# Supreme Court Notes

**by Anita Del Medico**

**CRIMINAL LAW - INDICTMENTS - Criminal Code - ss 299 and 339 - altering charges after committal - motion to quash indictment - unfairness to accused - stay of proceedings**

*R v Hansen* (Mildren J) 23/6/93

The prisoner had been arrested and charged with attempting to rob W whilst armed with a firearm (ss 211 & 277): maximum penalty 7 years imprisonment.

The matter proceeded by way of hand-up committal in the CSJ, the defendant's solicitor indicating that it was the defendant's intention to plead guilty to this charge.

The defendant was committed for trial on this charge in the Supreme Court. The matter was listed for plea in the Supreme Court, however the Crown elected to indict the defendant on one count of aggravated assault with intent to steal pursuant to s 212(1) and (2) - maximum penalty: 14 years. The accused then applied to the Supreme Court for an order pursuant to s 339(1)(a) that the indictment be quashed on the ground that it was calculated to prejudice or embarrass him in his defence to the charge.

It was submitted that the accused's decision to plead guilty to the charge of attempted robbery was based on "uncontested evidence" that immediately after the attempt to steal, he had threatened to use violence upon the victim. In his statement (handed up to the Magistrate at committal), the victim's evidence was that at the time of the demand for the money, the accused pointed the shotgun at his chest.

This had been denied by the accused when interviewed by the police.

*Held*, Supreme Court proceedings stayed for the purpose of referring the matter back to the CSJ for full committal hearing on the charge of aggravated assault with intent to steal (1) the accused and those representing him had been led to believe that he was facing a charge of attempted robbery; the indictment laid charged a much more serious offence, which involved different elements to be proved. The accused had not been forewarned, formally or informally, as to the course which would ultimately be taken.

He had therefore lost the opportunity to cross-examine a critical Crown witness on a piece of evidence crucial to an element of the present charge which was not an element of the charge the accused had formerly faced.

The opportunity to submit that he should not be committed on the more serious charge was also denied him. The unfairness which flowed from these circumstances were grounds for a stay in proceedings in the Supreme Court.

(2) The importance of committal proceedings emphasised.

*R v Siugzdinis & Mauri* (1984-5) 32 NTR 1, considered.

*R v Jimmy Boungaru* (unrep, Martin CJ, 13/5/93), applied.

Motion to quash indictment pursuant to s 339(1) of the *Criminal Code*.

*J Waters*, instructed by NAALAS, for the Applicant/Accused;

*I Glasgow*, instructed by the DPP, for the Respondent/Crown.

[But see: *Drozd v R* CA 93/224 (Macrossan CJ, Pincus & Davies JJA) Qld CCA 17/6/93.

Appeal dismissed from a judge's refusal to order a stay of proceedings which had been sought on the ground that lack of opportunity to cross-examine witnesses on statements adduced after committal proceedings would result in an unfair trial.

*Held* that such a stay could only be granted in "an extreme case" and (per Macrossan CJ) that "the circumstances would be unusual where the Court will act in a way which compels the reopening of committal proceedings rather than leave control of the matter to the trial judge."

*Glennon v R* 173 CLR 592; *Jago v District Crt of NSW* 168 CLR 23, considered.

*Ngalkin* (1984) 12 ACR 29, not followed.

*R v Harry; ex p Eastway* (1985) 39 SASR 203, 212; *Barron v AG* (1987) 10 NSWLR 215, 233, referred to.

Queensland & NT Judgments Bulletins Vol 7 No 7, 2/7/93).]

**LOCUS STANDI - where a party is a deregistered company pursuant to s 574 of The Corporations Law**

**APPEAL - application for leave to appeal from interlocutory judgment - s 53 Supreme Court Act - grounds to be established for leave to be granted**

**LIMITATION OF ACTIONS - scope of s 44 of the Limitation Act - interpretation of s 44(3)(b)(i).**

*C.T.G. Pty Ltd & Ors v Yamamori (Hong Kong) Pty Ltd* (Asche CJ, Gallop & Martin JJ) 9/12/92.

