

SHORT PARTICULARS OF CASES
APPEALS

COMMENCING TUESDAY, 29 NOVEMBER 2011

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**PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED v
INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA & ANOR
(A7/2011)**

Court appealed from: Full Court of the Supreme Court of South
Australia [2011] SASFC 14

Date of judgment: 15 March 2011

Date application referred to Full Court: 8 June 2011

The Public Service Association of South Australia (PSA) wrote to the Industrial Relations Commission of South Australia (the Commission) in October 2010 notifying it of two disputes. The first dispute related to “security of employment for Public Sector employees”. The second dispute related to “entitlements for Public Sector employees in respect of both recreation leave loading and long service leave entitlements”. In each case the PSA requested the calling of a conference under s 200 of the *Fair Work Act* 1994 (SA) (the Act). Commissioner McMahon declined to make any order, holding that the Commission had no jurisdiction. The PSA appealed to the Full Commission, which held in each case that there was no industrial dispute about an industrial matter, and that the Commission did not have jurisdiction:

The PSA then issued proceedings in the Supreme Court of South Australia, by way of judicial review, seeking an order quashing the decision of the Full Commission. The Full Supreme Court (Doyle CJ, Duggan and Vanstone JJ) dismissed the application on the ground that it lacked jurisdiction to make the orders sought. The Court relied on s 206 of the Act which provides:

- (1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.
- (2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction.

The Court applied the decision of this Court in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 (**PSA** case). The PSA submitted that the decision of this Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 meant that the **PSA** case was no longer good law, because the effect of *Kirk* was that s 206 of the Act could not exclude judicial review by the Supreme Court of a decision affected by jurisdictional error. While recognising the force of that submission, Doyle J (with whom Duggan and Vanstone JJ concurred) considered that it was not open to the Supreme Court to hold that the decision in the **PSA** case had been reversed by *Kirk*. Only the High Court could take that step.

The PSA submitted that ss 206(2) applied in this case because the Full Commission mistakenly denied the existence of jurisdiction and had no jurisdiction to dismiss the appeal. The Full Court held that to accept that submission would be to undermine the distinction drawn by the High Court in the **PSA** case. A failure or refusal to entertain an appeal, based on an erroneous conclusion that there is no jurisdiction to entertain the appeal, will usually result in an order either striking out or dismissing the appeal. To say that the making of that order changes the decision from a decision involving a failure to exercise jurisdiction to a decision involving an excess of jurisdiction is to deny the very distinction that the High Court drew in the **PSA**

case. In this case, the Full Commission merely failed to exercise its jurisdiction. The decision that it made could not be challenged.

The application for special leave was, on 8 June 2011, referred to an enlarged bench. The PSA has given notice that this proceeding involves a matter arising under the Constitution within the meaning of s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General of the Commonwealth, South Australia, Victoria, Western Australia, Queensland and Tasmania are intervening in this application.

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

- Does the privative provision constituted by s 206 of the *Fair Work Act* 1994 (SA) preclude judicial review by the Supreme Court of South Australia of jurisdictional error and encompassed by the phrase "in excess or want of jurisdiction";
- If so is such section beyond the scope of the South Australian Parliament?

ROADSHOW FILMS PTY LTD & ORS v iiNET LIMITED (S288/2011)

Court appealed from: Full Court of the Federal Court of Australia
[2011] FCAFC 23

Date of judgment: 24 February 2011

Date of grant of special leave: 12 August 2011

The Appellants are Australian and American companies who are the owners and exclusive licencees of copyright in thousands of commercially released films and television programs. These are "cinematographic films" pursuant to the *Copyright Act 1968* (Cth) ("the Act") and the Appellants' ability to exploit them depends heavily upon the protections guaranteed by that Act.

The Respondent is an Internet Service Provider ("ISP"). It provides its customers with internet access pursuant to a standard Customer Relationship Agreement ("Agreement"). Amongst other things, that Agreement requires its customers not to use the internet to infringe anybody's copyright. It also entitles the Respondent to cancel, suspend or restrict its customers' access to the internet for any breach of those terms.

