Supreme Court Notes

by Cameron Ford, Barrister at Law

MORTGAGE - validity - "indoor management rule"

Verdi Club Inc v National Australia Bank (Asche CJ) 18/7/91

Application for interlocutory injunction. Plaintiff had sought and obtained interim injunction preventing bank from exercising its rights and powers under a mortgage. On the hearing of the application for an interlocutory injunction until trial, the plaintiff argued that there was a serious question to be tried that the mortgage was invalid as not having been executed in accordance with the constitution of the plaintiff. Held: the "indoor management rule" enables third parties to assume that the formal requirements of the body have been complied with *unless* the nature of the transaction or other circumstances put the third party on inquiry. Here, the bank probably had the constitution at the time of execution of the mortgage and there therefore was a serious case to be tried. In any case, the constitution is a public document which is outside the rule. The majority of applications for interlocutory injunctions will be decided on whether or not there is a serious question to be tried and where the balance of convenience lies. Interlocutory injunction granted on undertakings.

Counsel: A Harris instructed by Turner and Deane, Applicant/Plaintiff; J Waters instructed by McBride and Stirk, Respondent/Defendant.

CRIMINAL LAW - confession - discretion to exclude

R v Nelson (Nader J) 27/11/92

Voire dire to determine admissibility of confession. Accused confessed to crime and gave particulars of the circumstances. But he had, the day before, allegedly confessed to a similar but unrelated crime, again with a fair degree of particularity about the circumstances. Police conceded that he had not committed the first crime to which he confessed and were unable to explain how he provided the particulars in the confession. Accused had been detained in custody overnight between the first "confession" and the second. Held: whatever factors operated to render the first confession false, it cannot be said that they did not continue to operate at the time of the second "confession." The concession by the police that the first was false was like the thirteenth stroke of a crazy clock; it discredited not only itself, but cast serious doubt upon the confession in dispute. Confession excluded in exercise of discretion.

Counsel: J Lawrence of DPP, Crown; D Brustman instructed by CAALAS, Accused.

WORK HEALTH - prosecution - unsafe system of work - evidence - expert - hearsay - burden of proof - intent - costs

RAILWAYS - Darwin - SA - Commonwealth obligations (obiter)

TTS Pty Ltd v Griffiths (Asche CJ) 20/12/91

Justice's appeal from conviction of appellant under s29 of the Work Health Act.

Argued: 1. inadmissible hearsay for inspector to say that worker told him he (worker) was am employee of the company and foreman.

Held: 1. can be accepted as prima facie evidence and then construed in light of all surrounding circumstances. The evidence can be led but it should be connected with other evidence before it can be strictly admissible. Other evidence can be the inquiries made by the inspector, the place he attended and how he attended. No evidence was adduved by the defendant to say that he was not an employee or a foreman. The magistrate was therefore in a ion where he could find either way, giving what weight he thought right to the evidence. That could not be disturbed on appeal.

Argued: 2. evidence from engineer/ safety officer that system unsafe inadmissible.

Held: 2 normally expert evidence will be given by someone trained in an "organised branch of knowledge." It may be that there has grown up an organised branch of knowledge studied both in theory and in practice by people who can be said thereby to have attained special skills in determining whether various work practices are safeor unsafe. Courts have accepted evidence from persons not necessarily skilled in theory but possessing such significant practical experience that their opinions will be of value to the court. There are thus two classes of "expert" evidence, one based on occupational experience and one based on systematic training. EAch is admissible provided the knowledge is attained by "some special and peculiar experience, more than is the common possession." But this case did not require experts. A judge or magistrate was in as good a position to say whether or not the system was unsafe.

Argued 3: the offence had to be committed by someone with authority of the corporation, acting in the cours of the authority and with the necessary *mens rea*.

Held: 3. First question is, was there an unsafe system of work? Yes, because "health: in the section means soundness of body, not just freedom from illness or infection. So the system posed a danger to the health of the employees and was unsafe. Next question is, was the operation being carried out by servants or agents in the course of their employment? Yes, because not necessary to show that they were the alter ego of the company, just that they were acting in a manner in which they were authorised to act. ast, the offence is a simple offence. The prosecution must show an intent to do the act, but not an intent to do an unsafe act, or an act contrary to the statute. On the prosecution to

negative mistake, but that must first be raised in some way by the defendant. Not raised here but defence showing it was a common place act. That was not mistake but persistence in error. Offences such as these with a broad public police base sit ill with the Criminal Code and should be categorised as "strict liability" cases as in He Kaw Teh v R (1985) 157 CLR 523. So, offence was committed by appropriate person with appropriate *mens rea.*

Argued: 4. not at "workplace" (on road 20km from Alice Springs).

