Cameron Ford's Supreme Court case notes

Detailed notes of all Supreme Court decisions are published on *www.ntclr.org* and in the Northern Territory Law Journal

CONSTRUCTION SECURITY OF PAYMENT – PROCEDURAL FAIRNESS

In *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45, Kelly J set aside a determination under s 48(1) of the *Construction Contracts (Security of Payments) Act* for an adjudicator's failure to accord the parties procedural fairness. The adjudicator had based the determination on matters not submitted by either party and without giving them a chance to submit. Her Honour said at [30] that procedural fairness required that the adjudicator notify the parties of "proposed conclusions that were not put forward by the parties and could not be easily anticipated." The court will set aside a purported determination by an adjudicator where there has been a failure by an adjudicator to provide such procedural fairness and, as a result, a party has been deprived of the possibility of a successful outcome.

CONTRACT – ACCEPTANCE OF REPUDIATION; WAIVER BY NON-PERFORMANCE

In *Anchung Pty Ltd v Northern Territory of Australia* [2017] NTSC 42, Kelly J held that a defendant had not unequivocally accepted the plaintiff's repudiation of a contract before the plaintiff later affirmed the contract, with the result that defendant's later purported acceptance of the repudiation was itself a repudiation. A party who refuses to perform its obligations and thereby intimates to the other party that the other party need not bother to fulfil a condition precedent, may be liable to the other party even though that other party has not fulfilled the condition. The non-performing party is taken to have waived performance of the condition. The other party must still have substantial capacity to perform.

'DRIVING' FOR MACA

In *O'Connor v Motor Accidents (Compensation) Commission* [2017] NTSC 36, Riley J held that a woman was not 'driving' a motorcycle when she was sitting on it stationary for more than five minutes with the engine running, in neutral, with the left indicator flashing and the brake light on, talking to people, one of whom was standing in front. The undefined word 'driving' in the *Motor Accident Compensation Act* has its ordinary, everyday meaning being to cause and guide the movement, or to use the driver's control in order to direct the movement, of the vehicle. If the driver moves off the roadway and parks the vehicle it will be a matter of fact and degree as to whether the act of driving has ceased.

INDECENT DEALING – RELEVANCE OF MOTIVE

In *BD v The Queen* [2017] NTCCA 2, the Court of Criminal Appeal held at [26] that the motive of the accused is not legally relevant to guilt but may be factually relevant. If an act is indecent in itself, an allegedly innocent motive will not excuse. If an act is ambiguous as to indecency, innocent motive might exculpate and sexual motive might inculpate. A teacher's washing young female students' legs between knees and upper thighs with wash cloth and soap was not plainly and obviously indecent although it may have been inappropriate or made the complainants feel uncomfortable. But the conduct was not incapable of being indecent, and it was for the jury to decide if the acts were sexually motivated and therefore committed in circumstances of indecency.

JURY DELIBERATIONS TO IMPUGN VERDICT

In *BD v The Queen* [2017] NTCCA 2, the Court of Criminal Appeal held at [110] that the general rule is that evidence of the jury's deliberations is not admissible to impugn a jury gives its verdict and is discharged. Evidence is admissible of matters extrinsic to the deliberations or of unlawful coercion. Inter-personal pressure from robust debate is not coercion; something more than "bullying" would be needed to raise a suspicion of unlawful intimidation. It is well-recognised that jurors may be subject to second thoughts after the event. Here a juror presented an unsigned, anonymous document two days after the verdict saying jurors read newspaper and internet reports of the case, three jurors were bullied into agreeing, and the jury did not consider every element and definition of each count. The court rejected this ground of appeal but allowed others.

JURY DIRECTIONS ON INDECENCY

In *BD v The Queen* [2017] NTCCA 2, the Court of Criminal Appeal held at [62] that in most cases of indecent dealing it will be simple for the jury to decide whether the dealing was indecent having regard to current community standards and attitude and a judge need only give that direction. However in this case a live issue was whether the accused had sexual motivation or purpose or was merely acting innocently as the school's occupational health and safety representative. The directions were inadequate in failing to explain this significance. No objection was taken to the direction at trial but the accused had not actively or intentionally abandoned the issues. The direction was allowed to be raised on appeal because of this and the real possibility of injustice.

