Cameron Ford's Supreme Court Case Notes

SUPREME COURT JUDGMENTS FOR OCTOBER 2014

ADMINISTRATIVE LAW

- ***Health Practitioners***
- ***Health Asessment***
- ***Investigation***
- ***Powers***
- ***Injunction***
- ***"Belief"***
- ***Natural justice not applicable***

In *Coppa v Medical Board of Australia* [2014] NTSC 48, Barr J dismissed a doctor's application for an injunction and declaration that he not be obliged to undergo a health assessment under s 169 of the *Health Practitioner Regulation National Law (NT)*. His Honour held that (1) A health assessment may be required while an investigation is underway under Part 8 Division 8: [46]; (2) A health (or performance) assessment under Division 9 is not required to follow upon the processes for investigating a notification under Division 8: [47]; (3) The power contained in s 167(b)(i) to "take the action the Board considers necessary or appropriate under another Division" reflects the position under the National Law that the Board has options after considering an investigator's report, including to continue processes already commenced under Division 9 and taking action following the completion of those processes: [49]; (4) Section 167(b)(i) does not operate to prevent action under Division 9 being commenced before the Board has considered the investigator's report provided under Division 8, nor does it evidence an intention under the National Law that an assessment cannot occur at the same time as an investigation: [49]; (5) The only limitation to Division 9 being utilized to require a health assessment is the Board's reasonable belief under s 169 that the registered health practitioner has or may have an impairment: [51]; (6) The words "have *or may have* an impairment" in s 169 clearly indicate that reasonable belief as to the possibility of an impairment is sufficient; [51]; (7) Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture; a belief need not "establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof: *George v Rockett* (1990) 170 CLR 104 at 115-6: [52]-[53]; (8) the rules of natural justice did not apply to the administrative process preliminary to the defendant Board reaching the reasonable belief necessary to require the plaintiff to undergo a health assessment pursuant to s 169 of the National Law: [59].

APPEAL, LEAVE TO

- ***Conviction***
- ***Delay***
- ***Prejudice and prospects***

In *Seriban v R* [2014] NTCCA 12 at [14] and [44], the Court of Criminal Appeal (Riley CJ,

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Southwood and Hiley JJ) refused an application for leave to appeal against conviction brought more than four years later because of prejudice to the prosecution of a retrial and no prospects of success of an appeal, citing *Lo Castro v The Queen* (2013) NTCCA 15 at [8] and *R v Green* (1989) 95 FLR 301 at 304. Not every misdirection relating to the elements of an offence will necessarily amount to a fundamental flaw in the trial: [37], citing *Krakouer v The Queen* (1998) 194 CLR 202; *Darkan v The Queen* (2006) 227 CLR 373.

APPEAL
- ***Time***
- ***Dispensing with compliance***
- ***See time***
- ***Appeal***
- ***Dispensing with compliance***
- ***Prospects of success relevant***

CONSTRUCTION
- ***Security of payment***
- ***Further applications for same payment dispute prohibited***
- ***Court may determine whether same applications repeated***
- ***More than one payment dispute per application***
- ***No consent***

In *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44, Kelly J held that (1) determining whether a party purporting to make an application for an adjudication is entitled to do so under s 27 is not one of the core functions conferred upon the adjudicator by the *Construction Contracts (Security of Payments) Act 2004* (NT) but the adjudicator has jurisdiction to determine the question: [22] and [31]); (2) the adjudicator's power to determine that question does not exclude the court's power to do so if asked: [31]; (3) the imminent expiry of a time limit for application may be relevant to the court's discretion to determine the question, but not here: [33]; (4) s 27 prevents more than one application for a payment dispute, whether the previous application is on foot or has been determined: [41]; (5) an application for adjudication of more than one payment dispute without the consent of the respondent under s 34(3)(b) is still an "application" for the purposes of s 27: [45]-[48].

