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High Court judgments

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Criminal law

Sexual offences against children – appeal against conviction by jury

Pell v The Queen [2020] HCA 12 (7 April 2020) concerned offences alleged to have been committed by the applicant, Mr Pell, in St Patrick's Cathedral, East Melbourne, in 1996 and 1997. The offences were allegedly committed after the celebration of Sunday solemn Mass and within months of Mr Pell's installation as Archbishop of Melbourne. The victims of the alleged offending were two Cathedral choirboys "A" and "B".

Following a trial before the County Court of Victoria, Mr Pell was found guilty by a jury and convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years. He appealed to the Court of Appeal of the Supreme Court of Victoria. That appeal, by majority, was dismissed.

In the High Court, Mr Pell contended that the Court of Appeal majority had erred in two ways. First, by finding that their belief in A required Mr Pell to establish that the offending was impossible in order to raise and leave a doubt. Second, by concluding that the jury verdicts were not unreasonable when there was a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

The High Court unanimously accepted that the Court of Appeal majority erred. The High Court said that the unchallenged evidence of Mr Pell's movements after the Mass, his always being accompanied within the Cathedral, the timing of the alleged assaults and the priests' sacristy being a "hive of activity" after Mass, gave rise to compounding improbabilities which required the jury to have entertained a doubt as to Mr Pell's guilt.

The High Court said that notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was incapable of excluding a reasonable doubt as to Mr Pell's guilt. In relation to all five charges, there was a significant possibility that an innocent person had been convicted.

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal of the Supreme Court of Victoria allowed.

Evidence

Admissibility – evidence obtained improperly or in contravention of Australian law

Kadir v The Queen; Grech v The Queen [2020] HCA 1 (5 February 2020) were two appeals concerning the admissibility in a criminal prosecution of evidence obtained unlawfully, and of evidence obtained →

as a result of that unlawfully obtained evidence. The appeals focused on s138(3)(h) of the Evidence Act 1995 (NSW) which required the Court to take into account the difficulty (if any) of obtaining evidence without impropriety or contravention of an Australian law.

The appellants, Mr Kadir and Ms Grech, were charged with acts of serious animal cruelty. At trial, the prosecution proposed to tender several video-recordings made unlawfully by a person acting on behalf of Animals Australia. As a result of those recordings, a search warrant for Mr Kadir's property was executed and material supportive of the prosecution case obtained. The same person who made the video-recordings also attended Mr Kadir's property and had conversations with him in which he allegedly made certain admissions.

The trial judge rejected all three categories of evidence. The respondent appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales. That Court found that the trial judge's assessment was flawed, and concluded that the first video-recording, the search warrant evidence and admissions were all admissible. The Court of Criminal Appeal assumed that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law.

The High Court said that the basis on which the parties and the Courts below had approached s138(3)(h) was misconceived. Demonstration of the difficulty of obtaining evidence of animal cruelty lawfully did not weigh in favour of admitting evidence obtained in deliberate defiance of the law. The trial judge's conclusion that all of the surveillance evidence should be excluded was correct. The High Court determined the admissibility of the search warrant evidence and admissions itself, and concluded that the desirability of admitting that evidence outweighed the undesirability of admitting it.

Kiefel CJ, Bell, Keane, Nettle and Edelman JJ jointly. Appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales allowed in part.

Customs and excise

Customs tariff – tariff classification – whether Administrative Appeals Tribunal erred

Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd [2020] HCA 2 (5 February 2020) concerned the construction and application of provisions of the Customs Tariff Act 1995 (Cth) (the Tariff Act), which imposes duties of customs on goods imported into Australia. A dispute arose between the Comptroller-General of Customs and Pharm-A-Care Laboratories Pty Ltd about the tariff classification of goods imported into Australia from Germany. The goods were referred to as "vitamin preparations" and "garcinia preparations".

