Supreme Court Notes

by Cameron Ford, Barrister at Law

CRIMINAL LAW - sentencing - rape

R v Babui CCA (Asche CJ, Gallop and Angel JJ) 19/12/91

Crown appeal against inadequacy of non-parole period and prisoner's cross-appeal against severity of head sentence. Prisoner sentenced to 16 years head sentence with five years non-parole for aggravated rape (female aged seven years). Offence committed while on parole for similar offence. Sentencing Judge ordered that he serve the balance remaining on the first offence and specified a period but did not allow for remissions. Held: Judge should simply have ordered imprisonment for the remainder of the first sentence with the determination of the length (including remissions) being an administrative matter. A sentence of 16 years was crushing and should be reduced to 12. The non-parole period of five years did not reflect the gravity of the offence, that he was a recidivist (three very similar prior convictions) and that it did not cater to the demand for punishment. Increased to seven years.

Counsel: T Pauling QC with him W J Karczewski instructed by Solicitor for the NT, Appellant; D Mildren QC with him S Cox instructed by NTLAC, Respondent.

CRIMINAL LAW -murder - provocation - Aboriginal defendant

Mungatopi v R CCA (Marting, Angel and Mildren JJ) 23/12/91

Defendant's appeal against trial Judge's refusal to leave provocation to the jury. Provocation said to be appellant's belief that the deceased (his 25 year old wife) was unfaithful to him, his anger that she was neglecting their two young children, and her refusal to go home with him from a card game. Held: to see if the deceased's words and conduct could have amounted to provocation, look at them against the background of what is acceptable conduct in the Aboriginal community to which the appellant and deceased belonged. The "ordinary person" in the Territory includes an ordinary Aboriginal male person living in the environment and culture of a fairly remote Aboriginal settlement. It is not the reasonable man of negligence nor the average person. To be provocative in law, the act or insult must have been capable of provoking that person not merely to some retaliation, but to relatiation to the degree and method and continuance of violence which produces the death. Look at all the circumstances of the day, not just the act or insult in isolation. Here, even assuming there was a wrongful act or insult, the level of retaliation producing death was far greater than could be expected of the ordinary person. Appeal dismissed.

Counsel: W Sommerville of NAALAS, Appeallant; R Wallace of DPP, Respondent.

WORKER'S COMPENSATION - ss 104 and 111 WHA applications - when used - *dux litus* - changing from one to another - solicitors at cross-purposes - costs

Van Selderen v Yirrkala Business Enterprises Pty Ltd (Asche CJ) 25/11/91

Worker's appeal from refusal of magistrate to treat s104 application as a s111 application and award of costs to employer. Worker initially made a s111 application after employer ceased payments. Solicitors for both parties agreed, wrongly, that s111 procedure wrong and should be s104 application. S111 application dismissed by consent and s104 application commenced. In its answer, employer said s104 was the wrong procedure. Worker filed a reply maintaining correctness of s104 procedure and saying employer estopped from saying otherwise. On the day of hearing, worker applied to receive the s111 application, or have the s104 application treated as one under s111, or file a fresh s111 application that day and abridge all times to allow hearing to proceed. The magistrate refused, dismissing the s104 application and ordering costs thrown away to be paid by the worker. Held: s104 applications are used where there is an initial denial (actual or deemed) of entitlement to compensationl; s111 is used where payments are ceased after an initial acceptance and payment of entitlement. Under s111, the employer is *dux litus* and has the burden of proof which is the opposite to s104. Here, s111 was the appropriate procedure. Absent consent or fraud, there is no jurisdiction to change one application into another -- it goes far beyond the power of amendment. Especially since it would change the *dux litus* and the onus. Also absent consent or fraud, there is no jurisdiction to revive an earlier dismissed proceeding. Magistrate probably had jurisdiction to entertain fresh application that day but was wise not to exercise it. So magistrate was correct in dismissing application. As to costs, the problem arose not from any party's fault, but from honest and reasonable misapprehensions on both sides. No order as to costs on the trial, instead of worker pay costs. On the appeal, each party pay own costs.

Counsel: J Waters instructed by Waters James McCormack, Appellant; T Riley QC instructed by Cridlands, Respondent.

CONTRACT - collateral contract - lease - inconsistency

DKB Investments Pty Ltd v Belcote Pty Ltd (Mildren J) 26/11/91

Plaintiff's application to strike out paragraphs of Defence alleging a collateral contract. Main contract was a lease and collateral contract alleged to be agreement by representations that defendant would be only menswear shop in Ford Plaza. Argued that the collateral contract pleaded was inconsistent with the main contract and therefore could not exist in law.