Held: 4 need not be in structure or at stable place. Anywhere work is being done, eg truck driver in truck has mobile "workplace." Appeal dismissed.

Cross Appeal: Prosecution was denied costs on the conviction because it was the first prosecution. Held on appeal: not a proper exercise of discretion. Award costs of trial and appeal to prosecution to be calculated, with liberty.

Obiter: "[unlikely to be inspecting trains in the NT], the Commonwealth Government having apparently taken the view that it should not be stampeded into honouring express contractual obligations undertaken a mere eighty years or so ago to construct a railway line from Darwin to the South Australian border."

Counsel: J Reeves instructed by McBride & Stirk, Appellant;

T Riley QC instructed by Buckley & Stone, Respondent.

CRIMINAL LAW - escape lawful detention - "detention"

Paul O'Brien v Patrick O'Brien (Kearney J) 21/12/91.

Justice's appeal from conviction of drive under the influence and escape lawful detention (reasons for dismissing appeal against first conviction not published). Driver stopped by police, asked police's permission to urinate, told "Certainly, but I'm going to give you a breath test," fled after urinating.

Argued: not detained because no physical restraint or control and that person required to undergo breath test is not under such restraint.

Held: detained means "lawfully kept from proceeding on" or "lawfully stopped." The stopping of traffic issuch detention. For the purposes of sl12(1)(b) Traffic Act, "detained" is a word of wide scope. Police must clearly and unambiguously convey to driver that he is required to undergo breath test. The words used above were sufficient.

Argued: detention temporarily suspended to allow driver to urinate, so not escape *from* detention.

Held: as a matter of law, detention not waived or suspended. Appeals dismissed.

Counsel: M Maurice QC instructed by Withnall Cavanagh & Co, Appellant;

FGaffy QC instructed by DPP for the Crown.

CRIMINAL LAW - sentencing - payback - non-parole period - generally bond plys minimum term not to be less than head sentence

R v Minor (Asche CJ, Martin & Mildren JJ) 13/1/92.

Crwn appeal against stentence. Pleaded guilty to two counts of manslaughter, one of unlawfully causing grievous bodily harm and one of aggravated assault. Sentenced to 10, six, four and one years respectively, concurrently. Directed to be released after four years on OR of $1000 to be of good behaviour for three years after release. Crown complained that fixed date of release should not have been given, and instead a non-parole period fixed.

Held *per curiam:* whilst a non-parole period had certain advantages (see per Asche CJ at page 6, Martin J at pp 9-13 and Mildren J at pp 29-30), there was no error of principledisclosed in the firxed date which would justify the CCA's intervention. Argued that the release date was fixed by reference to an irrelevant and extraneous circumstance, namely the interests of the Hermannsburg community in finalising payback and putting the matter behind them.

Held per Mildren J (with Asche CJ and Martin J concurring): a sentencing judge is entitled to have regard not only to the interest of the wider community but also to the special interests of the community of which the respondent is a member. There was ample authority in the NT, back to 1900, of courts taking tribal law into account. This is even the case where payback is unlawful by English law (eg causing grievous bodily harm) but in that situation the court should not structure a sentence to facilitate the unlawful act.

Per Asche CJ: the court must have expert or other credible testimony that the payback will occurand that is more than mere bengeance, that the community will benefit. It will not act on unsupported assertions from the bar table. Here, the evidence was very good and the court could act upon it. Argued that the minimum term plus bond here totalled only seven years and that it should not be less than head sentence.

Held *per curiam*: unless in exceptional circumstances, the total of the minimum term and the bond should not be less than the head sentence. There were no exceptional circumstances here to justify a lesser term. Bond increased to six years.

See Mildren J at pp 22-27 for history of taking tribal laws and punishments into account.

Appeal allowed by increasing bond to six years, otherwise dismissed.

Counsel: L FLanagan QC, DPP, for the Crown;

D Ross QC instructed by NAALAS, Respondent.