At the Administrative Appeals Tribunal AAT), Pharm-A-Care contended that both preparations should be classified so as to be free of duty. The Comptroller-General contended that the preparations were to be classified so as to be dutiable at a rate of either 5 per cent or 4 per cent. The AAT, adopting the conventional two-staged approach to tariff classification explained in Re Gissing and Collector of Customs (1977) 1 ALD 144 (at 146), determined that both preparations were classifiable such that no duty was owed.

The Comptroller-General appealed to the Federal Court on numerous questions of law. The Full Court of the Federal Court dismissed the appeal. On appeal to the High Court, the Comptroller-General submitted that the AAT and the Full Court of the Federal Court had erred in their construction of the Tariff Act, specifically Note 1(a) to Chapter 30 of Sch 3. The High Court unanimously accepted that submission, but said that the AAT's misconstruction of Note 1(a) was immaterial to the decision which it made, which was otherwise correct in law.

Kiefel CJ, Bell, Gageler, Keane and Gordon JJ jointly. Appeal from the Full Court of the Federal Court of Australia dismissed.

Constitutional law

Power of Commonwealth Parliament to make laws with respect to naturalisation and aliens

Love v Commonwealth of Australia; Thoms v Commonwealth of

Australia [2020] HCA 3 (11 February 2020) were two special cases concerning s51(xix) of the Constitution, which provides that the Commonwealth Parliament has power to make laws "for the peace, order, and good government of the Commonwealth with respect to . . . naturalisation and aliens". The question for the High Court was whether an Aboriginal Australian, born overseas, without the statutory status of Australian citizenship and owing foreign allegiance, is an alien in Australia within the meaning of s51(xix).

The plaintiffs, Mr Love and Mr Thoms, were born overseas. They had both lived in Australia for substantial periods as holders of visas which permitted their residence but were subject to revocation. They had not sought Australian citizenship. Their visas were cancelled under s501(3A) of the Migration Act 1958 (Cth) because they were each convicted of a criminal offence and sentenced to a term of imprisonment of 12 months or more. On cancellation of their visas they became unlawful non-citizens and liable to removal from Australia.

Detention of unlawful non-citizens and their removal from Australia was provided for in ss189 and 198 of the Migration Act. All parties agreed that the plaintiffs were not subject to those sections if they were outside the scope of s51(xix), pursuant to which ss189 and 198 were enacted.

By majority, the High Court said that Aboriginal Australians (understood according to the test in Mabo [No 2]) are not within the reach of the aliens power in s51(xix) of the Constitution. While the majority could not agree whether Mr Love was Aboriginal on the facts, this was a difference about proof, not principle.

Bell, Nettle, Gordon and Edelman JJ separately concurring. Kiefel CJ, Gageler and Keane JJ separately dissenting.

Corporations

Meaning of "officer" of corporation

Australian Securities and Investments Commission v King [2020] HCA 4 (11 March 2020) was concerned with the construction of the word "officer" as defined in s9 of the Corporations Act 2001 (Cth) (the Act). The first respondent, Mr King, was an executive director of MFS Ltd, a publicly listed company and the parent company of the MFS Group. He was the CEO of MFS Ltd until his resignation on 21 January 2008. Until that date, he was also, in effect, the CEO of the MFS Group. He was a director of the second respondent, MFSIM, until 27 February 2007.

On 30 November 2007, $130 million was paid by MFSIM to an entity acting as the treasury company for MFS Group. On the same day it received the $130 million, the treasury company paid $103 million to Fortress Credit Corporation (Australia) II Pty Ltd. ASIC claimed that MFSIM breached its duties under s601FC(1) of the Act, and had provided a financial benefit to a related party in contravention of the Act. ASIC contended that Mr King was liable under s601FD of the Act as an "officer" of MFSIM.

