Supreme Court Notes

Reporters for this month include Anita Kneebone, Damian Sammon, David Lisson, Rachel Neil, Alastair Shields and David Ward.

CRIMINAL LAW - SENTENCING - SENTENCING PROCESS - COMPARABLE SENTENCES

Noble, Darrel Shane v The Queen

No CA1 of 1995

Judgment of Kearney, Angel JJ and Gray AJ delivered 21 July 1995.

The applicant pleaded guilty to four charges under the Misuse of Drugs Act. Three were of unlawfully supplying a dangerous drug, cannabis, and the fourth was a charge of unlawfully cultivating a commercial quantity of cannabis. The applicant pleaded guilty to cultivating 104 plants. The Misuse of Drugs Act provides that "not less than 20 plants" constitute a "commercial" quantity.

The applicant successfully asked that two associated offences be taken into account under the Section 396 of the Criminal Code.

The sentencing judge heard that the applicant had been before the courts on five occasions since 1987 on a variety of drug related charges. These charges included possession, use, cultivation and supply of cannabis.

The applicant was sentenced to 18 months imprisonment on each of the supply charges, and to three years imprisonment on the cultivation charge.

All four sentences were directed to be served concurrently. The effective sentence was 3 years imprisonment. A nonparole period of 15 months was fixed.

The application and the substantive grounds of the appeal were heard together by the Court of Criminal Appeal.

Counsel for the applicant referred to eleven sentences in cannabis cases handed down by single judges of the Supreme Court. He submitted that they provided "guidance" as to the sentencing appropriate in this case. Counsel for the Crown argued that these sentences did not establish a "range" of sentencing for a commercial quantity of cannabis. In accepting this latter submission, Kearney J referred to *R v Young* [1990] VR 951 at 955 "Any judge with experience of sentencing knows that no two cases are the same and that the circumstances of particular offences and particular offenders are infinitely various". Significantly, in several of these cases the accused had no relevant prior criminal history.

It was argued by the applicant that the sentencing judge had given undue weight to the applicant's prior convictions.

Held by Kearney J: that the sentencing judge appropriately characterised the applicant's prior criminal history as preventing his punishment being mitigated as it could have been he were "a first offender or a person of good character" or had his offences been "a mere aberration". The use to which the sentencing judge made of the applicant's prior criminal history did not contravene what was said by Mason CJ in *Veen (No 2) v R* (1988) 164 CLR 465 at 477.

Held by Angel J and Gray AJ: that the applicant's prior criminal history was highly relevant and demonstrated a contumelious disregard of law. The court was entitled to have regard to his history as an aggravating factor, *Veen (No 2)* (1988) 164 CLR 465; *Mulholland* (1991) 1 NTLR 1 and *Babui* (1991) 1 NTLR 139.

Counsel for the applicant submitted that the fact that the total weight of the growing plants and seeds was only 20.1 grams pointed to a low degree of criminality.

Held by Kearney J: Clearly it is the number of plants, and not their weight, which is "most critical" for present purposes.

Held by Angel J and Gray AJ: The offending was not a minor or insignificant enterprise. The mere fact that the cultivation comprised seedlings at the time of police intervention does not reduce the applicant's culpability or the seriousness of the offending. There was potential for the applicant to profit considerably. The applicant had well over the number of plants constituting a commercial crop.

Per Kearney J: The legislature clearly intends that the cultivation of relatively few cannabis plants be treated as a very serious offence; se *R v Jackson* (1972) 4 SASR 81 at 87 and *R v Peel* [1971] 1 NSWLR 247 at 256, 262.

Leave to appeal refused.

Mr Robinson instructed by NAALAS for the applicant.

Mr Cato instructed by the Director of Public Prosecutions for the respondent.

DS

Continued Page 14

Supreme Court Notes

From Page 13

CONTRACT - COSTS

Favaro v Lichtenberg

SC No 223/94

Judgment of Thomas J delivered 29 June 1995.

