High Court and Federal Court Notes

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Provocation

97/44 Criminal Law - murder - provocation - whether conduct of deceased would have induced an ordinary person to have lost self-control - accused beaten by father - victim murdered by accused after making homosexual advances to him - whether susceptibility of accused relevant in determining response of "an ordinary person".

In Green v Q (7 November 1997) the appellant man was convicted of murdering a male. The appellant and his siblings had suffered beatings and sexual abuse from their father as children. The victim, a family friend of the appellant, was killed after making homosexual advances to the appellant. By s23(1) *the Crimes Act 1900* (NSW) provides for the "defence" of provocation. It provides that an act causing death is done under provocation where the act is the result of a loss of self-control on the part of the accused that was induced by the conduct of the deceased and the conduct of the deceased would have induced "an ordinary person in the position of the accused" to have so far lost self control. The trial judge allowed the issue of provocation to go to the jury but excluded evidence of the beatings and abuse of the appellant and his siblings. The trial judge ruled these matters were subjective factors peculiar to the appellant and not related to "an ordinary person". The appellant's appeal to the Court of Criminal Appeal (NSW) was dismissed. This court concluded that while the trial judge's charge to the jury was defective, no substantial miscarriage of justice had occurred. It found on the facts that the appellant's reaction to the homosexual advances exceeded that of "an ordinary person in the position of the accused". The appellant's appeal to the High Court was allowed: Brennan CJ, Toohey J, McHugh J; contra Gummow J, Kirby J. The majority concluded that the appellant's experiences were relevant in determining the effect of the homosexual advances on him as "an ordinary person in the position of the accused". The majority concluded evidence of these matters should have been considered by the jury. New trial ordered.

97/43 Criminal law - sentencing - life sentence.

In *Vanit v Q* (7 November 1997) by s16G the *Crimes* Act 1914 (Cth) provides that if a federal sentence is to be served in a prison of a State or Territory in which sentences are not subject to remission or reduction, the court imposing the sentence must take that fact into account in determining the length of the sentence and adjust it accordingly. By s16(1) the Act defined "federal sentence" to mean "a sentence imposed for a federal offence". The appellant was sentenced to life imprisonment in the Northern Territory for offences against the *Customs Act* 1901 (Cth). On appeal the Court of Criminal Appeal set non-parole periods but dismissed the appeals against the imposition of life sentences. The High Court concluded that imposition of a sentence of life imprisonment was not precluded by s16G of the *Crimes Act*: Brennan CJ with Gaudron J.; sim McHugh J, Gummow J, Kirby J. The court explained the true purpose of s16G was to make in certain circumstances adjustments to determine sentences where the concept of remission and reduction of sentence may operate. The court construed the provision according to its purpose and generally concluded it did not apply to life sentences because they were not subject to remissions or reductions in any state or territory. Appeal dismissed.

97/45 - Negligence - contributory negligence - whether jury can find 100% contributory negligence.

In *Wynbergen v Hoyts Corporation* (11 November 1997) the appellant sued his employer for personal injuries caused by a breach by the respondent employer of its duty to provide a safe system of work. The jury answered questions to the effect that (a) the respondent employer was negligent in failing to provide a safe system of work; (b) the appellant/plaintiff had been negligent by failing to take care of his own safety and this contributory negligence amounted to 100%; (c) the appellant was entitled to $38 damages. On appeal the NSW Court of Appeal proposed the inconsistent answers be reconciled on the basis that the jury had regard to culpability as well as causation. This court dismissed the appellant's appeal. The appellant's appeal to the High Court was allowed. Hayne J (with whom Gaudron, McHugh, Gummow JJ agreed) observed that apportionment legislation such as s10 of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) is predicated on a finding of both negligence and contributory negligence. He observed it could not be "just and equitable" within this provision that having regard to the claimant's share and responsibility for the damage the claimant be held totally responsible for it. The High Court concluded the answers of the jury indicated that it had not understood the law and the existence of a substantial wrong or miscarriage of justice could not be denied. Appeal allowed, new trial ordered.

Federal Court

Veterans' affairs - reasonable hypothesis.

In ***Webb v Repatriation Commission*** (VG 761/96, 24 October 1997) Finkelstein J concluded the AAT had erred in law in misconstruing medical evidence and had thereby arrived at its decision without having taken into account a relevant consideration. The veteran suffered from a histiocytic proliferative disorder of uncertain aetiology. Finkelstein J concluded the AAT had erred in concluding the hypothesis propounded to link this disorder to war service was rendered tenuous because the diagnosis of the disease was not known. He observed that conflict between the hypothesis and medical opinion was not sufficient reason to conclude the hypothesis was unreasonable.