Supreme Court Notes

by Cameron Ford, Barrister at Law

APPEAL - payroll tax - "decision" of Commissioner - ultra vires - court's duty where no jurisdiction.
Commissioner of Taxes v Tangentyere Council Inc Court of Appeal (Asche CJ, Kearney and Martin JJ) 28/5/92
Appeal from Angel J holding that the Council was a "public benevolent institution" for payroll tax purposes. In 1979, the Commissioner had notified the Council that he regarded it as such an institution, but in 1985 he notified it that he no longer had that opinion. The Council set in train the review procedures under the relevant Act, namely by objection to the "decision." He disallowed the objection from which the Council appealed to the Supreme Court. Angel J "allowed the appeal," holding that Council was such an institution. On appeal to the Court of Appeal, held: *per curiam*: the Commission had no power to determine the Council's status and therefore his "decision" was not a decision at all. The Council should have waited until an assessment issued and objected thereto, or brought proceedings for declaratory relief. Since there was no "decision," there was nothing to object to and nothing to appeal from. The proceedings were a nullity from the start. The court is bound to observe a patent jurisdictional point even though the parties don't raise it. Lack of power cannot be cured by the parties' consent. The Court of Appeal has appellate jurisdiction, nonetheless, to correct the jurisdictional error, and even though none of the parties sought such an order.
Counsel: G Hiley QC and M Spargo of Solicitor for NT, Appellant.
J Larkins QC and J Scutt instructed by P Ditton, Respondent.

CRIMINAL LAW - conspiracy - alleged co-conspirators - acquitted - stay of trial - inconsistent verdicts
R v Idolo Catalano (Kearney J) 14/2/92
Application by accused for permanent stay of trial on charges of conspiracy with two others. Those two were acquitted at an earlier trial. Argued that it would be inconsistent for a jury to find the accused guilty when another had found his alleged co-conspirators not guilty.
Held: the articulation of a common intention by making an agreement is the essence of a conspiracy. The Crown must prove the participation of the co-conspirators as a crucial element. However, the conviction of a conspirator may stand even if a co-conspirator is acquitted unless in all the circumstances the conviction is inconsistent with the acquittal. That may not be so unless the evidence to be presented at both trials is significantly different. Where such an application is brought before the second trial, unless the Crown concedes that the evidence is not significantly different, it is best left to an appeal court to consider inconsistency. The court has an inherent power to stay criminal trials which are oppressive because it involves an abuse of the judicial process. Application refused (Note: a verdict of not guilty was entered by direction at the conclusion of the trial).
Counsel: J Adams of DPP, Crown; D Hoare-Lacy instructed by TS Lee & Associates, Accused.

WORK HEALTH - appeal - pleadings - notice after first 26 weeks - partial incapacity, burden of proof - penalty interest
Horne v Sedco Forex Australia Pty Ltd (Mildren J) 13/2/92
Appeal from Work Health Court (WHC) holding: (1) on 20 May, that the appellant's incapacity had not ceased at the time of the respondent's notice terminating payments and ordering resumption of payments, and; (2) on 1 July, that the appellant ceased to be incapacitated on a certain date and that the respondent was entitled to cease payments on that date without notice. Held: the situation arose because of the state of the pleadings and the argument before the court. The Statement of Claim was deficient as it did not state what relief or remedy the appellant sought and there was no specific claim for the payment of an amount of weekly compensation. In the WHC, pleadings have the same function as in the Supreme Court, that is to define the issues and control admission of evidence.
Reliance on pleadings will not be treated by an appeal court as mere pedantry or formalism. To shrug off a criticism as a mere pleading point is bad in law and bad practice. The magistrate should have taken a firm hand and entertained only those claims before him on the pleadings. The court had no power to make the findings on 1 July as they were not issues before it.
No notice is required to decrease payments after the first 26 weeks under s65 of the Act. The WHC can still find partial incapacity where there is no employer's notice under s69. That section is procedural and confers power on the employer; it does not restrict the court's jurisdiction.
Prior to the amendment of s69, the burden of proving partial incapacity, where the worker is receiving payments at a particular rate, is on the employer. But once this onus is discharged, the onus of showing the level of the partial incapacity and its money value rests with the worker. The filing of a fresh application for penalty interest after the hearing and after some submissions was incorrect procedure.
Ordering penalty interest on interim payments can result in duplication of interest payments because of s89.
Appeal and cross appeal (against penalty interest) allowed.
Counsel: J Waters instructed by Waters James McCormack, Appellant; G Hiley QC with him C Ford instructed by Ward Keller, Respondent.

APPEAL - inferences - contract - time - estoppel - unconscionability
Trippe Investments Pty Ltd v Henderson Investments Pty Ltd, Court of Appeal (Kearney, Angel & Morling JJ) 27/2/92
Appeal from Martin J. Appellants entered into a deed with the respondents by which the respondents' indebtedness to the appellants would be extinguished by the respondents

making cattle available to the appellants by a certain date. The respondents did not, but informed the appellants of the delays, to which the appellants said nothing.

