SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2010

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DETECTIVE SENIOR CONSTABLE HOGAN v HINCH (M105/2010)

Court from which cause removed: Magistrates' Court of Victoria

Date cause removed: 30 July 2010

In September 2008, the defendant (Hinch) was charged with five offences pursuant to the *Serious Sex Offenders Monitoring Act* 2005 (Vic) (the Act). The charges arose from a speech made by Hinch at a public protest rally on the steps of the Victorian Parliament on 1 June 2008, in which he allegedly stated the name of two sex offenders, in contravention of a suppression order previously made in the County Court of Victoria. Hinch also posted articles on his website in which he revealed the names of the two offenders.

The matter came before the Melbourne Magistrates Court on 18 February 2010. Hinch applied for an adjournment on the basis that a constitutional issue was raised regarding the validity of s 42 of the Act and that Notice of a Constitutional Matter had been served on the various Attorneys-General of the States, Territories and the Commonwealth. Magistrate Rosencwajg adjourned the hearing. Hinch then filed in the High Court an application for removal of the cause pending in the Magistrates Court. The Supreme Court of Victoria subsequently granted a stay of the Magistrates Court proceedings. On 30 July this Court ordered that so much of the cause pending in the Magistrates Court as concerned the validity of s 42 of the Act be removed into this Court.

The Attorneys-General of the Commonwealth, NSW, Queensland, South Australia and Western Australia have all given notice that they will intervene.

The issues to be determined by this Court include:

- whether s 42 of the *Serious Sex Offenders Monitoring Act* 2005 (Vic) ("the Act") is constitutionally invalid as:

    (a) being repugnant to an implication in Chapter III of the Constitution that, in order to be appropriate repositories of the judicial power of the Commonwealth, State courts must exercise that judicial power in a manner that does not diminish the institutional integrity of the judiciary;

    (b) being contrary to an implication in Chapter III of the Constitution that all State and Federal Courts must be open to the Public and carry out their activities in public;

    (c) being contrary to the implied freedom of political communication in that it inhibits the ability to criticise legislation and its application in the courts and seeks legislative and constitutional changes and changes in court practice by public assembly, protest and the dissemination of factual data concerning court proceedings as a means of seeking such changes.

MILLER v. MILLER (P25/2010)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2009] WASCA 199
Date of judgment:	6 November 2009
Date special leave granted:	28 May 2010

On 17 May 1998 the appellant was rendered tetraplegic in a motor vehicle accident while a passenger in a car driven by her "uncle", who was unlicensed and who was known by the appellant to be intoxicated when driving. The appellant and her sister had earlier stolen the car in which the accident occurred. The respondent pleaded guilty to dangerous driving causing death (one of the other occupants of the car, which had nine passengers, was killed), dangerous driving causing grievous bodily harm and driving under the influence of alcohol. The appellant commenced proceedings for damages for personal injury in the District Court. The respondent denied the existence of a duty of care, relying on this Court's decision in *Gala v. Preston* (1991) 172 CLR 243. The trial judge (Schoombee DCJ) found for the appellant, noting that in all the circumstances it was not unreasonable for the appellant to expect the respondent to drive according to ordinary standards of competence and care, including that the appellant respected the respondent, regarding him as her uncle, that the joint criminal activity (unlawful use of a motor vehicle) did not constitute the whole context of the accident and was not fraught with serious risks, that the fact that the car was stolen did not contribute to the manner of the respondent's driving, and that the appellant had challenged the respondent's manner of driving. The mere fact that the car was stolen did not make it impossible to determine an appropriate standard of care. The respondent appealed.

