Cameron Ford's Supreme Court case notes

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CRIMINAL LAW

Defamation – Qualified privilege

In *Sangare v Northern Territory of Australia* [2018] NTCA 10, the Court of Appeal upheld the trial judge's decision at [2018] NTSC 5 that an otherwise defamatory Ministerial Briefing about an employee by senior members of a government department to the responsible Minister was protected from liability under both s 27 of the *Defamation Act* and the defence of qualified privilege at general law. Although the briefing conveyed defamatory imputations, the senior members were acting reasonably and within the scope of their duty, and the Minister had an interest in the information.

CIVIL PROCEDURE

When documents "filed"

In *Street v Arafura Helicopters Pty Ltd t/as Alice Springs Helicopters* [2018] NTCA 11, the Court of Appeal held that proceedings under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) had not been filed within the two year limitation period. The plaintiff had lodged defective documents with the Registry for filing but they had been returned to the plaintiff with the clear message they had been rejected. Correct documents were not filed until after the limitation period expired. Where defective documents lodged, rejected and corrected, the Registry had a practice of backdating the filing to the original lodging date. The court confirmed the ruling of the trial judge in [2018] NTSC 15 that the proceedings had not been commenced within the limitation period because the documents ultimately accepted and placed on the court file and on which the proceedings were conducted were not the same documents as those originally lodged within the limitation period. The non-compliant documents originally lodged had never been accepted and therefore were not "filed". Technically different documents complying with the rules were later lodged, after the limitation period. The court left open the question of when documents are "filed" under the Rules – at the time of lodgement at the Registry or when they are placed on the court file.

CRIMINAL LAW

Inter-jurisdictional sentencing

In *TRH v The Queen* [2018] NTCCA 14, the Court of Criminal Appeal upheld a sentence of six years imprisonment with a non-parole period of four years and three months for five counts of indecent dealing and unlawful carnal knowledge of young children committed between 1989 and 1992. The sentence was backdated to the date the prisoner was extradited from Queensland when he was released on parole after serving 10 years and six months of a 13 year sentence for 31 similar offences committed after the Territory offences. The total effective sentence for the 36 offences was 16 years, 5 months and 22 days which the sentencing judge considered was appropriate. The Territory sentence was backdated to the date the prisoner was released in Queensland on parole, effectively making part of the Territory sentence concurrent with the remainder of the Queensland sentence. There was no legislative power to do otherwise. On appeal by the prisoner on the ground that the sentence did not give effect to *Mill v The Queen* (1988) 166 CLR 59, the Court of Criminal Appeal held that the court is not required to adopt convoluted measures designed to "get around" the requirements of the legislation and the restrictions on the court's discretion. In any case, the total sentence for the 36 offences was appropriate and the fact that the non-parole period was 89% of the head sentence was a mathematical artefact of the Territory sentence being partially concurrent with the Queensland offence.

Different minimum non-parole periods

In *TRH v The Queen* [2018] NTCCA 14, the Court of Criminal Appeal left open for a five member bench the question of the approach to be taken for setting non-parole periods for two or more offences where the minimum non-parole periods are different for those offences. For one offence the minimum non-parole period was 50% of the head sentence while for another it was 70%. One approach was for the non-parole period for each offence to be calculated separately using its specific minimum. The other was for the higher percentage to be used since it was "not less than" the lower percentage. Two decisions of the Court of Criminal Appeal appeared to accept without argument or reasons that the first approach was correct, while the court in *TRH* was inclined to the second approach. A five member bench would be required to decide the question, perhaps on a reference to the Full Court when the issue next arises.

Prior convictions admitted as coincidence evidence

In *Gjonaj v The Queen* [2018] NTCCA 13, the Court of Criminal Appeal upheld the admission of three prior cannabis offences as coincidence evidence under s 98(1) of the *Evidence (National Uniform Evidence) Act* (NT) as having significant probative value of one of the issues, that the defendant was familiar with the smell of cannabis. He was apprehended driving a car containing 44 packets of cannabis totalling almost 20 kg and with the overwhelming smell of cannabis. He was taken to be in possession of the cannabis unless he could satisfy the jury that he neither knew nor had reason to suspect the cannabis was in the car. The Crown had offered to agree that he knew the smell of cannabis or to agree the "bare-bone" convictions but he rejected these and put the Crown to proof. The Court said that the convictions had significant probative value, especially in conjunction with other evidence, and there was no particular outweighing prejudice. Evidence of prior convictions will usually be highly prejudicial especially when the convictions are for similar offending and will rarely be admitted. Here, they were admitted to prove one matter, familiarity with cannabis, and by inference, its odour, and they were not the kind of offences to arouse disgust or an emotional response in the jury, nor distract them from their duty.