The trial judge found that time was of the essence in the contract, that the contract had been breached and the appellants entitled to damages, but, in saying nothing to the respondents when informed of the delays, was estopped from complaining about them.

On appeal, held: *per curiam* (1) time was of the essence to be implied from the nature of the subject matter, cattle in the Top End in the Dry, even though not expressed to be so; (2) there was a breach, as the cattle were not delivered by the said date; (3) there was no estoppel because it could not be said that the appellants had clearly and unambiguously represented to the respondents that it was not necessary to deliver the cattle by the said date; (4) to draw an inference, the facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied. It does not authorise a court to choose between guesses. An appellate court is at full liberty to draw inferences from found facts. In the absence of any evidence as to the appellants' reaction to the information of the delays, an affirmative conclusion that they did not object to those delays could not be drawn; (5) even if there were a promise from the appellants, it would not be unconscionable for them to depart from it because it was induced by the respondents' unintentionally misleading statements. Equitable estoppel only prevents unconscionable conduct.

Appeal allowed on ground that appellants not estopped from demanding due performance.

Counsel: G Downs instructed by B S Cooney, Appellants; G Hiley QC instructed by Cridlands, Respondents.

CRIMINAL LAW - Justices appeal - nature - rehearing - fresh evidence - sentencing - parity - totality - cumulative vs concurrent

V.T. v Winzar (Mildren J) 24/2/92

Appeal from sentence in Court of Summary Jurisdiction (Mr Gillies SM). Appellant sentenced to three months' detention for unlawful use of a motor vehicle and three months' detention for unlawful trespass, to be served consecutively. His co-offender had been sentenced earlier by Mr Lowndes SM to one months' detention for the first offence and seven days' detention for the second, to be served concurrently.

On appeal the court received evidence of the co-offender's prior convictions, complaints and other materials which were before Mr Gillies SM.

Held: an appeal under the *Justices Act* is a rehearing in the sense of a new trial and on the issues raised by the Notice of Appeal, using the evidence in the court below, with a discretion to receive further evidence.

Since amendments, this may involve the exercise of either original or appellate jurisdiction. If original, the appeal court can consider the evidence anew and come to its own conclusion. If appellate, it can only act on well settled principles, eg the miscarriage of a discretion.

The mere reception of fresh evidence does not necessarily mean the court is exercising original jurisdiction, although in many cases it will. Where the appellate court hears evidence of the facts and circumstances relevant to the sentence imposed on a co-offender by a court other than the court appealed from, the appeal court will only intervene if there is a manifest discrepancy between the sentences so as to give a justifiable sense of grievance, or the appearance that justice has not been done.

Whether or not there is such a discrepancy is very much in the discretion of the appeal court. Here, the discrepancy is manifestly excessive. There were no substantial differences between the antecedents of the offenders to base such a disparity in sentences. However, apart from disparity, the total of six months detention would not have been manifestly excessive. On concurrent vs cumulative, the Supreme Court is divided (Asche CJ, Nader J and Martin J having differing views). Prefer views of Nader J that there is no "one transaction" principle, only a conventional practice, but that the overriding principle was that the aggregate sentence should not lack proportion to the total criminlaity of the accused. If all that is shown is that sentences should have been concurrent instead of cumulative, there is no substantial miscarriage of justice if their aggregated is proportionate to the total criminality. Appellant has served two months and 23 days. Released. Appeal allowed.

Counsel: W Stubbs of NAALAS, Appellant; R Davies of DPP, Respondent.

APPEAL - sentence - manifestly excessive - youthful offenders - principles - Aborigines - leniency - assault

Gadatjiva v Lethbridge (Mildren J) 28/2/92

Appeal from sentence in Court of Summary Jurisdiction. Sentenced to total of 12 months' imprisonment for two counts of aggravated assault and two counts of aggravated criminal damage, to be released on bond after four months.

Reparation of $1756.

Appealed on ground that solicitor on plea had offered to put "at further length the subjective circumstances," which offer was not accepted by magistrate before sentencing to imprisonment.

Held: this was not a denial of natural justice since the subjective circumstances had already been put. Also appealed as manifestly excessive.

Held: when this is a ground, it is very desirable that meaningful statistics be provided. In their absence, court can have regard to own knowledge from awareness of sentencing pattern in Supreme Court and on appeals from CSJ and of reported decisions. Youthful first offenders to be treated leniently with a fine, probation, suspended sentence usually better than a reformative or deterrent sentence. But even first offenders can be imprisoned if under influence of liquor, passion or anger and physically endanger others. Law is to protect the public, but lean towards mercy. Don't award the maximum which the offence will warrant, but the minimum which is consistent with public interest. Special leniency has always been shown for Aborigines. Not manifestly excessive. Appeal dismissed. Counsel: G Barbaro instructed by NAALAS, Appeallant; R Davies of DPP, Respondent.