Many of the Respondent's customers downloaded (and exchanged) unauthorised copies of the Appellants' films using a "peer to peer" protocol called BitTorrent. (BitTorrent is also the dominant file sharing protocol used on the internet.) The Respondent was aware of BitTorrent and its use in the unauthorised sharing of files. It was also aware that approximately half of the internet traffic on its system was BitTorrent traffic, a substantial proportion of which involved copyright infringement.

In July 2008 the Australian Federation Against Copyright Theft ("AFACT") began sending the Respondent infringement notices. Those notices detailed the online infringement of the Appellants' copyright (using BitTorrent) detected on the Respondent's network. AFACT also requested that the Respondent take unspecified action to prevent any future infringement, a request that the Respondent effectively declined.

On 20 November 2008 the Appellants commenced Federal Court proceedings, alleging that the Respondent had authorised past, present and future infringements of the Appellants' copyright. Also on that date, the Respondent advised its affected customers that a judicial determination of infringement would be required before their accounts would be terminated.

On 4 February 2010 Justice Cowdroy held that the Respondent had not authorised the acts of infringement. This was despite the Respondent failing to take those legal and technical steps available to it to prevent the acts of infringement taking place. On 24 February 2011 the Full Federal Court (Emmett & Nicholas JJ, Jagot J dissenting) dismissed the Appellants' appeal. The majority held that the Respondent had not authorised the infringements of the Appellants' copyright.

Applications for intervention in this matter have been filed by the following interests: the Australian Recording Industry Association Limited; the Media, Entertainment & Arts Alliance and the Screen Actors Guild; the Australasian Performing Right Association Limited; the Australian Privacy Foundation; the Australian Digital Alliance Limited and the Communications Alliance Limited.

On 2 September 2011 the Respondent filed a notice of contention, the grounds of which include:

- The Full Court erroneously failed to decide that merely because other persons used facilities provided by iiNet for making, or facilitating the making of, a communication to engage in acts comprised in the Appellants' copyright, in the circumstances of this case iiNet is not taken to have authorised any infringement of copyright by reason of s 112E of the Act: Emmett J at [212]-[218], Jagot J at [452]-[465], Nicholas J at [784]-[797].

The grounds of appeal include:

- The Full Court erred (per Emmett & Nicholas JJ) in holding that the Respondent had not authorised the infringements of the Appellants' copyright by users of the Respondent's internet services (per Emmett J at [257]; Nicholas J at [798]; cf Jagot J at [477], [527(2)]).

KING v THE QUEEN (M129/2011)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2011] VSCA 69

Date of judgment: 17 March 2011

Date special leave granted: 2 September 2011

Following trial in 2008, the appellant was found guilty of 2 counts of culpable driving causing death, contrary to s 318 of the *Crimes Act 1958 (Vic)* (the Act). He was sentenced to a total of 7½ years' imprisonment with a non-parole period of 4½ years.

In 2005 the appellant, then aged 19, was driving two friends home to Oakleigh, having already dropped off a third friend in Cranbourne. He was unfamiliar with the area and drove past a *Give Way* sign on Evans Road into the intersection with Thompsons Road. A truck coming down Thompsons Road and driven by one Grayson, was unable to brake in time; the truck collided with the left hand side of the appellant's car. The appellant's two friends were killed.

Although familiar with the intersection, Grayson was not aware until after the accident that there was a *Give Way* sign on Evans Road. The intersection was a "black spot" because of the number of collisions involving injuries or fatalities that had occurred previously. After this accident, a roundabout was installed and no further fatal accidents had occurred. Expert evidence indicated that the appellant was travelling well within the speed limit of 80 kph. There was no evidence that the appellant had driven irresponsibly leading up to the collision and it was not disputed that he had not had any alcohol prior to driving. There was a dispute as to whether the appellant had consumed cannabis prior to driving. The appellant admitted he had used cannabis the day before, but not on the day of the accident. Analysis of the appellant's blood taken after the collision indicated a level of cannabis such as to impair his driving skills. Analysis of the deceased men's blood showed a high level of cannabis. It was suggested at trial that passive smoking may have explained the appellant's cannabis reading.

