Supreme Court Notes

by Anita Del Medico

APPEAL - Appeal against conviction - where appellant gives evidence after unsuccessful "no case" submission - ruling on "no case" submission cannot be challenged.

STATUTORY INTERPRETATION - Criminal Code s192(1) & (3) - "...thereby...".

Stennett -v- R

11.03.94 CCA: Kearney, Angel & Priestley JJ

Appeal against conviction under s192 of the Criminal Code (rape). The first ground of appeal was that the jury's verdict was unsafe and unsatisfactory. The second ground of appeal was that the learned trail judge erred is not upholding a "no case" submission made at the close of the Crown case and in not directing a verdict of not guilty. After the learned trial judge had ruled against the "no case" submission A had given evidence as part of his case.

HELD, per Kearney, Angel & Priestley JJ, dismissing the appeal:

(1) A having given evidence at trial, the second ground of appeal was unavailable, it being for practical purposes subsumed within the first ground of appeal. In considering the first ground of appeal, A's evidence was to be taken into account.

Wood [1974] VR 117, followed.

(2) The fourth ground of appeal sought to raise questions concerning the interpretation of s192(1) and (3) of the Code. Those subsections provide:

"(1) Any person who unlawfully assaults another with intent to have carnal knowledge or to commit an act of gross indecency is guilty of a crime and is liable to imprisonment for 14 years.

.....

(3) If he thereby causes bodily harm to the person assaulted or commits any act of gross indecency, he is liable to imprisonment for 14 years."

The question of construction sought to be argued was whether the "thereby" in subs (3) refers only to the causing of bodily harm to the person assaulted mentioned in the first part of the subsection or refers not only to that but also to the committing of any act of gross indecency referred to in the second part of the subsection. A submitted that the latter construction was the correct one, so that it was clear that the act of gross indecency had to be part of the assault. It was held that although there is more than one way of reading the effect of "thereby" in s192(3), it was unnecessary to resolve the ambiguity in the present case because the indictment was framed on the assumption that the construction which A submitted was the correct one, was correct and the direction given by the trial judge was in substance in accordance with the way the count was expressed in the indictment and with the way A submitted on appeal it should be read.

[The remainder of the case does not call for further report.]

Appeal against conviction.

M David QC, with I Sampson instructed by Ward Keller, for the appellant.

R Wild QC, instructed by DPP, for the respondent.

APPEAL - Appeal from Work Health Court - cessation of compensation payments pursuant to s69 Work Health Act - onus on employer at time of cessation of payments to show worker not incapacitated for work at time of cessation - Work Health Act, Ss. 65, 68, 69 & 89.

STATUTORY INTERPRETATION - Meaning of "normal weekly number of hours of work" - Work Health Act, s49.

Hughes -v- AAT Kings Tours Pty Ltd

29.04.94 Angel J

The appellant worker ("A") was a bus driver who drove coaches for the respondent ("R") employer, based in Alice Springs. On 31.07.92, whilst on a bus tour he sustained an eye injury which caused permanent 95% impairment of vision. R paid compensation to A until 23.04.93. R thereafter cancelled payments in purported pursuance of s69 of the Work Health Act. In March 1993 A went overseas for family reasons. At that time, he had applied for a new job with the NT Police. Upon his return in September 1993, the NT Police offered employment to A, who accepted.

The Work Health Court held that R justifiably cancelled compensation payments and further held that A's earnings of overtime with R as a coach driver ought not to be taken into account in calculating compensation.

HELD, per Angel J, allowing the appeal and ordering that A be entitled to compensation beyond the date of cessation of payments, costs and interest pursuant to s89 of the Work Health Act:

(1) In order to justify cancellation of payments pursuant to s69, an employer carries an onus of establishing a change of circumstances warranting cancellation. In particular, the onus is on the employer to demonstrate that the employee has ceased to be incapacitated for work, that is, by virtue of the definition of "incapacity" in s3, that he has an ability to undertake paid work.

Horne -v- Sedco Forex (1992) 106 FLR 373 at 376, followed.

(2) The appropriate legal test to determine whether the worker is incapacitated for work depends on whether there is loss of earning capacity within the meaning of s65(2) of the Work Health Act. This necessarily requires an assessment of the most profitable employment available to the worker under s68 of the Work Health Act. It is for the Court to consider both the potential availability of employment and whether such employment is

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reasonably available to the worker. There being no evidence as to when a position with the NT Police first became available or as to the rate of pay offered or as to the likelihood or otherwise of A being accepted for the job when it first became available, R had failed to establish that at the time of cessation of payments (23.04.93), there had been a change of circumstances such as to show that A was no longer incapacitated for work.

