SHORT PARTICULARS OF CASES

FEBRUARY 2020

HOCKING v DIRECTOR-GENERAL OF THE NATIONAL ARCHIVES OF AUSTRALIA (S262/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 12

Date of judgment: 8 February 2019

Special leave granted: 16 August 2019

At issue in this appeal is whether certain documents ("the Records") held by the National Archives of Australia ("the Archives") are *"property of the Commonwealth"* and are therefore "*Commonwealth records*" for the purposes of the *Archives Act 1983* (Cth) ("the Archives Act").

The Records include the originals (and copies) of correspondence between the then Governor-General Sir John Kerr (or his Official Secretary) and Queen Elizabeth (or her Private Secretary) from 15 August 1974 to 5 December 1977. The then Official Secretary to the Governor-General lodged the Records with the Archives on 26 August 1978 with the instruction that they were to remain closed until 2037. (That date was later changed to 2027.) Thereafter they could only be released following consultation between the reigning Sovereign's Private Secretary and the incumbent Governor-General's Official Secretary.

The Appellant's request for access to the Records was refused by the Archives on 10 May 2016. The refusal letter stated that the Records were not *Commonwealth records* and were not therefore subject to the access provisions of the Archives Act.

Relevantly s 3(1)(a) of the Archives Act defines "*Commonwealth record"* as meaning a record that is the property of the Commonwealth or of a Commonwealth institution. It does not however include exempt material and the term "property" is not defined. A "Commonwealth institution" does however include "the official establishment of the Governor-General" and "an authority of the Commonwealth".

On 16 March 2018 Justice Griffiths dismissed the Appellant's application seeking a declaration that the Records were *Commonwealth records*. On 8 February 2019 the Full Federal Court (Allsop CJ & Robertson J; Flick J dissenting) also dismissed the Appellant's subsequent appeal, with the majority finding that the relationship between the Queen and the Governor-General was essentially a personal one. The majority then held that the Records were the personal property of Sir John Kerr and not that of the Commonwealth.

Justice Flick however disagreed strongly with the majority and concluded that the Records, as whole, were in fact *Commonwealth records*. His Honour reached that conclusion by reference to the following factors:

a) The positions occupied by the Queen and the Governor-General;

b) The functions being discharged by the Governor-General;

c) The nature of the correspondence;

d) The subject matters being addressed; and

e) The importance of that subject matter to the Constitutional system of government of this country.

Justice Flick held that to regard those documents as Sir John Kerr's personal property was a conclusion which could not be supported.

The grounds of appeal are:

- The majority erred at FC [97] in reasoning that the Records are constituted by documents, none of which are the property of the Commonwealth because they were each created or received by Sir John Kerr acting personally and not officially.

- The majority erred by reasoning at FC [95] and [102] that the Archives Act does not include within the defined term "Commonwealth record" records which, while they are the property of the Commonwealth, are the personal or private records of the Governor-General.

On 29 August 2019 a Notice of Constitutional matter was filed. On 14 October 2019 the Attorney-General of the Commonwealth filed a Notice of Intervention in this matter.

COMMONWEALTH OF AUSTRALIA v HELICOPTER RESOURCES PTY LTD & ORS (S217/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 25

Date of judgment: 15 February 2019

Special leave granted: 21 June 2019

In January 2016 Captain David Wood, a helicopter pilot, died while working in the Australian Antarctic Territory, as a result of falling into a crevasse that was hidden by ice. The fall occurred while Captain Wood was attempting to reboard a helicopter that he had landed. At the time of his death, Captain Wood was employed by Helicopter Resources Pty Ltd ("Helicopter"), which was supplying helicopter services to the Commonwealth.

In September 2017 a coronial inquest into Captain Wood's death commenced in the Australian Capital Territory ("the ACT"). In December 2017, while the inquest was still underway, both Helicopter and the Commonwealth were charged, as co-accused, with summary offences under the *Work Health and Safety Act 2011* (Cth) ("the criminal charges"). The criminal charges were laid on behalf of Comcare, in the ACT Magistrates Court. One of the criminal charges alleges contraventions arising out of the circumstances of Captain Wood's death.

After the criminal charges were laid (and prior to the entry of pleas), Helicopter applied for the coronial inquest to be adjourned pending completion of the criminal prosecution. At that stage of the inquest, the only witness remaining to be examined was Helicopter's Chief Pilot, Captain David Lomas. The Commonwealth submitted that the inquest should proceed to finality. On 12 April 2018 the Chief Coroner of the ACT refused Helicopter's application. The Chief Coroner considered that Helicopter's defence to the criminal charges would not be compromised by Captain Lomas giving evidence in the inquest, nor would the coronial findings be binding on the Magistrate determining the criminal proceedings.