Although he had ceased to be a director of MFSIM on 27 February 2007, ASIC's case was that Mr King nonetheless remained an "officer" of MFSIM until 21 January 2008 as he fell within para (b)(ii) of the definition of "officer of a corporation" in s9 of the Act, being "a person . . . who has the capacity to affect significantly the corporation's financial standing".

The primary judge was satisfied that Mr King was an "officer" of MFSIM because he had the capacity to affect significantly MFSIM's financial standing. Mr King appealed. The Court of Appeal of the Supreme Court of Queensland considered that to be an officer required holding a recognised position with rights and duties attaching to it, which had not been proven.

The High Court said that para (b)(ii) of the definition of "officer" in s9 of the Act is not limited to those who hold or occupy a named office, or a recognised position with rights and duties attached to it, and the Court of Appeal had therefore applied the wrong test.

Kiefel CJ, Gageler and Keane JJ jointly. Nettle and Gordon JJ jointly concurring. Appeal from the Court of Appeal of the Supreme Court of Queensland allowed. →

Criminal Law

Sentence – Chiro v The Queen

In KMC v Director of Public Prosecutions (SA) [2020] HCA 6 (18 March 2020) the applicant, KMC, was charged in the District Court of South Australia with one count of persistent sexual exploitation of a child against s50(1) of the Criminal Law Consolidation Act 1935 (SA). After a trial before a judge and jury, the jury returned a unanimous verdict of guilty. The jury was discharged without being asked any questions as to the basis of its verdict. The applicant was sentenced to imprisonment for 10 years and three days, with a non-parole period of five years.

After the applicant was sentenced, the High Court delivered its judgment in Chiro v The Queen (2017) 260 CLR 425 in which the plurality stated that: "the judge should request that the jury identify the underlying acts of sexual exploitation that were found to be proved unless it is otherwise apparent to the judge which acts of sexual exploitation the jury found to be proved". Where a jury is not questioned as to the basis of its verdict, the plurality in Chiro held, "the offender will have to be sentenced on the basis most favourable to the offender".

The applicant, KMC, sought to appeal on the grounds that his sentence and the non-parole period were manifestly excessive and that, contrary to Chiro, the sentencing judge had not sentenced the applicant on the basis most favourable to him consistent with the verdict of the jury.

The respondent, the Director of Public Prosecutions (SA), sought to uphold the sentence relying on s9(1), Pt 4 of the Statutes Amendment (Attorney General's Portfolio) (No 2) Act 2017 (SA) ("the Amending Act"). The object of Pt 4 of the Amending Act was to overcome the effect of Chiro. But in order for s9(1) to apply, the applicant had to have been sentenced "having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt".

The High Court unanimously held that the sentencing judge did not make findings as to what acts of sexual exploitation he found to have been proved beyond reasonable doubt. This meant that s9(1) of the Amending Act was not engaged. The High Court concluded that the applicant had not been sentenced on the basis of the facts most favourable to him, and his sentencing was therefore contrary to what the law (as stated by Chiro) required.

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal allowed.

Criminal law

Sentence – irrelevant consideration

In The Queen v Guode [2020] HCA 8 (18 March 2020) the respondent, Ms Guode, deliberately drove into a lake in Wyndham Vale, Victoria, while four of her children were in the car. She was charged with infanticide (charge 1), murder (charges 2 and 3) and attempted murder (charge 4). She pleaded guilty to all counts in the Supreme Court of Victoria. The primary judge imposed a total effective sentence of 26 years and six months' imprisonment with a non-parole period of 20 years.

The respondent applied for leave to appeal against her sentence on the ground that it was manifestly excessive. The Court of Appeal of the Supreme Court of Victoria allowed the appeal and resentenced her, imposing a total effective sentence of 18 years' imprisonment with a non-parole period of 14 years.

The appellant appealed to the High Court on the sole ground that the Court of Appeal had erred by taking into account as a relevant consideration, in the determination of whether the sentences imposed on the charges of murder and attempted murder were manifestly excessive, that the appellant had accepted the respondent's plea of guilty to the charge of infanticide.