Appeal from a decision of the Local Court awarding judgment and costs in favour of the plaintiff in the Local Court and the respondent to the appeal.

The grounds of appeal at the hearing essentially involved two issues: (1) whether the operational expenses and admininstration cost of patent administration included the cost of applying for the patents, and (2) whether the magistrate erred in law in allowing the respondent to amend his statement of claim, which had the effect of allowing the discontinuance or withdrawal of a discrete and separate claim, without requiring the respondent as a condition of the amendment to pay the appellant's costs on that question.

The respondent is the inventor of a device called a V-clamp. The novel aspect of the V-clamp is that by its design it is useful for joining unusual shaped pieces of timber together. It adapts a new locking device with pivoting and sliding jaws rather than relying on one long shank to hold two pieces of wooden material together.

The respondent applied for patents for the V-clamp in Australia and overseas. Letters patent dated 21 March 1994 were granted giving the Australian patent a priority dated 9 February 1990. Prior to the granting of the Australian Letters patent, and following failed efforts to find a financial backer, the respondent met the appellant and two documents, 'Joint Patent Licence Investment Agreement' and a 'Royalty Deed' were executed. These documents, prepared jointly by the parties without legal advice, formed a single contract between them.

Contract - Construction: The respondent was successful before the Local Court in his claim that the 'administration costs of patent administration' included the administration costs of applying for patents, arguing that the two documents must be read together. The appellant while conceding he is responsible for 30% of the patent renewal fees, argued that the initial expense in obtaining patents is the sole responsibility of the respondent on the basis that the Royalty Deed must be subject to the express terms of the Joint Patent Licence Investment Agreement.

Her Honour dismissed the appeal in respect of appeal grounds on this issue. Accepted that the principle the Court must ask is: what is the governing intention of the parties. Held that the two documents were executed contemporaneously and when read together did not create an ambiguity. The Joint Patent Licence Investment Agreement placed on the respondent the responsibility to obtain and maintain patents and do what was necessary to preserve the subject matter of the agreement. The Royalty Deed provided a method of accounting between the parties.

Costs - Amendment of Statement of Claim Reducing Amount of Claim: The ground of appeal in respect of costs relates to the fact that the learned stipendiary magistrate made no order for costs referrable to the respondent's amendment on the morning of the trial whereby the amount claimed was substantially reduced. Assumed that the learned stipendiary magistrate exercised a discretion as to costs and the principles expressed in *Keddie v Foxall* (1955) VLR 320 at 322, as to the duty of a Court of Appeal, applied.

Held that the magistrate's discretion miscarried because he did not specifically address the issue of costs in respect of the amendment reducing the claim. When the amendment saved the expense of conducting a trial on an aspect of the claim no longer in issue, the amendment was not made until the morning of the trial. The defendant/appellant was thus unnecessarily put to the expense of preparing for a hearing for a larger amount of money that the plaintiff proceeded with at

Continued Page 15

Supreme Court Notes

From Page 14

trial. The issue of costs in respect of the amendment appeared never to have been properly addressed. The ground of appeal as to costs allowed.

Mr Young instructed by De Silva Hebron for the appellant.

Mr Alderman instructed by Barr Moore and Co for the respondent.

AK

CROSS-VESTING

Pedro Pikos v Australian Boat Sales Pty Ltd and Ors

SC No 50/95

Judgment of Thomas J delivered 26 July 1995.

The plaintiff's claim related to the plaintiff's purchase of a vessel named the "Paceda". An application was made by the second, third and fourth defendants pursuant to s 5(2) and s 10 of the *Jurisdiction of Courts (Cross-Vesting) Act* to have proceedings transferred from the Supreme Court of the Northern Territory to the Supreme Court of Queensland. Her Honour stated that the real question was whether it was in the interests of justice that the matter be transferred. Her Honour highlighted six matters of significance in determining whether a transfer is in the interests of justice. Two of the more relevant were the plaintiff's reason for the choice of forum and the balance of convenience to the parties and their witnesses. The vessel was located in Queensland at the time of purchase but was subsequently transported to Darwin. The contract was formed by facsimile and telephone. At all times the plaintiff was resident in Darwin. Her Honour decided that the cost and inconvenience to the defendants and their witnesses, all of whom resided in Queensland, in having to travel to Darwin did not exceed the cost and inconvenience to the Plaintiff and his witnesses in having to travel to Brisbane. Her Honour decided that, having regard to the interests of justice, it would not be approriate to transfer the action to the Supreme Court of Queensland. Accordingly, the application was refused.

