with the Manager of TIO, he had requested cover for "every eventuality." The premium was paid on 11/9/80. In October 1980 R undertook the erection of a patio verandah during the course of the partnership. The public liability policy was renewed until 2/5/82, but not thereafter. On 1/8/81, R left the partnership. On 13/2/84 a Mr McCraith (M) was working on the roof of the patio verandah constructed by R when it collapsed, causing him serious injuries. On 14/5/85 R was served with a writ by M claiming damages for negligence. Later that month, R filled in an insurance claim form with TIO and provided a statement to TIO's loss assessors. When R spoke to the Manager at TIO, he was told: "It's all okay; you're covered by us. You're still our client. You're covered and there is no problem." From 21/5/85 until 29/5/85 Poveys, solicitors, conducted R's defence to the litigation but withdrew their representation on 30/1/87. On 6/9/90, R joined the TIO (the appellant in these proceedings - "A") as Third Party to M's action, claiming indemnity under the policy or alternatively, that A was estopped from denying R was insured under the policy. There was no claim based on waiver.

The trial judge found in favour of the plaintiff (M), awarding damages, interest and costs. R was apportioned 80 per cent of the liability. On the trial of R's Third Party Notice, the trial judge found in favour of R; he held that A's manager's assurance to R amounted to a representation that the policy was on foot. By reason of the principles of common law estopped, R was entitled to an order precluding A from denying its obligation to indemnify R against liability in the action.

The TIO appealed.

The main appeal point was whether R had altered his position to his detriment on the faith of the representations made by A's managing officer. On a Notice of Contention, R claimed that A's issuing insurance cover which R had requested specifically to cover "every eventuality" amounted to a representation that the policy would cover R for acts of negligence caused

during the period of the policy - no matter when the loss occurred.

Held, per Mildren J, Asche CJ and Martin J concurring, allowing appeal, setting aside judgment for R on Third Party Notice and dismissing Third Party Notice; R to pay A's costs on Third Party proceedings and costs of appeal: (1) It does not matter whether the estopped relied upon is common law or equitable estoppel, or if there is but one doctrine of estoppel; whichever is the correct approach detriment must be proved by representee.

Grundt v Great Boulder Mines Pty Ltd (1937) 59 CLR 641; *Thompson v Palmer* (1933) 49 CLR 507; *The Commonwealth v Verwayen* (1990) 170 CLR 394; *Je Maintiendrai Pty Ltd v Quaglia* (1981) 26 SASR 101, referred to.

The trial judge had held that although R had not suffered any specific or identifiable pecuniary loss, sufficient detriment was established because during the period he was presented by A's solicitors in the proceedings instituted by M, he was deprived of the opportunity to do better: *Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VLR 198, per Fullagar J.

(2) Insofar as *Hansen, supra*, is authority for the broad proposition that sufficient detriment will be shown whenever an insurer takes over the conduct of the defence of litigation pursuant to a power which exists only by virtue of a policy, on the basis that by such conduct it deprives the insured from doing better, this does not correctly state the law. In order for there to be detriment sufficient to found an estoppel, the party alleging the estoppel must show that the detriment is more than a mere possibility; it must be "real" or "material."

Chin v Miller (1981) 37 ALR 171, applied.

Soole v Royal Insurance Co Ltd [1971] 2 Lloyds LR 332; *Genders v Ajax Insurance Co Ltd* (1950) SR (NSW) 280, referred to.

North Assurance Company Ltd v Cooper (1968) QdR 46, distinguished.

Hansen v Marco Engineering (Aust) Pty Ltd [1948] VLR 198; *Holts Corrosion Control Pty Ltd v CML Fire and General Insurance Co Ltd* (1984) 3 ANZ Insurance Cas 60-559; *Manufacturer's Mutual Insurance Ltd v New World Fabrications Pty Ltd & Ors* (1987) 4 ANZ Insurance Cas 60-775, distinguished and not followed.

(3) Although the detriment, which the representee must prove, must be real or material, pecuniary loss may not be necessary: *The Commonwealth v Verwayen, supra*; *Grundt v Great Boulder Mines Pty Ltd, supra*; *Thompson v Palmer, supra*; and *Je Maintenandrai Pty Ltd v Quaglia, supra*, followed and applied.

Mildren J held that no real detriment was established, on the evidence, by R; the detriment referred to by the trial judge was entirely speculative.