The High Court confirmed that the appellant's acceptance of the respondent's plea to the charge of infanticide was irrelevant to the sentences to be imposed on the other charges. By majority, the High Court found that the Court of Appeal erred in taking that irrelevant consideration into account.

Kiefel CJ, Gageler and Nettle JJ jointly. Gordon and Edelman JJ jointly dissenting. Appeal from the Court of Appeal of the Supreme Court of Victoria allowed.

Native title

Aboriginals – native title rights and interests

Western Australia v Manado; Western Australia v Augustine; Commonwealth of Australia v Augustine; Commonwealth of Australia v Manado [2020] HCA 9 (18 March 2020) were four appeals from a judgment of the Full Court of the Federal Court of Australia.

The appeals turned on the construction of s212(2) of the Native Title Act 1993 (Cth), which provides that: "[a] law of the Commonwealth, a State or a Territory may confirm any existing public access to and enjoyment of" various places including waterways; beds and banks or foreshores of waterways; coastal waters; beaches and stock-routes among others. The object of s212(2) was to preserve the principle of public access to beaches and other categories of lands and waters notwithstanding the possibility that native title might exist in respect of them.

The question for the High Court was whether the ability of members of the public to access and enjoy unallocated Crown land comprising of waterways, beds and banks or foreshores of waterways, coastal waters or beaches in the mid-Dampier Peninsula, Western Australia, had been validly recorded, pursuant to s225(c) of the Native Title Act 1993 (Cth), in two native title determinations made in respect of large areas of land and waters located north of Broome in the Dampier Peninsula. The High Court answered that question in the affirmative.

Kiefel CJ, Bell, Gageler, Keane and Gordon JJ jointly. Nettle and Edelman JJ each separately concurring. Appeal from the Full Court of the Federal Court of Australia allowed.

Taxation

Income tax (Cth) – assessable income – controlled foreign companies

BHP Billiton Limited v Commissioner of Taxation [2020] HCA 5 (11 March 2020) concerned Part X of the Income Tax Assessment Act 1936 (Cth) (ITA) which deals with Australian resident taxpayers who defer or avoid tax on foreign-sourced income by interposing entities in low-tax jurisdictions between the source of income and the Australian resident. Part X applies to Australian resident taxpayers with a sufficiently substantial interest in a controlled foreign company (CFC). It operates to attribute a share of the CFC's income to the resident taxpayer.

The appellant, BHP Billiton Ltd (BHP Ltd), was an Australian resident taxpayer and part of a dual-listed company arrangement with BHP Billiton Plc (BHP Plc). BHP Billiton Marketing AG (BMAG) was a Swiss company and was a CFC of BHP Ltd. BMAG purchased commodities from BHP Ltd's Australian subsidiaries and from BHP Plc's Australian entities for sale into the export market. BMAG derived income from those sales.

There was no dispute that BMAG's income from the sale of commodities it purchased from BHP Ltd's Australian subsidiaries was to be included in the assessable income of BHP Ltd under Pt X. The question for the High Court was whether BMAG's income from the sale of commodities it purchased from BHP Plc's Australian entities was also to be included in the assessable income of BHP Ltd under Pt X. That question depended on whether BHP Plc's Australian entities, the sellers of the commodities to BMAG, were "associates" of BMAG for the purpose of s318(2) of the ITA.

For the purposes of Pt X, one company is an "associate" of another if the company is sufficiently influenced by the other entity. The respondent, the Commissioner of Taxation, contended that BHP Plc's Australian entities were associates of BMAG for three reasons: first, BHP Ltd was "sufficiently influenced" by BHP Plc; second, BHP Plc was "sufficiently influenced" by BHP Ltd; and third, BMAG was "sufficiently influenced" by BHP Plc and BHP Ltd. The High Court unanimously accepted all three of those contentions.

Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Full Court of the Federal Court of Australia dismissed. ■