The Court of Appeal (McLure, Buss and Newnes JJA) unanimously allowed the respondent's appeal, each member of the Court giving separate reasons. McLure JA observed that the majority judgment in *Gala*, having relied on *Cook v. Cook* (1986) 162 CLR 376 which approved the notion of a variable standard of care, now appeared to be inconsistent with *Imbree v. McNeilly* (2008) 236 CLR 510 to the extent that the latter decision established as an essential requirement that the standard of care be objective and impersonal. Her Honour observed that in any event the material facts of the present case were not distinguishable from *Gala* or from *Smith v. Jenkins* (1970) 119 CLR 397 and, whatever the correct approach, the result in this case would be the same. Buss JA considered *Gala* to be still binding, and identified the special and exceptional circumstances which precluded a duty of care arising as between this particular driver and passenger. Those circumstances gave rise to significant and reasonably foreseeable risks and included that the respondent might refuse to comply with requests of his passengers, that the car was stolen, that the respondent was unlicensed and intoxicated, and that the car was grossly overloaded. Newnes JA concluded that despite a lack of consistent principle on the existence of a duty of care in a joint criminal enterprise, on the facts of this case where the joint criminal enterprise is the unlawful use of a motor vehicle, and it is the use of that vehicle which is complained of as having been done negligently, no duty of care is owed.

The grounds of appeal include:

- Whether the doctrine of joint illegal enterprise as a defence to negligence requires restatement in light of the rejection of proximity, the relevance of vulnerability and control to the existence of a duty of care, and in the light of the decision in *Imbree v. McNeilly* overruling *Cook v. Cook* to the effect that the legal standard of care of a driver is objective and impersonal.

LACEY v. ATTORNEY-GENERAL OF QUEENSLAND (B40/2010)

Court appealed from: Court of Appeal, Supreme Court of Queensland [2009] QCA 274

Date of judgment: 11 September 2009

Date special leave granted: 26 June 2010

This appeal concerns two brothers, the appellant Dionne and his co-accused Jade, who were tried together and convicted of manslaughter and wounding with intent to maim, respectively. The appellant, having been convicted of manslaughter, appealed unsuccessfully against conviction and the Attorney-General appealed successfully against sentence. Jade Lacey appealed unsuccessfully against both conviction and sentence. Both offences arose out of the same event. The brothers were at the flat of the deceased, and others, negotiating the purchase of cocaine. Both brothers were carrying concealed pistols. An argument broke out between the appellant and the deceased, Jade Lacey shot the deceased in the thigh, and the appellant shot the deceased in the chest, killing him. The appellant did not give evidence at his trial. Jade Lacey claimed that the deceased had rushed him while holding a pistol. There were several other witnesses but none who directly saw the shots being fired. The appellant was sentenced to 10 years' imprisonment and Jade Lacey to 5 years' imprisonment.

A five member Bench of the Court of Appeal heard the brothers' appeals against convictions and sentences, and the Attorney-General's appeal against sentence in the appellant's matter (de Jersey CJ, McMurdo P, Keane, Muir and Chesterman JJA; McMurdo P dissenting in part in relation to the sentence imposed on the appellant). The majority allowed the Attorney-General's appeal against the appellant's sentence and substituted a sentence of 11 years for that of 10 years imposed by the trial judge. McMurdo P would have reduced the sentence to 9 years and 8 months.

Special leave in relation to Jade Lacey's application was refused. Special leave in relation to the appellant's application challenging the decision of the Court of Appeal on his appeal against conviction was refused. Special leave was granted in relation to the orders of the Court of Appeal allowing the Attorney-General's appeal against sentence.

The grounds of appeal include:

- Whether the Court of Appeal erred in holding that the nature of the right to appeal conferred on the Attorney-General of Queensland by s 669A of the Criminal Code 1899 (Qld) did not require that error be shown on the part of the sentencing court before the jurisdiction of the appellate court was enlivened;

- Whether the Court of Appeal should not have overruled its previous decision in *R v. Melano; ex parte Attorney-General* [1995] 2 Qd R 186.