(4) The detriment which the representee must be shown to have suffered is judged only at the moment when the representor proposes to resile from his representation. In this case, this would have been from the moment A refused to continue to extend indemnity to R.

(5) There was no evidence that R suffered any material detriment based upon the alleged representation of A's manager in issuing the public liability policy, upon R's request that it cover "every eventuality.:" Accordingly, no estoppel could arise as submitted in R's Notice of Contention.

Appeal against judgment of the Supreme Court of the Northern Territory on Third Party Notice.

T Riley QC with *P Smith*, instructed by *James Noonan*, for the appellant.

O Downes instructed by *Crowe Hardy*, for the respondent.

LEGAL PRACTITIONERS - Section 14 *Legal Practitioners Act* (NT) -Requirement of Legal Practitioners Admission Board to provide report - Provision of Board's report to Court is a necessary prerequisite to the Court's consideration of an application for admission.

In the matter of an application by Nigel Anthony Thomson (10/9/92) Martin, Angel and Thomas JJ.

The applicant had sought an order that he be admitted to practise as a legal practitioner of the Court pursuant to the *Legal Practitioners Act*. The applicant had not served the 12 month period of articles of clerkship prescribed by s39(1) of the Act. An oral application was made via s39(2) for an order that the period for which he be required to render service in accordance with articles be less than the prescribed period. The applicant had served as an Association to a Supreme Court Judge in South Australia for 342 days. Section 39(4) of the Act stipulates that where a person has rendered service as a Judge's Associate, the period of articles is diminished by a period of half of the period of service as Associate, or six months - whichever is the lesser. The applicant further sought an order, without a copy of the Legal Practitioners Admission Board report being before the Court, as to his entitlement to apply for admission.

Held, per curiam: (1) Section 39(4) of the *Legal Practitioners Act* is not applicable; it applies only to an Associate to a Judge of this Court (*Interpretation Act*, section 31). Notwithstanding this, the Court may take into account service with the Judge of another Court in the exercise of its discretion upon an application to reduce the period of articles.

Belinda Lillian Eyers (unreported) 6/8/91, followed.

(2) Taking into account the period of time served as an articled clerk, together with an allowance of half the period served as a Judge's Associate produced a period in excess of one year. Special circumstances exist to justify the making of an order under s11(5) of the Act; order that the applicant be regarded as a person entitled to apply under s11 of the Act to be admitted to practise.

(3) The Legal Practitioners Admission Board is required under s14 of the Act to make a report regarding each application for admission under ss 11, 12 or 13 of the Act. In such report the Board is required to state whether in its opinion the applicant is entitled to be admitted and whether there are any grounds upon which the Court might be satisfied that the applicant is not of good fame and character. Sections 11, 12 and 13 of the

continued page 12...

Act stipulates that if the Court is satisfied as to the applicant's qualifications and inter alia that he/she is of good fame and character, the Court shall admit the applicant to practise as a legal practitioner of the Court. **No express reference is made to any obligation on the Court to have regard to the Board's report: the Court is not bound by conclusions of the Board.** The Court's satisfaction as to the prescribed matters and the Board's report thereon stand in isolation from each other. The fact that a copy of the report must be furnished to the applicant before his/her application is heard indicates that the Board's report to the Court is a necessary prerequisite to the Court's consideration of the application. Given the importance of the Board's function in assisting the Court in such an important matter as admission of legal practitioners, it would be wrong to construe the legislation as a whole such as to effectually dispense with the need for the Board's report in all cases.

(4) While the Court was willing to exercise its discretion in favour of the applicant to order that the applicant was entitled to apply for admission, this did not alter the circumstances under which an obligation is imposed on the Court to admit the applicant, this obligation only arising after the Court receives a report in writing which the Board is required to make. *Eyers, supra*, distinguished: the Full Court had before it a "provisional certificate: of the Board indicating the conditions to be met before it could become unconditional. Upon those conditions being met, the Court was satisfied to proceed on that basis.

As there was no report here, provisional or otherwise, the Full Court was not able to make an order for admission without it, even with the consent of the Law Society.

Application to the Full Court of the Supreme Court of the Northern Territory pursuant to the *Legal Practitioners Act* (NT).

DJ Crowe, for the applicant.

R Coates, for the Law Society of the Northern Territory.