The Crown case on culpable driving causing death was put on two bases: first that the appellant drove negligently and second that he drove whilst under the influence of cannabis. The appellant was found guilty on the basis of gross negligence but not of driving under the influence. The trial judge had also left to the jury the statutory alternative (and lesser) charge of dangerous driving causing death contrary to s 319(1) of the Act. The trial judge directed the jury that on that alternative charge, the way the Crown case was put was the same analysis as with the culpable driving charge.

The appellant sought to appeal against conviction and sentence. He submitted that in relation to the dangerous driving charge, the trial judge ought to have directed the jury that the Crown had to prove that the accused created a "considerable risk of serious injury or death" whereas the direction given was "a real risk of harming or hurting others". This submission was made following the Court of Appeal decision in *R v De Montero* (2009) 25 VR 694, (*Montero*), which was decided after the appellant's trial but before his appeal was heard.

Further it was submitted that the trial judge was in error in directing that the Crown did not have to satisfy the jury that the driving was deserving of criminal punishment. The Court of Appeal took the view that the substance of the trial judge's directions on dangerous driving conveyed the necessary elements of the offence as required by *Montero*. The Court of Appeal (Buchanan, Redlich and Mandie JJA) refused leave to appeal against conviction but allowed the appeal against sentence, reducing it to 6 ½ years with a non parole period of 3 ½ years.

The respondent has filed a notice of contention.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that the directions on the alternative counts of dangerous driving causing death - by specifying (a) that the driving need only have significantly increased the risk of hurting or harming others and (b) that the driving need not be deserving of criminal punishment - amounted to misdirections giving rise to a substantial miscarriage of justice such that the verdicts on the counts of culpable driving causing death had to be set aside.

**BUI v DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH
(M127/2011)**

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2011] VSCA 61

Date of judgment: 9 March 2011

Date special leave granted: 2 September 2011

In April 2010 the appellant pleaded guilty in the County Court to one count of importation of a marketable quantity of heroin contrary to s 307.2(1) of the *Criminal Code* (Cth). She was sentenced to 3 years' imprisonment to be released forthwith upon giving security by recognisance of \$5,000.00 and to be of good behaviour for 3 years. At the plea hearing, the appellant relied on two major points in mitigation: that her immediate incarceration would cause exceptional hardship to her infant twin daughters; and that she had given an undertaking to cooperate with law enforcement agencies in future proceedings. The respondent (CDPP) appealed against sentence on the basis that it was manifestly inadequate. CDPP also contended that the sentencing judge fell into material error in finding "exceptional circumstances" relating to the appellant's family circumstances or alternatively giving too much weight to them. The Court of Appeal accepted that the sentencing judge had fallen into error and also accepted that, even giving full weight to the factors in mitigation, the sentence was manifestly inadequate.

At the time the appeal was heard, new provisions of the *Criminal Procedure Act* 2009 (Vic) had come into operation. Sections 289 and 290 in effect provide that issue of double jeopardy in relation to Crown appeals against sentence is not to be taken into account. The appellant submitted that "double jeopardy" ought to be interpreted as it had been interpreted by Spigelman CJ in *R v JW* [2010] NSWCCA 49 regarding similar NSW legislation, namely that "double jeopardy" precludes reliance upon the presumed distress and anxiety suffered by a respondent to a Crown appeal, as distinct from any wider meaning. The appellant also submitted that the new provisions were not picked up and applied pursuant to the *Judiciary Act* 1903 (Cth). Alternatively, it was submitted that those provisions were inconsistent with s 16A(1) and (2) of the *Crimes Act* 1914 (Cth) (the Crimes Act), as s 16A(1) encompasses the need to moderate Crown appeals due to double jeopardy. The Court of Appeal accepted the reasoning of Spigelman CJ and had regard to the unchallenged evidence of the appellant's anxiety and distress. However the Court did not accept that there was inconsistency between the new provisions and s 16A of the Crimes Act, nor that there was any impediment to these provisions being picked up and applied pursuant to the *Judiciary Act* in a Crown appeal against sentence for federal offences.