Mr Wyvill instructed by Philip & Mitaros for the plaintiff.

Mr Carter of Close and Carter for the defendants.

DW

CASE NOTE

Ah Toy v Howard

SC Nos 118/80 and 119/80

Unreported 21 July 1995, Martin CJ.

Solicitor from South Australia were retained in relation to a major litigation conducted in the Supreme Court of the Northern Territory. Local Solicitors were retained as agents to provide an address for service of documents and to perform some services associated with the matter, but it was clear that the South Australian solicitors were the 'principal' solicitors and received their instructions directly from the client.

No attempt was made by the South Australian solicitors to obtain practising certificates until the opening day of the trial, by which time very substantial costs had been generated. Costs were awarded to both parties, to be paid out of the estate which was the subject of the action.

It was held, following *TNT Bulk Ships v Hopkins and Anor* (1989) 93 FLR 352, that the ex-Territory solicitors were not entitled to recover their costs incurred prior to admission and issue or practising certificates. Their eventual admission had no retrospective effect.

Had the roles been reversed, and the ex-Territory solicitors been retained and paid as agents of the Territory solicitors for work done outside the Territory, such disbursement would have been properly recoverable.

Territory solicitors should be alerted to such situations in the future and advise ex-Territory solicitors to seek early admission and practising certificates so as to avoid similar consequences.

Mr Waters instructed by Ward Keller for the plaintiff.

Mr Hiley QC instructed by Cridlands for the Defendant.

DL

STATUTORY INTERPRETATION

Winzar -v- Caddy

McMahon -v- Caddy

Judgment of Thomas J, delivered 29 June 1995.

Upon information laid by the informant Winzar, the defendant pleaded guilty to an offence of stealing. Before sentencing, the trial judge ordered that the defendant be assessed for a community service order pursuant to s 21(1) of the *Criminal Law (Conditional Release of Offenders) Act* ("the Act"). During the course of the assessment, a Probation Officer explained to the defendant the matters listed in s 21(3) of the Act ie the purpose and effect of the order, the consequences that might follow if the defendant failed to comply with the order, and the order might be reviewed on the defendant's or the Director of Correctional Services' application. The trial judge convicted the defendant and ordered him to undertake community service. The trial judge did explain the matters contained in s 21(3) of the Act.

The defendant was later brought before the court for not complying with the terms of the order. The defendant argued that the community service order was void as the trial judge had not explained or caused to be explained to him the matters listed in s 21(3) of the Act.

A special case was stated to the Supreme Court, the question of law being whether when a Magistrate orders a report, expecting, but not specifically requesting that the matters will be explained, the Magistrate has caused the matters to be explained.

Her Honour Thomas J considered that the provisions of the Act relating to the matters in s 21(3) are mandatory and not merely directory. The legislative intent was that the explanation of s 21(3) should be made personally by a Magistrate or that the Magistrate should state in open court the method by which he would cause the matters to be explained. Only when this explanation has been made may the court issue a community service order.

Her Honour further considered that s 21 provides for two stage process whereby the defendant must firstly consent in principle to the making of the order, and the Court must (a) be

Continued Page 16

Supreme Court Notes

From Page 15

notified by a probation officer that arrangements have been made for the offender to perform approved work and (b) be satisfied after considering a report from a probation officer that the offender is a suitable person to perform the work and that the work is approved and can be provided to the defendant.

Having done this, the court must secondly ensure that the provisions of s 21(3) have been complied with and that the defendant consents to the making of the order.