MENTAL IMPAIRMENT – PERIOD OF SUPERVISION

In *R v Gibson* [2017] NTSC 47 at [11], Barr J held that the hypothetical sentencing exercise under s 43ZG of the *Criminal Code* requires the court to assume that the supervised person has been found guilty as charged, and thus by necessary implication that mental impairment was not such as to affect the making of that assumed finding by providing a defence under s 43C(1). Nonetheless, s 43ZG does not otherwise exclude the application of ordinary sentencing principles, and thus the symptoms of the supervised person's mental impairment may still be taken into account. The hypothetical sentencing exercise is not an appropriate vehicle for either general or specific deterrence. That still leaves for consideration the need for community protection in sentencing.

SENTENCING – ADDITIONAL SENTENCE WHILE UNDER SENTENCE; 'ORDER'

In *Attorney-General (NT) v JR* [2017] NTSC 40, Grant CJ held that a sentence imposed by the Court of Summary Jurisdiction while the prisoner was serving a sentence imposed by the Supreme Court was to be served concurrently with the latter sentence by virtue of s 50 of the *Sentencing Act*. No specific form of words is required to order accumulation in the exercise of the power under s 50. An 'order' is the formal order made by the court which disposes of, or deals with, the proceeding then before it. The operation of the order will be strictly circumscribed by its terms and dialogue during submissions and the sentencing remarks do not form part of the order, although they may furnish the court's reason for the order and shed some light on the court's intention in order to discern whether the order reflects the actual decision of the court.

SENTENCING – COMMUNITY PROTECTION AND INDEFINITE REGIMES

In *Thomas v The Queen* [2017] NTCCA 4, the Court of Criminal Appeal reduced a total period of imprisonment for four sex offences from 14 to 10 years by changing orders for cumulation. The court said while protection of the community may be a material factor in determining an appropriate sentence, it would be erroneous to impose a sentence beyond what is proportionate to the crime in order to extend the period of protection from the risk of reoffending on the part of the offender. In determining whether any order may or should be made under an indefinite sentencing regime a court may take into account such matters as the length of sentence the offence would ordinarily attract, the available maximum penalty, and whether the protective purpose could reasonably be achieved by the imposition of a finite sentence of imprisonment. It is impermissible to impose a sentence which goes beyond what is proportionate to the crime(s) as an alternative to the imposition of an indefinite sentence pursuant to s 65 of the *Sentencing Act*. The potential for some application and form of order to be made under the serious sex offender legislation at the expiry of the sentence to be imposed by the court is not directly relevant in determining an application for an indefinite sentence. The operative consideration is whether the definite sentence which would otherwise be imposed is of such duration that estimations of future risk at the time of an offender's prospective release are too fraught with uncertainty to justify the conclusion that there would still remain a substantial or real risk at that time.

SENTENCING YOUTHS – REHABILITATION VS DETERRENCE FOR REPEAT OFFENDERS

In *TM v The Queen* [2017] NTCCA 3, the Court of Criminal Appeal upheld a sentence of 4 years suspended after 3 months with an operational period of 4 years for a 14 year old with prior offences convicted of aggravated robbery. The court said while rehabilitation is important for youths, it will not always be paramount where the offender has not responded to chances of rehabilitation in the past. The balance is to be struck between rehabilitation and the other sentencing purposes will be guided by a consideration of both the seriousness of behaviour and the prior criminal history. Punishment, denunciation and deterrence may be primarily served by a stern head sentence. Rehabilitation may be primarily served by suspending sentence after shorter imprisonment than for an adult. It is both legitimate and appropriate where warranted by the circumstances of the case for a sentencing court to give greater weight to the purposes of punishment, denunciation and deterrence when fixing the head sentence, and to give greater weight to the purpose of rehabilitation in making an order suspending sentence. A significant difference between the head sentence and the time before suspension does not necessarily indicate the discretion miscarried. It would first have to be shown that the head sentence was excessive for some appellable reason.

