

Supreme Court Notes

by Cameron Ford, Barrister at Law

EXECUTORS AND ADMINISTRATORS - who has the right to bury the body.

Calma v Sesar & Anor (Martin J) 27/3/92

A young man died in Darwin and the estranged father and mother each sought to make their own arrangements for the burial, the father in Port Hedland, WA, and the mother in Darwin. The mother sought and was granted an interim injunction restraining the father from removing the remains from Darwin, and then sought a permanent injunction to like effect. When she discovered the competing plans of the father, the mother applied for letters of administration, but the father lodged a caveat, and that application had not been determined at the time of these proceedings.

Held: (1) There is no property in a human corpse held for burial; (2) The rightful executor has the power and duty to bury the deceased in a manner befitting his estate: *Williams v Williams* (1882) 20 Ch D 659, referred to; (3) A person entitled to possession of a dead body may enforce that right in the courts, and an injunction will be granted since damages would not be an adequate remedy: *R v Fox* (1841) 2 QB 246, referred to; (4) The mother and father were here on an equal footing as regards the right to disposal, and the court had to resolve the argument in a practical way paying due regard to the need to have the body disposed of without unreasonable delay, but with all proper respect and decency; (5) Since the body was in Darwin and proper arrangements had been made for its burial, there was no good reason in law to remove it to Western Australia.

B Cassells instructed by Noonans for the plaintiff/mother; D Crowe instructed by Crowe Hardy for the defendant/father and the undertakers.

APPEAL - jury verdict unsafe and unsatisfactory - whether Judge's summing up unbalanced - whether incompetence of counsel a ground of appeal - duties of Crown counsel

Fitzgerald v The Queen, CCA (Martin, Angel & Mildren JJ) 20/3/92

The appellant was convicted by a jury of armed robbery. He appealed on the grounds that his counsel failed to take certain points at trial; that the Crown addressed so briefly that the Judge had to put the Crown case in unbalanced detail; and that the Judge left the jury overnight after addressing on the Crown case, thus rendering it unbalanced.

Held, per curiam, dismissing the appeal: (1) When the conduct of defence counsel is a ground of appeal, an appellate court will only intervene where there has been "flagrant incompetence" of counsel involving or causing a miscarriage of justice: *R v Birks* (1990) 19 NSWLR 677 and *Ellav R* (unreported, Court of Appeal 11/1/91), applied; (2) The Court has a power to set aside a guilty verdict where, at a very late stage of trial, an important new issue is raised for the first time by the trial judge in summing up: *King* (1985) 17 A Crim R 184, referred to; (3) In determining whether the verdict is unsafe and unsatisfactory, an appellate court asks whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused: *Chidiac v R* (1991) 171 CLR 432, applied; (4) It is the duty of the appellate court to make an independent assessment of the evidence both as to its sufficiency and quality: *Chidiac, supra*, at 443 and 462; (5) However, the appellate court is not entitled to substitute its view of the quality of the evidence for the view which the jury was entitled to take: *Chidiac, supra*, at 452-3 and 458; *per Martin J* (6) It

is the duty of Crown counsel to lay before the jury the whole facts of his case and to make them perfectly intelligible, and to see that the jury is instructed on the law and can apply the law to the facts: *Finn* (1988) 34 A Crim R 425, applied, *Vella* (1990) 47 A Crim R 119, referred to.

The appellant in person; J Karczewski instructed by Director of Public Prosecutions, for the respondent.

COSTS - orders for taxation in interlocutory applications - pleading - whether necessary to plead that plaintiff has sued the wrong party

Markorp Pty Ltd v Geoffrey King as Liquidator of Murray Constructions Pty Ltd & Ors (Mildren J) 20/3/92

At trial the plaintiff applied for and was granted leave to join a party, which resulted in the trial being adjourned. On the subsequent application by the parties for costs:

Held: (1) It is not usually necessary for a defendant to plead that the plaintiff has sued the wrong party -- this is not a "fact or matter" within the rules; (2) To have costs of interlocutory applications taxed immediately, it is not necessary to show particular circumstances or considerations: *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, Martin J, 29/5/90), not followed; (3) The rule against immediate taxation is directed to reducing the administrative burden of taxing small amounts, or amounts which might be offset in later orders for costs. Here the amount was neither small nor likely to be offset.

P Gabrynowicz and S Southwood instructed by Ward Keller and Crowe Hardy, for the applicants; J Waters instructed by Waters James McCormack, for the respondent.