Having completed these two steps, the court is then in a position to make a community service order.

Mr M Spargo instructed by De Silva Hebron for the defendant.

Mr C Cato instructed by the DPP for the informant.

RN

STATUTORY INTERPRETATION

Work Health Act: Meaning of the phrase "Has been wound up"

The Nominal Insurer -v- Desmond John Thomas

No 107 of 1994

Judgment of Kearney J delivered 15 May 1995.

The appellant appealed against the decision of the Work Health Court which granted the respondent's application to consolidate two Work Health claims arising out of the same facts, and dismissed the appellant's application to stay or dismiss the respondent's claim against the appellant.

The case turned on whether the phrase "has been wound up" in respect of a company in section 167(2)(a) of the *Work Health Act* means that the process of winding up the affairs of the company to has been completed in accordance with the *Corporations Law* (ie: that the liquidation has been finalised) or merely that a liquidation has commenced.

In deciding that the phrase requires the liquidation to have been completed in accordance with the *Corporations Law*, His Honour considered the intention and general aims of the *Work Health Act* as a whole, and the plain and ambiguous language used in Section 167. His Honour allowed the appeal, dismissed the claim against the appellant, and set aside the orders consolidating the two claims.

In the course of his judgment, His Honour made a useful analysis of the provisions of section 167 of the *Work Health Act.*

Mr T Riley QC instructed by Elston and Gilchrist for the appellant.

Mr J Brown instructed by Cridlands for the respondent.

AS

CRIMINAL LAW

Method of Administering Caution

The Queen -v- Sarah Mary Mangaraka

Judgment of Martin CJ, delivered 9 June 1995.

Certain evidence was ruled inadmissible, after a voir dire was conducted, upon the basis that confessions made by the accused were not voluntary, the Crown failing to satisfy the Court on the balance of probabilities that she understood her right to silence.

The accused was charged with the fatal stabbing of an Aboriginal man at Hermannsburg during an incident which involved violence as between a number of Aboriginal people. The accused, who herself had suffered injuries from knife wounds, was a full-blood Aboriginal woman, aged about 29 years, born at Hermannsburg. She had limited formal education and her first language was Western Arrente, although she also had a limited capacity to converse in English. She was partly deaf in one ear.

Features of the evidence that led to His Honour's decision to reject the confessional material were:

1) The numerous attempts made by police officers to explain to the accused that she had a choice as to whether to answer questions or not.

Held that there is an inherent problem in informing an Aboriginal person with limited English language skills of their right to silence and that the difficulty is compounded the more frequently the traditional form of warning is given.

2) When asked to tell the police questioner what was meant by the warning the accused attempted a verbatim repetition of what she had been told, not what it meant to her in the circumstances.

3) The inconsistent and other wise confusing responses.

Held that although it could be argued that taking some answers in isolation indicated a possibility that the accused understood what was being explained and had made her choice to speak, the contrary indications did not permit a finding on the balance or probabilities.

4) The presence of persons nominated by the accused and the assistance they gave to her with a view to explaining to the police were putting to her.

Held persuasion from a person who is not in authority over the accused in the legal sense [in this case the accused's mother who had told her to tell the truth], does not of itself render a subsequent confession questionable on the ground that it is not voluntary. However, when coupled with advice to the accused that the police were there to help her, may have caused the accused to consider the purpose of the questioning was to obtain information about what had happened to her as opposed to what she did to the deceased.

5) There was no trained interpreter.

Held that the endeavours to assist by one of the persons nominated by the accused [in this instance the accused's cousin] did not improve the accused's understanding of the relevant concepts.

His Honour stated that it may be that a case could be made out for a revision of the wording of the caution and the way it is delivered. A caution must be more easily explained and communicated by investigating police, and capable of being better comprehened by those whose understanding of the concept of the right to silence may be impaired, particularly where effective oral communication is a problem

Mr Wakefield for the appellant.

Mr Collins for the respondent.

AS