ROACH v. THE QUEEN (B41/2010)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2009] QCA 360

Date of judgment: 27 November 2009

Date special leave granted: 24 June 2010

The appellant, Kerry Raymond Roach, was convicted after a trial by jury of one count of assault occasioning bodily harm and was sentenced to 18 months' imprisonment. The complainant was his girlfriend, with whom he did not at that time reside. At trial, the Crown sought, and was permitted, to bring evidence of previous assaults which the complainant had suffered at the appellant's hands but which she had never reported to police and which had never been charged. The complainant in her evidence stated that during the assault in question the appellant had deliberately punched her on one of her arms which had been seriously injured in a previous assault, and that the appellant had said "I know you're gonna ring the fuckin' coppers so I may as well make a fuckin' good job of it". The complainant also gave evidence that the appellant was inclined to assault her when "he'd had one too many chardonnays" and that he was intoxicated on this occasion. The defence objected to the admission of evidence of previous uncharged assaults on the basis that it was not probative of the offence charged and was prejudicial. The Crown urged that the evidence be admitted because it went to show the relationship between the complainant and the appellant and gave context to what might otherwise appear to the jury to be an inexplicable incident, and expressly disavowed any intention to rely on it as propensity evidence.

The Court of Appeal (Keane and Holmes JJA and A Lyons J) unanimously dismissed the appeal against conviction and the application for leave to appeal against sentence. Holmes JA gave the principal judgment of the Court and rejected the appellant's argument that evidence of prior conduct, were it to be admitted, first had to satisfy the test in *Pfennig v The Queen* [1995] HCA 1 and that the jury must be directed that it could not rely on the evidence unless satisfied that the acts were proved beyond reasonable doubt. Her Honour held that the evidence was admissible by reason of s132B of the *Evidence Act* 1977 (Qld) as "relevant evidence of the history of the domestic relationship between the defendant and [the complainant]" and that the test in *Pfennig* did not apply. Her Honour concluded that the evidence of previous assaults was relevant to the context of this assault and of the relationship between the appellant and the complainant.

The grounds of appeal include:

- Whether the Court of Appeal erred in failing to conclude that the *Pfennig* test applied to the admissibility of evidence of prior violence by the appellant towards the complainant;

- Whether the Court of Appeal erred in concluding that it was not necessary to consider the application of the *Pfennig* test in relation to the admissibility of evidence of prior violence because of the operation of s132B of the *Evidence Act* 1977 (Qld);

- Whether the Court of Appeal erred in failing to conclude that the jury ought to have been directed of the need to be satisfied beyond a reasonable doubt of the truth of the evidence of prior violence.

SKA v THE QUEEN (S100/2010)

Court appealed from:	New South Wales Court of Criminal Appeal [2009] NSWCCA 186
Date of judgment:	14 July 2009
Date of referral to the Full Court:	30 July 2010

The Applicant was charged with five counts of sexual impropriety against his under-aged niece. Those offences allegedly occurred in the Applicant's home, a place which the Complainant visited regularly. While the Crown alleged that the Applicant had molested her repeatedly, the charges he faced only related to two episodes in 2004 and 2006. During his trial, the Applicant denied ever having improperly interfered with the Complainant. He also cast doubt upon her evidence as to the frequency with which she visited his home. Pursuant to section 306S of the *Criminal Procedure Act* 1986 (NSW), the Complainant's evidence was given mainly by way of her video-recorded police interview which was played to the jury. She did however also give oral evidence in Court and was cross-examined.

On 21 August 2008 the Applicant was found guilty on all counts. On 6 February 2009 Judge Finnane sentenced the appellant, structuring the sentences so that they were partially concurrent and partially cumulative. The effective overall sentence that resulted was one of a non-parole period of 4 years, 9 months and 15 days, commencing on 6 February 2009, and expiring on 20 November 2013, with a balance of term of 4 years, expiring on 20 November 2017. His Honour however suspended the execution of that sentence and granted the Applicant bail. In doing so, Judge Finnane made it clear that he had strong doubts about the Applicant’s guilt. He also suggested that an appeal against conviction had good prospects of success. The Director of Public Prosecutions however successfully sought a review of the Applicant's bail and he was taken into custody in March 2009.

On 14 July 2009 the Court of Criminal Appeal (McLellan CJ at CL, James & Simpson JJ) unanimously dismissed the Applicant's appeal against both his conviction and his sentence. It also upheld the Respondent's appeal against sentence. In doing so, their Honours rejected the Applicant's submission that the verdicts were unreasonable and unsupported by the evidence. The Court of Criminal Appeal further found that the Complainant's answers (in her video interview) were sufficient to enable the jury to conclude that the alleged incidents had actually occurred.

