Supreme Court Notes

This month's reporter is Mark Hunter

Erratum : September Supreme Court Notes
Johnston-v- Paspaley Pearls
"after the offence of the injury" should read *"after the occurrence of the injury".*

Constitutional Law _ Judicial power of the Commonwealth - *Community Protection Act 1994 (NSW)*

Kable -v- DPP NSW
High Court of Australia
Full Court No. 96/027

On 1 August 1990 Gregory Wayne Kable ("the appellant") was sentenced to a minimum term of imprisonment of four years and an additional term (parole) of one year and four months. He had been charged with murdering his wife but accepted the prosecution offer of a plea of guilty to manslaughter upon the basis of diminished responsibility.

During his sentence the appellant wrote a series of threatening letters, mainly to relatives of his deceased wife. He was charged with sending threatening letters through the mail and was in custody pending the hearing of these charges when his sentence expired. A number of persons feared for their safety if the appellant was released.

On 2 December 1994 the New South Wales Parliament passed the *Community Protection Act*, 1994 ("the Act") which conferred jurisdiction upon the Supreme Court of NSW to make an order for the preventative detention of the appellant.

On 23 February 1995 Levine J ordered pursuant to section 5 of the Act that the appellant be detained in custody for a period of six months.

On 9 May 1995 the Court of Appeal dismissed an appeal brought by the appellant against the order of Levine J.

On 21 August 1995 Grove J refused an application by the DPP for a second preventative detention order. The appellant was released but remained liable at any time to be the subject of a further application that he be detained in custody.

HELD

The Act is invalid.

In a majority decision (Brennan CJ and Dawson J dissenting) the High Court ruled the Act to be in conflict with Chapter III of the Commonwealth Constitution by reason of the fact that it purported to vest in the Supreme Court functions which were incompatible with the exercise of the judicial power of the Commonwealth by the Supreme Court.

The Act contained a number of odd features. Section 5 of the Act gave the Supreme Court power to make a preventative detention order if satisfied:

(a) that a "specified person" was "more likely than not" to commit a serious act of violence; and

(b) that the protection of another person, persons or the community required the specified person to be held in custody.

Section 5 specifically allowed for orders against persons not in custody and not otherwise liable to be detained. Section 3(1), however, expressed the object of the Act to be "to protect the community by providing for the preventative detention.... of Gregory Wayne Kable". Section 3(30 specifically limited the operation of the Act to the appellant.

(Per Dawson J) - The legislature appeared originally to intend a statute of general application but passed a law directed at only the appellant. Section 10 of the Act prohibits the operation of the Act to persons under sixteen years of age. Clearly this section could have no application by virtue of the operation of the Act being restricted to the appellant.

(per Toohey J) - Chapter III of the Commonwealth Constitution reflects an aspect of the doctrine of the separation of the powers and protects the role of a judiciary which is independent from the legislature and executive. The Act is invalid because it requires the Supreme Court to participate in the preventative detention order where no breach of the criminal law is alleged. The Act vests in the Supreme Court a non-judicial function which diminished public confidence in the integrity of the judiciary of as an institution.

(Per Gaudron J) - The Commonwealth Constitution provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court and "other courts" vested with federal jurisdiction.

The Act attempts to "dress up" proceedings conducted under it as legal proceedings but proceedings contemplated by the Act are otherwise unknown to the law.

Proceedings under the Act do not involve the resolution of a dispute between the contesting parties as to their legal rights and obligations.

By dressing up the proceedings under the Act with the requirement that they be commenced by summons and referring to the specified person as the "defendant", the Act makes a mockery of the judicial process and inevitably weakens public confidence in it.

The Act therefore weakens confidence in the institutions comprising the judicial system created by Chapter III of the Commonwealth Constitution.

(per McHugh J) - Nothing in Chapter III of the Constitution prevents a state from conferring non-judicial functions on a state Supreme Court in respect of non-federal matters so long as those non-judicial functions are not of a nature which might lead an ordinary member of the public to conclude that the Court was not independent of the executive government of the state. For example, a state law which gave the Supreme Court the power to determine how much of the state budget should be spent on child welfare would be invalid.

His Honour referred to expert evidence received by the Court that predicting dangerousness is "notoriously difficult".

Gummow J approved comments made by Gaudron J in *Chu Kheng Lim -v- Minister for Immigration* that detention in the absence of some breach of criminal law "is offensive to ordinary notions of what is involved in a just society". Her Honour prefaced this comment by recognising the legitimacy of involuntary detention in cases such as contempt of court, breach of military discipline, mental illness or infectious disease.

His Honour noted that the Act impinged on the operation of the *Judiciary Act* but held that the vice from which the Act suffered was best removed without involving section 109 of the Commonwealth Constitution upon inconsistent

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laws. His Honour ruled that the Act is invalidated by the operation of the Constitution itself.

COMMENTARY

The High Court was clearly prepared to concede the power of a state to legislate for the preventative detention of specific persons or classes of persons. What was offensive to the Commonwealth Constitution was making the Supreme Court the instrument of such a legislative plan.

Criminal Law - Insanity - Sections 109 and 112 *Justices' Act*

Keighran -v- Lowndes & Wild
SC No 71 of 1996

Judgment of Thomas J delivered 13 September 1996 (unreported)

The plaintiff sought Supreme Court relief in respect of an order made by the first defendant committing the plaintiff for trial to the Supreme Court on a number of charges. At the conclusion of evidence for the prosecution, the first defendant found that there was sufficient evidence to commit for trial (section 109). He then advised the plaintiff of his right to give evidence and/or call evidence from witnesses.

The plaintiff elected not to give evidence but called evidence from two psychiatrists who both expressed the view that a jury could find him legally insane.

The first defendant was of the view that evidence of insanity could not form part of the consideration of the evidence by a committing magistrate. He described it as a "classic jury issue" and proceeded to commit the plaintiff for trial (section 12).

The plaintiff's counsel at the committal hearing had urged the first defendant to consider the evidence going to his client's mental state on two bases -

1. whether a jury could reasonably arrive at a conclusion other than that the plaintiff was legally insane; and (in the alternative)
2. if the first defendant could not consider insanity, whether there was sufficient evidence of specific intent to warrant a committal for trial.

Her Honour was referred to the decision of *Hawkins -v- R* where the High Court ruled that -

1. evidence of mental disease is inadmissible on the issue of voluntariness unless it is capable of supporting a finding of insanity; but
2. evidence of mental disease is admissible on the issue of the specific intent required for murder under the Tasmanian Criminal Code.

HELD

Committal proceedings are not an appropriate forum for considering matters such as insanity where the onus of proof is on the defendant. The first defendant had not acted in error.

The plaintiff's application was refused.

COMMENTARY

Her Honour, like the first defendant, declined to rule on whether the rationale in *Hawkins* is applicable to Northern Territory law. The plaintiff has appealed this decision.

Book Review continued

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into the "dominant legal system" is argued for strongly.

The proposal in respect of urban Aboriginal and Torres Strait Island people greatly interested me. The author is able to dispel myths in a very straightforward way. At page 76 she states:

"There seems to be some problem with non-Aboriginal people conceptualising the autonomy of urban Aboriginal communities. The appearance may be one of integration because of the physical position of the community, but the physical integration is deceptive. An urban Aboriginal person would feel a stronger connection with an Aboriginal person living in a rural , even a traditional setting than with a non-Aboriginal person living next door or working on the desk opposite them".

Ms Behrendt does not regard her proposed model as being fully developed and definite, and her proposal cannot be viewed in that light.

After reading the book one cannot help but wonder if and when the equation will ever be equal. The book is thought provoking and well worth reading.