SEX OFFENDERS – SERIOUS DANGER TO THE COMMUNITY

In *The Attorney-General of the Northern Territory v JD* (No 3) [2017] NTSC 48 at [33], Barr J held that the task for the court under the *Serious Sex Offenders Act* is to decide whether a person is or continues to be a 'serious danger to the community', which means that there is an unacceptable risk that he will commit a serious sex offence unless in custody or subject to a supervision order. The risk does not need to be absolute. In considering whether a risk is 'unacceptable', the court must engage in a balancing exercise, having regard to the nature of the risk (that is, the commission of a serious sexual offence and the consequences for the victim), and the likelihood of the risk being realised, as well as the consequences for an offender who may be detained or subjected to an onerous supervision regime without having committed any further offence.

SEX OFFENDERS – 'QUALIFYING OFFENDER'

In Attorney-General (NT) v JR [2017] NTSC 40, Grant CJ held that jurisdiction of the court to make a continuing detention or supervision order under s 23 of the *Serious Sex Offenders Act* is dependent on the person being a 'qualifying offender' at the time of the application. This in turn depends on the person being under a sentence of imprisonment or in custody. Here the person was not under a sentence of imprisonment because various sentences were to be served concurrently and not cumulatively and had expired (see SENTENCING – ADDITIONAL SENTENCE WHILE UNDER SENTENCE; 'ORDER' below). The court therefore had no jurisdiction to make an order under s 23.

SEX OFFENDERS – REVOCATION OF SUPERVISION ORDER

In *EE v Attorney-General* (NT) [2017] NTCA 2, the Court of Appeal upheld a judge's revocation of a supervision order and replacement with a detention order under the *Serious Sex Offenders Act*. The appellant had contravened the supervision order by consuming alcohol and cannabis and by using a mobile phone to access pornography. His initial offending had involved accessing pornography on a mobile phone. The onus of proving it is not appropriate to revoke a supervision order and replace it with a detention order is on the person the subject of the order. The person must satisfy the court that his management and supervision by probation and parole officers would be reasonably practicable and appropriate if the supervision order were continued. Here it was not reasonably practicable for correctional services officers to prevent the appellant from coming into possession of a contraband phone with internet capacity.

TENDENCY AND NON-TENDENCY EVIDENCE – 'SIGNIFICANT PROBATIVE VALUE'

In *BD v The Queen* [2017] NTCCA 2, the Court of Criminal Appeal held at [79] that there is a distinction between tendency evidence and 'relationship' or 'context' evidence, with the latter being admissible in sexual offence cases as essential background or to overcome a false impression that the event was an isolated one. Propensity (tendency) evidence is admissible only if it bears no reasonable explanation other than the inculpation of the accused in the offence charged or, to put it another way, if an innocent explanation is objectively improbable. The test of 'significant probative value' in the tendency rule is higher than that required to establish relevance. 'Significant' connotes something more than mere relevance, but something less than a substantial degree of relevance and resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the fact(s) in issue. Here, the real issue was sexual motive or purpose, so the question of significant probative value must be directed to that issue, not to a tendency merely to touch. The question becomes whether the features of commonality between the conduct charged and the tendency conduct are significant enough logically to imply that because he committed the previous acts or committed them in particular circumstances, he is likely to have touched the complainants *with a sexual motive or purpose*. Here, it suggested no more than he was overly nice and 'touchy' with female students. Care is needed when considering the probative value and admissibility of evidence said to demonstrate grooming behaviours or sexual interest. Evidence disclosing no sexual interest cannot be used as tendency evidence to support commission of offences requiring a sexual interest.

TOWN PLANNING – HELICOPTER WITHIN PERMITTED USE

In *Farris v Development Consent Authority* [2017] NTSC 44, Barr J held that landing, keeping and fuelling a helicopter for private use was within the permitted use of a dwelling house in a Rural Living Zone and did not require consent. If it was not within the permitted use it was ancillary there to and consent was still not required. His Honour agreed at [15] that some type of private transport is necessarily the use of land for a dwelling house for access to work, shops, social occasions, and other places. The private use of a helicopter is no different in principle from a car.

YOUTHS – DNA EVIDENCE OBTAINED WITHOUT SUPPORT PERSON

In *R v TA* [2017] NTSC 46, Blokland J admitted DNA evidence obtained in breach of s 29 of the *Youth Justice Act* in that a support person was not present while the intimate forensic procedure was carried out. Her Honour admitted the evidence under s 59(1) because of the gravity of the charge, the importance of the evidence and the genuine belief of one of the officers that he was authorised to act without a support person.