CRIMINAL LAW
- ***Attempt***
- ***Conduct more than preparatory***
- ***Permanent stay***
- ***Principles***

In *English v R* [2014] NTSC 38 at [29], Southwood J held that "[t]he essence of an attempt is an intention to commit the offence and then beginning to put that intention into execution by some conduct adapted to its fulfilment which is more than merely preparatory to the commission of the offence." His Honour held that there was no such evidence in this case and at [30] permanently stayed the prosecution because it was manifestly foredoomed to fail, citing *Situ v The Queen* (2008) 186 A Crim R 224 at 228 and *R v De Silva* (2007) 176 A Crim R 238 at [14]. See also CRIMINAL LAW – *Permanent stay of prosecution.*

CRIMINAL LAW
- ***Fitness to stand trial***
- ***Not guilty due to mental impairment***
- ***Supervision order***
- ***Hypothetical sentencing***

In *R v Kunoth* [2014] NTSC 41, Barr J held the accused unfit to stand trial and a special hearing was held under s 43R(3) of the *Criminal Code* at which the jury found the accused not guilty because of mental impairment. His Honour made a supervision order under s 43ZC which is for an indefinite term, and set a period of two years as required by s 43ZG as the appropriate sentence for the offence if she had been found guilty, agreeing at [36] with *R v Morton* [2010] NTSC 26 at [46] that s 43ZG does not exclude the normal sentencing principles.

CRIMINAL LAW
- ***Identification evidence***
- ***Principles***

In *Cumaiyi v Jones* [2014] NTSC 36 at [18], Riley CJ held that a magistrate did not err in relying on a police officer's identification of the accused, referring to the familiar authorities of *Domican v The Queen* (1992) 173 CLR 555 and *Winmar v Western Australia* (2007) 35 WAR 159 that an honest witness may be mistaken and an honest and mistaken witness may be convincing. The officer's identification of the accused was reliable.

CRIMINAL LAW
- ***Permanent stay of prosecution***
- ***Principles***

In *English v R* [2014] NTSC 38 at [30], Southwood J held that a prosecution may be permanently stayed at the outset as an abuse of process where it is clearly and manifestly foredoomed to failure because of being plain beyond argument that there is no evidence on an essential element of the offence, citing *R v Smith* [1995] 1 VR 10 at 16 and 28 and *Walton v Gardiner* (1993) 177 CLR 378 at 392-3.

CRIMINAL PROCEDURE
- ***Discharge jury***
- ***Application***
- ***Accused's adaverntent disclosure of prison***
- ***Bad character***

In *R v Foster* [2014] NTSC 47, Kelly J refused to discharge a jury where the accused inadvertently disclosed that he had spent time at "Berrimah". Her Honour held at [10] that there is no inflexible rule requiring the jury to be discharged if there is any inadvertent disclosure that the defendant has been to prison with the consequent implication of bad character. The question is whether there can be a fair trial, considering its nature and the prejudice caused by the disclosure: *R v Knape* [1965] VR 469; *R v Boland* [1974] VR 949 at 866; *R v George, Harris and Hilton* (1987) 9 NSWLR 527 at 532

– 533; *R v Vaitos* (1981) 4 A Crim R 238 at 243. Here there was enough other evidence of bad character that this disclosure was highly unlikely to be more prejudicial: [11]. In any case, the jury could easily have understood the reference to Berrimah to his being on remand for these charges: [11].

CRIMINAL PROCEDURE

- ***Withdrawal of plea after conviction***
- ***Whether free and voluntary and conscious of guilt***
- ***Principles***

In *Singh v The Queen* [2014] NTCCA 16 at [65], the Court of Criminal Appeal (Kelly and Blokland JJ and Mildren AJ) dismissed an application to withdraw a plea of guilty after conviction, holding that the applicant's will was not overborn and there was no miscarriage of justice. An applicant must show that there was a miscarriage of justice because he did not intend to plead guilty, he did not understand the nature of the charge, the facts could not in law amount to the offence, or there was intimidation, inducement, fraud or the like: [31]-[34] citing *Meissner v The Queen* (1995) 184 CLR 132, *Hogue v The State of Western Australia* [2005] WASCA 102, *Liberti v The Queen* (1991) 55 A Crim R 120 and *Lo Castro v The Queen* [2013] NTCCA 15.