The first and second defendants in the action applied for leave to appeal against orders made by Angel J giving leave to the plaintiff (respondent in these proceedings) to amend the endorsement on the Writ of Summons by adding "The plaintiff seeks an extension of time pursuant to the *Limitation Act*", and extending the time for instituting the proceedings. The first defendant (CTG Pty Ltd) had applied for summary judgment against the plaintiff on the ground that the plaintiff's action was statute barred - this had been dismissed. However, his Honour had granted leave for the first defendant (in the absence of any opposition), to amend its defence. It was not until the hearing of this appeal that the Court was formally advised that at the time of its application for summary judgment before Angel J, the first defendant had been deregistered pursuant to s 574 of *The Corporations Law*. As the first defendant proposed to apply for registration of the company to be reinstated, it was submitted, with the respondent's consent, that the appropriate course in all the circumstances was to determine these applications for leave to appeal on the basis that the first defendant was notionally a party with standing.

*Held* (1) the orders that the primary judge made concerning the first defendant were clearly made per incuriam and this Court must rectify the record by setting them aside on the

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ground that the first defendant was not competent to make application for leave to amend the defence and further to order that the first defendant be removed from the proceedings as from the date of its deregistration. These orders do not affect the first defendant's rights to make application either to the ASC or to the Court for reinstatement of the registration of the company or to apply to the Commission for it to act on the first defendant's behalf pursuant to s 575 of *The Corporations Law*. [The application for leave to appeal was therefore confined to one made by the second defendants/applicants.]

It was submitted on behalf of the applicants that they would suffer substantial injustice if the interlocutory orders of Angel J were allowed to stand because they would be deprived of a substantive defence to the effect that the respondent's claim is statuted barred and if an extension of time is not granted, they would be entitled to summary judgment which would finally dispose of the respondent's claim. The issue for determination by the COA was whether the decision of Angel J was attended with sufficient doubt as to its correctness to justify a grant of leave to appeal.

*Held*, leave to appeal refused (2) an order granting an extension of time pursuant to s 44 of the *Limitation Act* is an interlocutory order affecting procedural rights only and leave to appeal is therefore required (s 53 *Supreme Court Act*). The general principles governing such applications are well settled and stated by Kearney J in *Heller Financial Services Ltd v Solczaniuk* (1989) 99 FLR 304 at 317. Although the Court has an unfettered discretion in granting leave to appeal, the applicant must show that the interests of justice make it desirable to grant leave. A successful applicant for leave must first show that the correctness of the decision in question is attended with sufficient doubt to warrant it being reconsidered on appeal and secondly, that if the decision is wrong, substantial injustice would result if it were left to stand.

*McKain v R W Miller & Co (SA) Pty Ltd* (1991) 104 ALR 257; *Hall v TND* (1966) 117 CLR 423; *Merton Enterprises Pty Ltd v Nelson* (1988) 13 NSWLR 454, referred to.

(3) Statutes of limitation confer upon a defendant a very important right - the right to plead the limitation period as an absolute defence. As such, should the interlocutory order be found to be incorrect on the first limb of the *Solczaniuk* test, the defendants would have demonstrated that they had incurred a substantial injustice. *McKain v R W Miller* (supra); *Cwth v Dixon* (1988) 13 NSWLR 601, followed.

(4) It was unnecessary for the respondent to seek to amend the endorsement on the Writ of Summons by adding the words "The plaintiff seeks an extension of time pursuant to s 44 of the *Limitation Act*". Section 44(4) is permissive in terms and has application at the commencement of the action. It has no operation where proceedings have been instituted out of time and it only becomes apparent to the plaintiff that an extension of time is necessary when the statute is pleaded against his claim. However it would not be fair in the administration of justice to preclude a plaintiff faced with that situation from applying for an extension of time pursuant to s 44 unless otherwise expressly provided. The respondent's substantive right to bring the action, albeit out of time, was left intact and could not be defeated by the *Limitation Act*. There is no basis for restricting the operation of s 44 once the action has been instituted, although out of time. Order 36 of the *Rules of Court*, considered.

*Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471; *Williams v Jones* [1811] 13 East 439; 104 ER 441; *Harris v Ouine* LR 4 QB 653; *Maxwell v Murphy* (1957) 96 CLR 261; *Pedersen v Young* (1964) 110 CLR 162; *ANZ Banking Corpn v Larcoss* (1987) 13 NSWLR 286; *Baldry v Jackson* (1976) NSWLR 286, referred to.

