Supreme Court Notes

by Anita Del Medico

CRIMINAL LAW AND PROCEDURE - s 410(c) Criminal Code - Principles to be applied by the Court in considering application for leave to appeal against sentence.

GM McDonald v The Queen (Asche CJ) 27/10/92

The Applicant (A) applied for leave to appeal against sentence pursuant to s 410(c) of the *Criminal Code*. A single judge of the Court is empowered to hear such application: s 429 *Criminal Code*. The application was based on three grounds: (i) a question of law or principle arose insofar as the Court would be asked to reconsider the principles applied by it in *R v Bird* 56 NTR 17; (ii) the various sentences imposed should have been concurrent, not cumulative, bearing in mind their overall similarity; and (iii) the total sentence was manifestly excessive. A had pleaded guilty to 10 counts of stealing from the same establishment. A was sentenced to 6.5 years imprisonment; it was further ordered that after serving 18 months, he was to be released upon entering a good behaviour bond in the sum of $1000 for the balance of the sentence.

Held, granting leave to appeal on grounds (ii) and (iii) of the application: 1. There seems to be little specific guidance on the principles to be exercised by the Court in considering whether or not to grant leave to appeal. Where an application comes before the Court of Criminal Appeal, the distinction between the application and the ultimate appeal not infrequently becomes blurred; it might be a legitimate comment in some cases that the Court indulges in some post hoc reasoning in granting leave. No particular guidance can be found from other situations where leave is required in criminal proceedings, for example, leave to file an application out of time or where special considerations apply and a stricter test is warranted, ie an appeal by the Crown. *R v Mealey and Sheridan* (1975) Criminal Law Review 154, considered. 2. The reason why no more than very general statements can be made as to how the Court should act in applications such as this is that appellate Courts have been reluctant to fetter discretion in these matters, as there are numerous circumstances which might occur in applications where the liberty of the subject is concerned. It is sufficient to adopt the broad remarks of Lowe J in *R v Broadway* [1957] VLR 398, that "at least an arguable case" should be shown that the sentencing discretion of the trial judge had miscarried. Another broad test might be that some possible though real element of injustice might be thought to occur if leave were refused. The purpose of the application for leave to appeal against sentence is to weed out the obvious cases where it is plain that the appeal cannot succeed, but not otherwise deprive an applicant of his right to appeal. Even if an individual judge hearing the application took the view that, on the probabilities, A would not succeed, if there is a real possibility that A might suffer injustice by refusal, leave should be granted. *R v Broadway* [1957] VLR 398, applied. *Matovsky* (1989) 41 A Crim R 368; *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Incorporated* (1981) 148 CLR 170; *Hughes v The National Trustees* [1978] VR 257 at 263, considered. *Wing Luc Foods v Le Chu Lim* [1989] WAR 358, referred to. 3. Upon examination of the decisions of *Trenorden* (unreported, FC of Supreme Court of Victoria 8/6/89) and *Chaloner* (1990) 49 A Crim R 370, his Honour rejected the submission by A that there had been some "shift in principle" in the way in which courts dealt with offences involving cases where persons are in some form of fiduciary relationship (*R v Bird* 56 NTR 17). 4. As to the remaining grounds for the application, A had established that "at least an arguable case" existed and further, that injustice would flow should A not be given the opportunity to put such case before the Court of Criminal Appeal.

Application for leave to appeal against sentence pursuant to s 410(c) of the Criminal Code.

G J Stirk, instructed by McBride & Stirk, for the applicant.

M D O'Loughlin, instructed by the office of the Director of Public Prosecutions, for the respondent.

EVIDENCE - Criminal Law - Aboriginals - Application pursuant to s 57 Evidence Act for suppression order in relation to name of deceased.

R v Bara Bara (Mildren J) 24/12/92

The accused, an Aboriginal juvenile aged 14 years, pleaded guilty to the manslaughter of a 17 year old Aboriginal -- both the accused and the deceased were from Angurugu on Groote Eylandt. The accused's counsel applied pursuant to s 57 of the *Evidence Act* ("the Act") that the name of the deceased be prohibited from publication. No evidence was led to support such application; it was asserted from the Bar table that the people of Groote Eylandt would not like the deceased's name published. The Crown opposed the application on two grounds: first, that the Judge had no power to make the order and secondly, on the ground that there were other people in Australia who may not have heard of this matter, and had every right to be informed of it, through the media.

Held, per Mildren J on 17/12/92 (reasons for Ruling being published 24/12/92), order prohibiting the publication of any part of the evidence before his Honour which referred to the deceased's name: 1. s 57 specifically permits the Court, in the circumstances therein envisaged, to prohibit the publication of the name of a party or a witness to a proceeding before the Court. Unlike legislation in some other jurisdictions, there is no

specific power to prohibit publication of the name of the victim of a crime. If such power exists in the NT Act, it is to be found in s 57(1)(a), as the power to prohibit "any evidence...likely to offend against public decency..."

2. There is no definition of "evidence" in the Act. In criminal proceedings, when there is a plea of guilty, the facts orally presented to the Court from the Bar table by the prosecutor and admitted by the accused are "evidence" within the meaning of s 57. As the name of the deceased formed part of the agreed facts, it was also part of the "evidence" before his Honour within the meaning of the Act. *Quinn v Given* (1980) 29 ALR 88 at 95-6, followed. 3. As to whether the publication of such "evidence" would be likely to offend against "public decency," the definitions of "decency" in the Shorter Oxford Dictionary and the Macquarie Dictionary were examined. Something likely to offend against public decency is not necessarily limited to blasphemy, obscenity, profanity or sexual indecency. The meaning to be given to the expression is that which would be generally regarded by the public, or a significant section of it, as lacking in propriety or good taste, or unbecoming or unseemly. 4. Judicial notice taken of the fact that it is extremely offensive to most Aboriginal Territorians, and furthermore contrary to most tribal customs, to speak of a dead man by his name. The Courts have often insisted, at least in this Territory and in his Honour's experience, that witnesses not refer to a deceased Aboriginal by name, but instead employ such expressions as "the deceased," "the dead man," etc. This is so widely known in this community that every ordinary person may be presumed to be aware of it and therefore judicial notice may be taken of this. *Holland v Jones* (1917) 23 CLR 149 at 153, followed. Publication of the deceased's name would be lacking in propriety and be quite offensive to a significant section of the NT's community, bearing in mind that the Aboriginal population of the NT represents approximately 22 per cent of the total population. 5. Although not raised by either counsel, the issue of the accused's standing to make such application was addressed. It was presumed by his Honour that at the time the application was made, the accused or his immediate family were in some danger of "payback" as a result of the killing. At a later stage of the proceedings when bail was applied for it seemed to be the common understanding of both counsel that payback to the accused's father was at least a possibility. Publication of the deceased's name was considered likely to have the effect of increasing such danger. Furthermore, as the accused was a member of the same community as the deceased, he had an interest greater than any other member of the public, or any other Aboriginal not from that community, in seeking the order. These factors were sufficient to establish standing. *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, followed. 6. As to the submission that the rest of Australia has an interest and a right to be informed through the media of the deceased's identity, held that no such right exists. The most that can be said is that the law permits such publication unless it is prohibited by an order made under s 57 of the Act. *G v The Queen* (1984) 35 SASR 349 at 350-51, referred to.

Application for suppression order pursuant to s 57 *Evidence Act.*

W Somerville, instructed by NAALAS, for the accused/applicant.

R J Wallace, instructed by the Office of the Director of Public Prosecutions, for the respondent.