LEGAL PRACTITIONERS

- ***Costs***
- ***Review of assessment***
- ***"Fair and resaonable"***
- ***Effect of costs agreement***
- ***Advocates' immunity displaced***
- ***Costs diclosure rules***

In *Black v Alexiou & Anor* [2014] NTSC 46, Kelly J dismissed an application for review of a costs assessor's determination, holding at [15] that a reviewer of a determination needs to make a preliminary determination under s 352 of the *Legal Profession Act 2006* (NT) whether or not to conduct a review. The applicant bears the onus of showing that there has been an error of fact or law in the assessment: [18]. It is not appropriate for a reviewer to examine the assessment in detail when considering whether to grant the application to review: [39]. Manifestly excessive deductions made by the assessor may indicate an error of principle: [41]. The effect of s 341 is that the existence of a costs agreement simply precludes the assessor from substituting what he considers to be a fair and reasonable rate or amount for a rate or amount specified in the fee agreement; it does not preclude him from considering whether the costs are fair and reasonable: [30]. While advocates' immunity as described in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1 can extend to disputes between advocate and client, it is a principle of common law and may be displaced by statute: [36]-[37]. The purpose of the costs disclosure rules is to ensure that the client knows from the outset the likely magnitude of the costs he will incur in conducting the action, or a range of estimates along with an explanation of the major variables that will affect the magnitude of those costs. This is not achieved simply by giving with each invoice an estimate of costs to the next hearing or stage of proceedings. This is not a mere technicality: [43].

PRACTICE

- ***Adjournments***
- ***Summary court***
- ***Judicial review***
- ***Unusual***

In *Chin v Teague* [2014] NTCA 5 at [30], the Court of Appeal (Blokland, Barr and Hiley JJ) overturned a single judge's quashing of a magistrate's refusal of an adjournment of a criminal trial. The Court of Appeal held at [23]-[24] that the length of the necessary adjournment was much longer than the judge had been led to believe and that it is unusual for superior courts in judicial review proceedings to interfere with decisions of summary courts to grant or refuse adjournments, citing Kirby J in *Blaveski v Judges of the District Court of New South Wales* (1992) 29 ALD 197 at 200.

PRACTICE

- ***Preliminary trial***
- ***Standing***
- ***Principles***

In *Joondanna Investments Pty Ltd v City of Palmerston & Anor* [2014] NTSC 42 at [25], Master Luppino dismissed an application for the preliminary trial of the question of standing so as to avoid multiplicity of proceedings and to achieve the earliest determination of the substantive issues. His Honour adopted at [5] the principles stated in *Carlo Nobili SpA Rubinetterie v Militaire Nominees Pty Ltd* [2004] WASC 47 and *Vliestra v Ranger* [2005] NTSC 6 applicable to this case as: 1. A separate trial of issues is only appropriate in clear and simple cases; 2. Separate trials of issues should only be embarked on when the utility, economy and fairness is beyond question; 3. The fact that the separate trial may determine the litigation is relevant; 4. Separate trials of issues may be appropriate where it is likely to save expense and inconvenience; 5. There is a focus in the Rules of the Supreme Court on the expeditious determination of matters and separate trials of issues may advance the expedition; 6. Separate trials may be productive of delay, extra expense and uncertainty of outcome, which they are intended to avoid. Saving some time is often illusory when the parties have the necessity of making full preparation and factual matters relevant to one issue are relevant to others which overlap; and 7. There is potential for further appeals (see *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 55).