The Court of Appeal re-sentenced the appellant to 4 years' imprisonment, starting from the date of its judgment, with a 2 year non-parole period.

The ground of appeal is:

- That the Court of Appeal erred in holding that sections 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) were picked up and applied pursuant to the *Judiciary Act* 1903 (Cth) in a Crown appeal against sentence instituted by the Commonwealth Director of Public Prosecutions.

The appellant has given notice that the appeal involves a matter under the Constitution within the meaning of s 78B of the *Judiciary Act* 1903 (Cth). The Attorney-General for the State of Victoria has intervened in the appeal.

AYTUGRUL v THE QUEEN (S315/2011)

Court appealed from: New South Wales Court of Criminal Appeal
[2010] NSWCCA 272

Date of judgment: 3 December 2010

Date of grant of special leave: 2 September 2011

The Appellant and the deceased, Ms Sevda Bayrak, were former lovers. The Crown alleged that the appellant murdered Ms Bayrak on the evening of 26 November 2005. The case against him however was circumstantial. The Crown submitted that the appellant's motive for killing her came from the failure of their relationship. Ms Bayrak had apparently refused his request to marry and he was also upset that she had formed a new relationship. On 9 December 2008 the appellant was convicted of Ms Bayrak's murder.

The appellant appealed against his conviction on two grounds. The first related to the use that was made of the DNA evidence. The second was that the verdict was unreasonable. On 3 December 2010 the Court of Criminal Appeal (McClellan CJ at CL, Simpson & Fullerton JJ) unanimously dismissed the second ground, while only McClellan CJ at CL would have allowed the first.

The DNA evidence from hair found at Ms Bayrak's apartment was equivocal. That evidence indicated that it could have come from either a male or a female. Two DNA samples were also found on an abrasion under Ms Bayrak's chin. One profile was consistent with that of a Mr Tunc (Ms Bayrak's new lover), while the other was definitely not the Appellant's. There were also unidentified fingerprints found at the scene. No blood was found in the Appellant's car.

The statistical evidence relating to the DNA was presented to the jury in two forms: "random occurrence (or likelihood) ratios" and "exclusion percentages". Random occurrence ratios express the frequency with which a particular DNA profile is expected to occur in a population. They are expressed as "one in every X persons". An exclusion percentage is the proportion of people in that same population who would not be expected to have that same DNA profile. The appellant submitted that DNA evidence expressed as exclusion percentages should have been rejected. He submitted that, when expressed as percentages of close to 100%, such evidence was unfairly prejudicial and should have been rejected pursuant to s 135 or s 137 of the *Evidence Act* 1995 (NSW) ("the Evidence Act").

McClellan CJ at CL held that the trial judge should not have allowed the exclusion percentages, all of which invited a subconscious "rounding-up" to 100%. His Honour found that the trial judge's directions on this issue would not have eliminated the risk of unfair prejudice to the appellant, a prejudice that substantially outweighed the probative value of the evidence.

Justices Simpson and Fullerton however were not convinced that there was any deficiency in the way the DNA evidence was put to the jury. Neither Justice considered that such evidence, framed as it was, was unduly or unfairly prejudicial, confusing or misleading so as to enliven consideration of s 135 or s 137 of the Evidence Act.

The ground of appeal is:

- The Court of Criminal Appeal erred in holding that the trial judge did not err in admitting statistical evidence expressed in exclusion percentage terms.