Stealing – Dispose of property "regardless of the rights" of owner

In *Manolas v The Queen* [2018] NTCCA 12, the Court of Criminal Appeal upheld the conviction and sentence of six years with a non-parole period of three years for 20 counts of stealing by a director syphoning money from one company to another. He said he intended it as a loan and hoped to repay eventually and that he did not "deprive" the owner of the property within the extended meaning of s 209(1) of the *Criminal Code 1983* (NT) because he did not act "regardless" of the rights of the owner. He argued he had regard to those rights and the trial judge was wrong to direct the jury that the Crown did not have to prove that he did not make a subjective assessment of the interests of the owner. The Court said this conflated "interests" with "rights" and that a person can act without regard to the rights of someone while believing they are acting in their interests. If an accused borrows or appropriates property with an intention to "treat the property as his own to dispose of … regardless of the rights of the owner", then that person is guilty of stealing within the second aspect of the definition, whether or not he believes it is in the interests of the owner of that property for him to do so.

"Regardless" means no more than "notwithstanding"; it does not mean "having no subjective regard to". The Crown does not have to prove beyond reasonable doubt that the accused gave no thought at all to either the rights or interests of the owner of the property.

Sentencing - Moral culpability of 20 counts of director stealing from company

In *Manolas v The Queen* [2018] NTCCA 12, the Court of Criminal Appeal upheld the conviction and sentence of six years with a non-parole period of three years for 20 counts of stealing by a director syphoning money from one company to another. The Court held that, to determine the appellant's moral culpability, the sentencing judge did not have to determine under which definition of "deprive" in s 209(1) of the *Criminal Code 1983* (NT) the appellant came, whether he had the intention to permanently deprive the owner or was deemed to have the intention because of his disposing of the property regardless of the owner's rights. Sometimes it is acceptable for a judge to say "I don't know". In any case, the sentencing judge conducted a detailed analysis of the appellant's moral culpability on the facts. The sentence was not manifestly excessive having regard to *R v Bird* (1988) 56 NTR 17, *R v Gregurke* [2014] NTCCA 11 and *R v Barry* (Unreported, Supreme Court of the Northern Territory, Kelly J, 9 June 2017).

Inconsistent sexual offence verdicts

In *Niehus v The Queen* [2018] NTCCA 10, the Court of Criminal Appeal held that verdicts of guilty of two sexual offences were not inconsistent with not guilty verdicts of two other sexual offences, applying *M v The Queen* (1994) 181 CLR 487 at 493 and *Jones v The Queen* (1997) 191 CLR 439 at 450-451. The appellant argued that the jury must have disbelieved the complainant on the two not guilty verdicts and therefore should have disbelieved her on the other offences. The Court said that unlike in Jones, there were other logical and common sense reasons for the not guilty verdicts than disbelieving the complainant. An appellant on this ground must show that no reasonable jury who had applied their minder properly to the facts could possibly have come to the different verdicts. If there is a proper and reasonable way to reconcile the verdicts, the court should accept the verdicts. Historical sex cases involving child complainants can give rise to complainants having clearer memories or evidence of some offences than others and juries being able to find guilt of some offences and not others.

WORKERS COMPENSATION

Notice of sequelae required

In *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7, the Court of Appeal held that a worker who claims to suffer sequelae to primary injuries must give notice of those sequelae, and if he does not, the employer may terminate benefits by notice referring only to the primary injuries. An employer being aware of the actuality or possibility of the sequelae does not change the situation unless it is notified by the worker. An employer's notice terminating benefits referring solely to notified injuries is valid and the worker cannot seek reinstatement of benefits on the ground the notice was invalid for failing to mention injuries or sequelae which he did not notify. He must bring an application under s 104 of the *Return to Work Act* alleging and proving the sequelae and their having arisen out of and in the course of employment, he bearing the legal and evidential onera.

Procedure – "Appeal" and counterclaim

In *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [43]-[46], the Court of Appeal explained the various procedures available to workers and employers in workers compensation proceedings in the Local Court. A worker challenges a cancellation of weekly compensation by an "appeal" in which the employer bears the onus of proving the alleged change in circumstances. If that onus is discharged, the worker bears the onus of proving any partial incapacity. In the appeal the worker may confine the challenge to the grounds of cancellation or may widen the appeal beyond those grounds. If the worker confines the challenge to the grounds of cancellation, the employer may file a counterclaim raising other issues. This allows the employer to establish cessation of incapacity even if its cancellation notice is invalid and to raise issues beyond those raised by the worker. If the worker does not confine the appeal to the cancellation grounds, the employer may raise other grounds in answer.