SENTENCING

- ***Aggravated robbery***
- ***Youths***
- ***Custody***
- ***Last resort***
- ***Shortest time***
- ***Manifestly excessive***

In *BB v The Queen* [2014] NTCCA 13 at [14], the Court of Criminal Appeal (Blokland, Barr and Hiley JJ) held to be manifestly excessive a wholly suspended sentence of two years and three months for a 13 year old's plea to robbery aggravated by assault, ordered to be served concurrently with a shorter sentence for seven property offences, with another three property offences taken into account. Suspension of sentences is irrelevant to consideration of manifest excess: [16]. For youths, custody should be the last resort and for the shortest possible time: [17]. The offending was serious but not planned or sophisticated and did not involve weapons; the appellant pleaded and agreed to testify against co-offenders: [21]-[22]. Resentenced to 12 months detention without conviction, fully suspended for the primary count: [41]. Bond of $100 for 6 months for the remaining offences: [42].

SENTENCING

- ***Assault***
- ***Nine victims***
- ***Juvenile***
- ***In company***
- ***Non-parole reduced***

In *Wesley v The Queen* [2014] NTCCA 1 at [44], the Court of Criminal Appeal (Riley CJ, Kelly and Blokland JJ) dismissed an appeal against a head sentence of five years for ten counts of assault and related offences by an offender 15 years and 10 months old, but reduced the non-parole period from two years six months to 18 months. It was not an error not to seek a presentence report because the sentencing judge had a psychiatric report which provided all the necessary information: [28]-[30]. The judge properly considered prospects of rehabilitation: [32]. There was no disparity between this and the sentence for a co-offender: [35]. The sentence was stern but no manifestly excessive: [43]. The non-parole period was manifestly excessive because the psychiatrist said the "picture will clarify over the next year or so", it was not clear from the sentencing remarks why the longer period was chosen, and under the *Youth Justice Act* and court is not obliged to set a non-parole period of at least 50% of the head sentence: [44].

SENTENCING

- ***Errors in agreed facts***
- ***Insignificant to sentence***

In *O'Reilly v The Queen* [2014] NTCCA 14, the Court of Criminal Appeal (Riley CJ, Blokland and Hiley JJ) held that errors in agreed facts were insignificant to the sentence and did not warrant leave to appeal. It was incorrectly agreed that the victim was hit while looking away and fell to the ground as a result: [6].

SENTENCING

- ***Driving offences***
- ***Youth***
- ***Licence disqualification***
- ***Dependency for employment***

In *Demur v The Queen* [2014] NTCCA 15, the Court of Criminal Appeal (Riley CJ, Blokland and Hiley JJ) allowed an application for leave to appeal and the appeal against a sentence of ten years disqualification of licence on the ground of manifest excess. The 22 year old appellant had caused serious long term injuries to a passenger in an accident while driving intoxicated. Their Honours held that "[n]othing in *Baumer v The Queen* (1988) 166 CLR 51 stands for the proposition that first offenders may not receive lengthy disqualification periods for serious driving offences" and that a balancing of all factors is required: [29]. Because of the prevalence of young people driving dangerously, factors such as youth, prior good character and rehabilitation must be given less weight than general deterrence: [30-[31], citing *Director of Public Prosecutions v Neethling* (2009) 22 VR 466 at [27] – [28] and *Director of Public Prosecutions v Oates* (2007) 47 MVR 483 at 487. In principle the disqualification period should be longer than the period of imprisonment so that the disqualification has some "real and manifest sting" from both the point of view of personal and general deterrence: [36], citing *R v Veatufunga* [2007] NSWCCA 4, at [40] per Sully J; *R v Franklin* [2009] VSCA 77. The appellant's dependency on his licence for employment was a significant factor: [33], citing *R v Dang Hai Nguyen* [2009] VSCA 64. Resentenced to five years disqualification: [41].