While not formally a ground of appeal, the Court of Criminal Appeal also considered how it should deal with the Complainant's video evidence. Their Honours decided that they should rely on the *transcript* of that video interview rather than by watching the video itself. They did this so as not to give undue weight to the video evidence when compared to the other evidence for which they only had access to a transcript.

The Court of Criminal Appeal then re-sentenced the Applicant to 12 years imprisonment, with a non-parole period of 8 years. Their Honours were also critical of Judge Finnane's comments that the original convictions were unsafe. They found that this gave false hope to the Applicant who, rather than being released, now faced the reality of a significant extension to his original sentence. They also considered whether this ought to be taken into account when determining the sentence imposed. The Court of Criminal Appeal concluded that it could not be.

The questions of law said to justify a grant of special leave include:

- Where the prosecution case depends on the acceptance of a single witness whose evidence in chief was primarily given by playing a video recording of questions and answers, is it permissible for a court of criminal appeal to determine the appeal adversely to an appellant without itself having viewed the recording of that part of the complainant's evidence?

- In such an appeal, is a court of criminal appeal required, in an appeal against conviction on the ground that the verdict is unreasonable or cannot be supported having regard to the evidence to take into account the view of a trial judge that the jury acting reasonably could not have convicted the applicant, what impact does this have in assessing the advantage held by the jury in having seen and heard the witnesses give their evidence at trial?

- Will a court of criminal appeal err if, in determining whether it was open to the jury to convict the appellant, the court fails to form its own view of the appellant's guilt, before considering whether, any difference of opinion can be explained by any advantage held by the jury in having seen and heard the witnesses give their evidence at trial?

SPRINGFIELD LAND CORPORATION (NO 2) PTY LTD & ANOR v. STATE OF QUEENSLAND & ANOR (B39/2010)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2009] QCA 381

Date of judgment: 11 December 2009

Date special leave granted: 24 June 2010

The appellants are the owners and developers of a large area of land near Ipswich, and a Development Control Plan for the area, between the appellants, the State and the Ipswich City Council, designated an area of land on the boundary of the appellants' land as a regional transport corridor. Part of the appellants' land was transferred to the Council in August 1999 for road purposes within the regional transport corridor (referred to as Trust Lot 7). In about 2000 the second respondent, the CEO of the Department of Main Roads, assumed control of the regional transport corridor and partially realigned the intended route. That part of Trust Lot 7 which was no longer required was returned to the appellants, and other land ("the Transfer Land") was agreed to be transferred to the State in return for compensation which was to be determined by arbitration as if the Transfer Land had been compulsorily acquired under the *Acquisition of Land Act* 1967 (Qld) ("the Act"). Section 20(3) of the Act provides that "any enhancement of the value of the interest of the claimant in any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land is taken" must be taken into consideration by way of set-off or abatement in assessing the compensation to be paid. The matter was referred for arbitration, and the arbitrator made an award on the basis that the increase in the value of the appellants' adjoining land arose prior to and independently of the expansion of the purpose for which the Transfer Land was taken, and that the purpose for which the Transfer Land was taken was the realignment of the boundaries of the previously established regional transport corridor. The arbitrator concluded that there was no "enhancement" in the value of the land adjoining the Transfer Land by reason of the carrying out of the works. This award was set aside on appeal to the Supreme Court (per McMurdo J), and the appellants appealed to the Court of Appeal.

The Court of Appeal (Keane and Fraser JJA and Atkinson J) dismissed the appellants' appeal, Keane JA delivering the principal judgment of the Court. The Court held that the "purpose" was the works in constructing the regional transport corridor and that the enhancement of the value of the appellant's land adjoining the Transfer Land was as a result of the carrying out of those works and must be taken into consideration in assessing the amount of compensation to be paid.

The grounds of appeal include:

- Whether the Court of Appeal erred in finding that the "works" for which the land was taken were works in constructing the regional transport corridor, and not the realignment of the boundaries of that corridor;

- Whether the Court of Appeal erred in not upholding the arbitrator's finding that any enhancement in the value of the land adjoining that taken arose prior to and independently of the inclusion of the land taken in the planned transport corridor.