Morrissey -v- Conaust Ltd (1993) 1 NTLR 183 at 189, followed.

(3) The Work Health Court had erred in holding that A was precluded from having overtime taken into account because of the definition of "normal weekly number of hours of work" in s49. Section 49(a) provides that this means "...in the case of a worker who is required by the terms of his employment to work a fixed number of hours, not being hours of overtime other than where the overtime is worked in accordance with a regular and established pattern, in each week - the number of hours so fixed and worked...". Contrary to the decision of the Work Health Court, the overtime worked need not be in accordance with a regular and established pattern in each week. A had worked overtime in respect of rostered trips which were pre-arranged on a fortnightly basis. In that sense it was "established". The overtime, although varying in amount, was regular in that it was consistent and not capricious or casual or ad hoc. "Regular" in the definition does not mean symmetrical or even, but habitual or frequent or usual, as contrasted with occasional or spasmodic. A's overtime was earned habitually and frequently and was part of his normal earnings even though it was not worked symmetrically at fixed intervals. It was irrelevant that the overtime varied in quantity from week to week. The object of the definition of "normal weekly number of hours of work" is to arrive at a norm of earnings, that is, a standard level by which a loss of earning capacity, if any, might be calculated. The fact that, pursuant to s49(3) of the Act "regard shall be had" to the overtime worked during the 6 month period preceding the date of injury, supported this view.

Francese -v- Corporation of the City of Adelaide (1989) 51 SASR 522 at 526-7, per King CJ, followed.

A's overtime ought to have been taken into account.

Appeal under the *Work Health Act*.

S Gearin, instructed by Poveys, for the appellant.

I Nosworthy, with J Hebron, instructed by Ward Keller, for the respondent.

JUSTICES' APPEAL - Appeal against sentence - Juvenile Court - Jurisdictional limit in sentencing juvenile offender - Juvenile Justice Act, s53(1)(g).

JUVENILE JUSTICE ACT - Utilisation of s44 where sentencing court not fully aware of defendant's personal antecedents.

John Jabarula Nelson -v- John Henry Chute

12.05.94 Martin CJ

A had been convicted before the Juvenile Court for aggravated unlawful use of a motor vehicle (s118(2)(b)) of the Criminal Code. He was convicted and sentenced such that the effective total sentence was 7 months detention. In addition he was disqualified from driving for 3 years. The maximum sentence for the offence for which he was convicted was 7 years' imprisonment. It was a ground of appeal that the Magistrate had failed to request a report relating to the appellant under s44 of the *Juvenile Justice Act*. No mention had been made before the Magistrate of this section.

HELD, per Martin CJ, appeal allowed, sentence of 7 months detention quashed and in lieu thereof, sentence of 3 months' detention, cumulative upon prior 4 months' detention imposed, to be suspended after 6 weeks upon A entering into a bond to be of good behaviour and with conditions (supervised). Order for disqualification of licence set aside.

(1) Although the maximum penalty for the offence was 7 years' imprisonment, by reason of s53(1)(g) of the Juvenile Justice Act, the Juvenile Court could only order that A be detained for a maximum of 12 months. That does not mean that the maximum penalty that may be imposed for the offence is reduced from 7 years to 1 year if the offender is a juvenile, but rather that the limit of the jurisdiction of a Juvenile Court is to impose a sentence of 12 months. The Supreme Court is not so inhibited (s39(1)(b)). A was thus sentenced to a period of 7 months detention in relation to a maximum penalty of 7 years, not 12 months. The position is the same as that in relation to the jurisdictional limit on sentence for imprisonment applying in the Court of Summary Jurisdiction.

Sultan -v- Svikart (1989) 96 FLR 457, followed.

(2) Those constituting Juvenile Courts should make a decision in every case as to whether a report should be ordered pursuant to s44. This is especially so where those representing juveniles may not have the ability or resources to obtain all the information which may be of assistance to the Court. In the present case, reference to A's prior convictions and the disposition in respect of each of them, together with scanty information concerning his family and other matters personal to him, was not enough upon which to base a sound discretionary judgment as to sentence. Cases concerning the failure of sentencing Courts to order pre-sentence reports, referred to.

W (1990) 48 A Crim R72;

Manning -v- Police (1993) 65 A Crim R382;

Hardy (1979) 4 A Crim R343;

Hrvojevic (Unrep) Tas CCA 6 June 1979, approved.

[Further information having been made available to the Supreme Court on appeal, his Honour proceeded to resentence as noted above.]

T Burrows, instructed by NAALAS, for the appellant.

K Channells, instructed by DPP, for the respondent.