Held: there is binding High Court authority that a collateral contract which is inconsistent with the terms of the main contract will not be enforced. Question iswould the collateral contract impinge on it, or alter its provisions or the rights created by it or be otherwise inconsistent with it. This lease did not have the common clause that it contained the complete agreement and that no representations were made. Collateral contracts the sole effect of which is to vary or add to the terms of the main contract are viewed with suspicion by the law. But a collateral contract must inevitably add to the main contract, and it will not be invalid provided it does not vary it or be inconsistent with it. The collateral contract alleged here was not inconsistent with the main contract. Application dismissed.

Counsel: L Wyvill QC with him M Blumberg instructed by Poveys, Plaintiff; J Reeves instructed by Buckley and Stone, Defendant.

NEGLIGENCE - occupier's liability - contributory - damages - evidence (Australian standards) - interest rate where no evidence

Giner v Public Trustee & Priore (Mildren J) 12/12/91

Trial. Eleven year old girl racing a friend at the friend's parents' house, fell into a bank of louvres of annealed (not toughened) glass and suffered severe lacerations to the left leg (almost requiring amputation). Held: there was reasonable foreseeability in a general but not fanciful or far-fetched way, of a real risk of injuiry to the visitor or the class of persons of which the visitor was a member. A duty was thus owed. Applying the test as to whether or not a reasonable man would have taken steps to avoid the risk of a child falling through the glass, it was negligent to have left untoughened glass exposed in that place. This was taking into account aesthetic factors, the fact that the person at risk was likely to be a child, that the magnitude of the risk was significant although the degree of probability of the occurrence was low but not insignificant.

The relevant factors are those prevailing at the time of the accident. Regard was also had to the Australian Standards prevailing at the time. The publications of the Standards Association are neither public documents nor works of science to make them admissible per se. But it is permissible for an expert on safety to have regarded recourse to such published standards as one of the sources from which he informs himself as to matters relating to the subject on which he is expert. There was a breach of duty. A child can be guilty of contributory negligence. The standard of care is that expected of an ordinary child of the same age, intelligence and experience. Subjective factors are not wholly excluded. No contrib here. Award of $75,000 for pain, suffering and loss of amenities ($30,000 pre trial). No loss of earnings likely, but loss of a chance to work in physically demanding fields if necessary -- $15,000 awarded.

Interest at four per cent of pre-trial non-economic loss. On economic loss at average commercial rates from 1990 to 1991. No evidence but Judge used his own knowledge. Eleven per cent used. Not halved but reduced to eight per cent to allow for different times of incurrence.

Counsel: J Reeves instructed by Cridlands, Plaintiff; T Riley QC with him R Morgan instructed by Withnall Cavenagh & Co, Defendant.

CRIMINAL LAW - majority verdict - direction

R v Tipiloura CCA (Martin, Angel and Mildren JJ) 21/2/92

Appeal against conviction. After six hours, jury returned with majority (10-2) verdict of guilty of murder. Argued that trial judge should have directed jury specifically on unanimous and majority verdicts and returned them to deliberate.

Held: no rule of law or practice that criminal jury must be told that verdict must be unanimous. As general rule, it is better to say nothing of majority verdict when the jury first retires. Judge told jury that verdict must be unanimous when they first retired and when they returned it was clear from the exchange between judge and foreman that the jury understood this requirement. Once the jury returns a verdict which is not ambiguous and which is open to them on the indictment, judge had no discretion to refuse it. Appeal dismissed.

Counsel: W Sommerville of NAALAS, Appellant; J Karczewski of DPP, Respondent.

CRIMINAL LAW - jury panel exhausted - remedy of tales

R v Bush & Ors (Asche CJ) 7/2/92

Empanelment of jury. Panel exhausted before 11 accused had exercised all their rights to challenge. Remedy of tales used to obtain three potential jurors but each challenged. Impractical to seek further talesman. Suggestion by counsel that this panel be combined with another panel.

Held: panels cannot be combined once they have been separated; accused can only be tried by this panel or, if it is discharged, by another panel subsequently selected. Consideration of ss32 and 37 of *Juries Act*. Refused suggestion that accused might agree to limit their challenges as improper and undesirable pressure on them. Panel discharged, trial adjourned and accused remanded.

Counsel: R Wallace of DPP, Crown; W Sommerville of NAALAS, 1, 3, 4, 5, 6, 7, 8 & 9 Accused; B Cassells 2nd Accused; C Kerr of NAALAS, 10 & 11 Accused.