(5) The respondent had satisfied the requirements of s 44(3)(b)(i) of the Limitation Act as interpreted in Ward v Walton (1989) 66 NTR 20. In that case, it was held that the requirement of s 44(3)(b)(i) that an action be instituted "within 12 months after" the ascertainment of material facts by the plaintiff, is properly met by showing that the action was instituted at a time not later than 12 months after the ascertainment of those facts by the plaintiff - whether those facts be ascertained before the expiration of the limitation period or after. Although the trial judge had erred in finding that there were a number of facts material to the plaintiff's claims that were first ascertained by the plaintiff during the 12 month period prior to the institution of the action (the fact, quantum and and dates of the withdrawals of the trust monies), it matters not because the action was instituted at a time not later than 12 months after the ascertainment of the material facts by the plaintiff.

*Ward v Walton* (supra); *Clutha Devts v Barry* (1989) 18 NSWLR 86, applied.

Application for leave to appeal from an interlocutory judgment.

*G Hiley QC*, instructed by Cridlands, for the applicants.

*A Wyvill*, instructed by Ward Keller, for the respondent.

**JUSTICES' APPEAL - appeal against sentence - failure by Magistrate to backdate sentence in accordance with s 405 Criminal Code**

*Nottle v Trenerry* (Mildren J) 23/6/93

The accused (A) had pleaded guilty on 5/11/92 in the CSJ to (1) aggravated unlawful assault (s 188CC); (2) dangerous act together with the aggravating circumstance that the act was committed under the influence of an intoxicating substance (s 154 CC); (3) unlawful damage to property (s 251 CC); and (4) driving a motor vehicle

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whilst having a concentration of alcohol in his blood in excess of .08 (s 19(2) *Traffic Act*). He had consented to (1) and (2) being dealt with summarily. The learned Magistrate imposed sentences of imprisonment in relation to each of the offences except (4) and ordered that the sentences be served concurrently. The total sentence imposed was two years imprisonment, effective from 5/11/92 with a NPP of 12 months. A had spent 43 days in remand (from 24/9/92) and in the Magistrate's remarks on sentence, he said that period of time in custody had been taken into account in determining penalty. No reasons were given for failing to antedate the sentence. It was A's submission that having failed to comply with s 405(2) of the Criminal Code, his Worship had exceeded his jurisdictional limit. The Notice of Appeal was lodge out of time (s 171(2) Justices Act), but the prisoner had instructed his solicitors to appeal against the sentence within ample time for his solicitors to comply with the provisions of the Act.

*Held*, allowing the appeal, setting aside the sentence of the learned Magistrate, and substituting a sentence of two years imprisonment with a NPP of 12 months, effective from 24/9/92 (1) A had done all that was reasonably practicable to comply with the provisions of the Justices Act. It was therefore appropriate to make an order, pursuant to s 165 of the *Justices Act* dispensing with compliance with the condition precedent imposed by s 171(2) that the appeal be instituted within 28 days. *Seven v Seears* [1984] NTJ 1112; *Fry v Williams* [1985] NTJ 397; *Commr of Taxation v Arnhem Air Eng Pty Ltd* (1987) 90 FLR 140 at 150, followed.

(2) The power conferred upon the Court under s 405(2) of the *Criminal Code* to antedate a sentence is discretionary, but it is well established that the failure to antedate a sentence is a sentencing error unless reasons are given for the failure to adopt the practice. This sentencing error is exacerbated by the fact that a failure to antedate a sentence has bearing upon the calculation of remissions, which does not take into account time spent on remand before sentence. The failure to backdate sentences has a serious effect on the accused's liberty. *Reed* (1992) 59 ACrimR 23 at 25; *R v McHugh* (1985) 1 NSWLR 588 at 590-91, followed.(3) Where a Magistrate imposes the maximum penalty and fails to properly antedate the sentence, of necessity he must exceed his jurisdictional limit. The learned Magistrate's jurisdictional limit of two years' imprisonment could not be extended by the indirect means of refusing to antedate the sentence.

*Reed* (supra); *Marshall* (1992) 62 ACrimR 162, applied.

Justices Appeal.

*G Barbaro*, instructed by NTLAC, for the appellant.

*C Delaney*, instructed by the DPP, for the respondent.