SHORT PARTICULARS OF CASES
APPEALS

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<u>LIKIARDOPOULOS v THE QUEEN</u> (M24/2012)

<u>Court appealed from:</u> Court of Appeal of the Supreme Court of Victoria [2010] VSCA 344

<u>Date of judgment:</u> 17 December 2010

<u>Date special leave granted</u>: 9 March 2012

The appellant was found guilty, after a trial in the Supreme Court of Victoria, of the murder of Christopher O'Brien, and was sentenced to 20 years' imprisonment with a non-parole period of 17 years.

The events which led to the death of O'Brien occurred around 6 to 8 March 2007. O'Brien was suspected of having stolen a mobile phone from the appellant's home. He was summoned to the home, where over a period of about two days he was viciously and repeatedly attacked. The attacks were perpetrated by a number of people, amongst whom the Crown identified the appellant, his son (John Likiardopoulos), Hakan Aydin and Shalendra Singh. O'Brien died at the home as a result of the assaults. The appellant was not present in the immediate vicinity at all times when O'Brien was under attack. At times he slept, and, for a period, he was not in the house. After O'Brien had died, the appellant directed others to dispose of the body and clean the premises. The decomposed body was discovered some 5 months later in a creek. The appellant and others were charged with murder. Prior to the appellant's trial the Crown accepted pleas of guilty to lesser offences by the co-accused. Aydin & Singh gave evidence for the prosecution at the appellant's trial. The appellant did not give evidence or call witnesses.

The Crown put its case against the appellant in two ways: first, that he acted with others in a joint criminal enterprise, that is, to beat O'Brien with the intention of inflicting really serious injury; second, that he counselled and procured others to beat O'Brien with that intention. The Crown contended that it did not matter whether the appellant had performed any, and if so which, acts of assault. Nor did it preclude him being found guilty of murder that he had not always been immediately present when the victim was being attacked. The Crown relied upon (a) a body of evidence to the effect that the appellant was the dominant, domineering person in the household; (b) evidence that he had repeatedly incited others to attack O'Brien; (c) evidence that he had participated in the assault; and (d) evidence of admissions by the appellant of his participation in the murder of the victim.

The appellant's appeal to the Court of Appeal (Buchanan, Ashley and Tate JJA) was dismissed. The Court rejected the appellant's submission that joint criminal enterprise requires the presence of the offender at the scene of the crime: this aspect does not form part of the appeal to this Court.

The appellant further submitted that the trial judge's directions to the jury on counselling and procuring were flawed in a number of ways: relevantly, that the judge had erred in leaving that derivative form of liability for murder, when none of the alleged principals had been convicted of that offence. It was also submitted that it was an abuse of process for the Crown to present its case in this way and rely on it to prove guilt by the appellant, when the Crown had in fact accepted pleas of guilty by the co-accused to lesser offences other than murder. The Court of Appeal rejected this ground, following the approach of the Privy Council in *Hui*

Chi-ming v The Queen [1992] 1 AC 34, which it held stood in the way of the appellant's submissions and was not distinguishable.

The respondent will seek to rely on a Notice of Contention contending that the Court below erred in affirming that the first element the prosecution must prove is that a principal offender committed the offence of murder. The respondent submits that the first element that the prosecution must prove ought to be that a principal offender committed the *actus reus* of murder.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that the trial judge erred in leaving to the jury [a] derivative form of liability [counselling and procuring] for murder when none of the alleged principals had been convicted of murder and indeed the Crown had accepted pleas of guilty from those offenders to offences other than murder.

NEWCREST MINING LIMITED v. THORNTON (P59/2011)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2011] WASCA 92

Date of judgment: 12 April 2011

Date of grant of special leave: 9 December 2011

The respondent, who was employed by Simon Engineering Pty Ltd, was injured in an accident at the Telfer mine site. He issued a writ against his employer seeking damages for personal injury and the action was settled and a consent judgment for $250,000 was entered on 31 May 2007. In 2008, the respondent issued a writ of summons against the appellant, the owner and operator of the mine, seeking damages for the same injury. In his particulars of damage, the respondent reduced the damages claimed against the appellant by $250,000 on account of settlement moneys received.

On 11 May 2009 the appellant applied in the District Court for summary judgment against the respondent. The essence of the application was that the respondent had already been compensated for the injury that he suffered on 16 February 2004 and recovery of further damages was impossible having regard to s 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("the Act"). The deputy registrar granted summary judgment.

Mazza DCJ upheld the deputy registrar's decision and held that the respondent's claim against the appellant was with respect to the same damage the subject of the settled proceedings and by virtue of s 7(1)(b) of the Act he could not in the proceedings against the appellant recover damages which exceeded the amount of the damages he received in the action against his employer.

The Court of Appeal (Pullin & Murphy JJA & Murray J) gave a unanimous decision allowing the respondent's appeal. It noted that after Mazza DCJ handed down his decision, the New South Wales Court of Appeal gave its reasons in *Nau v Kemp & Associates* [2010] NSWCA 164. In that decision, the Court of Appeal held that, in relation to the New South Wales equivalent of s 7(1)(b) of the Act (s 5(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW)), the phrase "damages awarded . . . by judgment" referred to damages awarded by a court following a judicial assessment and not to a judgment entered by consent. The Court of Appeal noted that an intermediate appellate court should not depart from an interpretation placed on uniform national legislation by another intermediate appellate court unless convinced that the interpretation was plainly wrong. The Court noted that whilst the legislation was not uniform, identical provisions applied in Western Australia, New South Wales, Queensland and the Northern Territory. Their Honours concluded that the appellant had not been able to demonstrate that the decision in *Nau v Kemp* was plainly wrong. The construction urged by the appellant would have the effect that where a plaintiff who settled against one tortfeasor for less than the full loss and agreed to a consent judgment for the settlement sum would be shut out from pursuing their full loss, whereas a plaintiff in the same circumstance, but who did not agree to a consent judgment, would not be shut out.

The grounds of appeal include:

- The Court below erred in holding that Mazza DCJ had erred when he dismissed the appeal from Deputy Registrar Hewitt who had granted the [appellant]'s application for summary judgment pursuant to o 16 of the *Rules of the Supreme Court* 1971 (WA).

- The Court below erred in holding that s 7(1)(b) of the Act applied only to damages awarded by a court following a judicial assessment and not to a judgment entered by the consent of the parties.