SENTENCING

- ***Mandatory***
- ***Exceptional circumstances***
- ***Factors***
- ***Good character relevant***

In *Dhamarrandji v Curtis* [2014] NTSC 39 at [21], Blokland J accepted the approach of Lord Bingham of Cornhill CJ in *R v Kelly* [2000] 1 QB 198 as to what are exceptional circumstances justifying departure from a mandatory sentence, namely circumstances which are unusual, special or uncommon but need not be unique, unprecedented or very rare. They cannot be ones that are regularly, routinely or normally encountered. A broad approach is permissible and the court may have regard to any matter provided it is not excluded: [24]. The sentencing factors in s 5 of the *Sentencing Act 1979* (NT) and the common law principles could be considered in determining what is exceptional: [25]. Both objective and subjective factors may be taken into account, including good character: [34].

SENTENCING

- ***Receiving stolen property***
- ***Drinking alcohol***
- ***Manifestly excessive***
- ***Proviso inappropriate***

In *Jinjair v Verity* [2014] NTSC 35, Blokland J replaced a sentence of six weeks imprisonment with one week for receiving stolen property – alcohol worth $70 – contrary to s 229 of the *Criminal Code*. Her Honour held at [17] that the sentence was significantly disproportionate to the offending, which was committed by accepting a drink of alcohol the appellant was told was stolen. It was inappropriate to apply the proviso because worth "[t]he imposition of a sentence that is manifestly excessive by its nature represents a substantial miscarriage of justice.": [21].

SENTENCING

- ***Stealing money***
- ***Breach of trust***
- ***Manifestly excessive***

In *Gregurke v The Queen* [2014] NTCCA 11, the Court of Criminal Appeal (Riley CJ and Barr J; Hiley J dissenting) granted leave to appeal against sentence, saying at [21] that the amount of money stolen is not the only determinant of length of sentence, referring to *R v Bird* (1988) 56 NTR 17 at 33 regarding breach of trust. The sentence of six years with four years non-parole was manifestly excessive for stealing $124,300 cash from an elderly victim to whom the accused provided home care. Resentenced to four years and six months with two years six months non-parole: [27].

SENTENCING

- ***Totality***
- ***Delay in sentencing***
- ***Additional sentence***
- ***Non-parole extension***
- ***Sentencing act s 57(1)***

In *Waters v James* [2014] NTSC 37 at [27], Hiley J held that "[t]he purpose and intent of s 57 is to require and enable a court to fix a new single non-parole period that is appropriate in light of the total effective imprisonment that the prisoner will now have to serve, having regard to the sentence or sentences still being served and the additional sentence about to be imposed." A magistrate did not set a new non-parole period after imposing additional sentences with the result that the non-parole period was extended by 7 months. Hiley J adjusted the sentences to attract the operation of s 57 and reduce the non-parole period.

SENTENCING

- ***Use offensive weapon***
- ***Youth offender***
- ***Manifestly excessive***

In *HB v Wood* [2014] NTSC 45 at [12], Barr J held that the sentencing magistrate misconceived the offence as *possess* an offensive weapon rather than *use* and, at [16], that the sentence of one month's detention was manifestly excessive for a youthful first offender, where rehabilitation is far more important than general deterrence, the benchmark for custody is higher and detention is a last resort, citing at [17] *R v Mills* 1 [1998] 4 VR 235 at 241, *Pascoe v Davis* [2010] NTSC 40 at [22] and *Ryan v Malagorski* [2012] NTSC 55 at [16].

TIME

- ***Appeal***
- ***Dispensing with compliance***
- ***Prospects of success relevant***

In *Swann v Mosel* [2014] NTSC 43, Barr J exercised the power in s 165 of the *Justices Act 1979* (NT) to dispense with compliance with the time limit for filing an appeal against sentence, holding at [20] that in this most unusual case, "there was nothing 'reasonably practicable' the appellant could have done to comply with the Act, because of her physical and emotional health and her living circumstances." His Honour disagreed at [24] with Martin CJ in *Alympic v Burgoyne* [2003] NTSC 43 at [11] that the prospects of success of the appeal are irrelevant to the discretion to dispense with compliance.