

STATE OF NSW v KABLE (S352/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 243

Date of judgment: 8 August 2012

Special leave granted: 14 December 2012

Mr Gregory Kable (“the Respondent”) stabbed his wife to death on 5 September 1989. He was initially charged with murder, but the prosecution later accepted his plea of guilty to manslaughter on the basis of diminished responsibility. The Respondent was then sentenced to five years and four months imprisonment. Whilst in prison he wrote threatening letters to various people. The Respondent was then charged with using postal services in contravention of s 85S of the *Crimes Act 1914* (Cth) and held on remand beyond the expiry (on 4 January 1995) of his prison term. On 23 February 1995 Justice Levine granted him bail on the fresh charges (which were later permanently stayed). His Honour also ordered however that the Respondent be detained in custody for six months (“the detention orders”). Those orders were made pursuant to the *Community Protection Act 1994* (NSW) (“the CPA”). That Act authorised the Supreme Court to make orders for the detention of the Respondent (and no other person) upon an application made by the Director of Public Prosecutions (“DPP”). He appealed from the detention orders on the basis that the CPA was invalid. That appeal was ultimately successful, with this Court setting aside those orders in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The Respondent then sued the State of NSW (“the State”) for damages for malicious prosecution, abuse of process and false imprisonment.

On 30 July 2010 Justice Hoeben struck out the Respondent’s entire claim. His Honour held that malicious prosecution could not be made out, as the evidence indicated that the DPP had reasonable cause to commence the CPA proceedings. Regarding abuse of process, Justice Hoeben found no evidence of improper purpose in the taking of those proceedings. The first two claims could also not succeed because the State itself had not been the prosecutor. His Honour further held that the false imprisonment claim must fail because the Respondent’s continued detention had been due to the (presumably valid and effective) orders of a superior court.

On 8 August 2012 the Court of Appeal (Allsop P, Basten, Campbell & Meagher JJA, McClellan CJ at CL) unanimously allowed the Respondent’s appeal in part. Their Honours held that the claims for malicious prosecution and abuse of process were correctly struck out, as their success required certain mental elements that the Respondent had not sought to prove. It was also not open to a litigant to impugn the motives of Parliament. The Court of Appeal held however that the Respondent’s claim for false imprisonment should not have been struck out, as the presumption of the validity of the superior court’s orders did not apply. This was because the detention orders had not resulted from an exercise of judicial power, but from an exercise of non-judicial power which the High Court had ruled invalid. Their Honours held that the common law protection from suit of officers who obey invalid judicial orders did not extend to those who had enforced the detention orders. As the State had no other defence available, the Court of Appeal found it vicariously liable for the Respondent’s false imprisonment pursuant to s 8(1) of the *Law Reform (Vicarious Liability) Act 1983* (NSW). The matter was then remitted to a single judge for the assessment of damages.

The grounds of appeal include:

- The Court of Appeal erred in holding that the order of Levine J made on 23 February 1995 that the Respondent be detained in custody for six months pursuant to the CPA, an order of a superior court of record, was not valid until set aside on the basis that the CPA was subsequently held to be constitutionally invalid.

Both parties have filed a “Notice of a Constitutional Matter” under s 78B of the *Judiciary Act* 1903 (Cth) and the Attorneys-General for the Commonwealth, Victoria, Queensland and Western Australia have all advised this Court that they will be intervening.

On 2 January 2013 the Respondent filed a Notice of Contention, the grounds of which include:

- The Court of Appeal should have decided (at [64], [129], [134], [168]) that the State was directly liable in false imprisonment to the Respondent, in addition to being vicariously liable for that tort (at [66], [167], [171], [173], [174], [175]).