Helicopter applied to the Federal Court for judicial review of the Chief Coroner's decision, contending essentially that an examination of Captain Lomas at the inquest prior to the determination of the criminal charges risked giving rise to an interference with the criminal proceedings in two ways: (1) the prosecution might become armed with evidence and admissions attributable to Helicopter; and (2) the Commonwealth would gain an advantage of assessing the evidence that Captain Lomas might give if he were called by the Commonwealth as a witness in its defence. On 29 June 2018 Justice Bromwich dismissed Helicopter's application, finding that although Helicopter had pointed to forensic disadvantage and a generalised sense of unfairness, it had not demonstrated that an improper interference with the criminal proceedings would result from the calling of Captain Lomas to give evidence at the inquest. Justice Bromwich found it premature to decide whether any restriction on Captain Lomas' appearance at the inquest was warranted, since there was no evidence as to the position Captain Lomas would take, nor could it be said in advance that the Coroner would not appropriately exercise protective powers such as restricting the disclosure of evidence.

An appeal by Helicopter was unanimously allowed by the Full Court of the Federal Court (Rares, McKerracher and Robertson JJ), which stayed the operation of any subpoena to be issued to Captain Lomas for him to give evidence at the inquest. Their Honours observed that anything said by Captain Lomas in giving evidence before the Coroner could be tendered against Helicopter as an admission by it in the criminal proceedings, by force of s 87(1)(b) of the *Evidence Act 2011* (ACT). The Full Court held that that fundamentally altered the position of Helicopter as an accused because Helicopter's hand could be forced prematurely. Such an alteration amounted to an improper interference with the criminal proceedings because it departed from the fundamental principle that the prosecution bears the onus of proving its case. Their Honours considered that such an interference could not be overcome by the entitlement of Captain Lomas to invoke the privilege against self-incrimination at the inquest, since Captain Lomas would be unable to object to answering a question on the basis that his answer might tend to incriminate Helicopter. The Full Court held that relief should not be withheld on the basis of prematurity, since the necessary considerations would be speculative and could not gainsay the risk to the due administration of justice.

The grounds of appeal are:

- The Full Court erred as to the meaning and effect of s 87 of the *Evidence Act 2011* (ACT).

- The Full Court erred as to the scope and effect of the accusatorial principle by treating it as preventing an employee of a corporation from being compelled to provide evidence that is relevant to pending criminal charges against that corporation.

- The Full Court erred in overturning the primary judge's findings as to prematurity.

Helicopter had filed a notice of contention.

This appeal was heard in Canberra on 10 October 2019, but argument was not completed in the time allocated. The Court then adjourned the matter to a date to be fixed.

KMC v DIRECTOR OF PUBLIC PROSECUTIONS (SA) (A20/2019)

Court removed from: Full Court, Supreme Court of South Australia (Court of Criminal Appeal)

Date cause removed: 30 August 2019

The central issue in this cause removed is the validity of s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (the Amendment Act"), which provides:

> *A sentence imposed on a person, before the commencement of this section, in respect of an offence against section 50 of the Criminal Law Consolidation Act 1935 (as in force before the commencement of section 6 of this Act) is taken to be, and always to have been, not affected by error or otherwise manifestly excessive merely because—*
>
> *(a) the trial judge did not ask any question of the trier of fact directed to ascertaining which acts of sexual exploitation, or which particulars of the offence as alleged, the trier of fact found to have been proved beyond a reasonable doubt and the person was not sentenced on the view of the facts most favourable to the person; and*
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> *(b) the sentencing court sentenced the person consistently with the verdict of the trier of fact but having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt.*

In June 2017, following a trial before a judge and jury in the District Court of South Australia, the applicant was convicted on one count of sexual abuse of a child against s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) as then in force. In August 2017, he was sentenced to imprisonment for ten years and six months, with a non-parole period of five years.

The information alleged that over a period of not less than three days the applicant committed more than one sexual exploitation of the victim, by: (1) performing cunnilingus on her; (2) causing her to perform an act of fellatio upon him; (3) inserting his penis into her anus; and (4) urinating on her. The particulars were advanced on the basis not that they each identified a single alleged act of sexual exploitation, but rather that they identified four *kinds* of act. The prosecution case, and the evidence of the victim, was that the applicant committed multiple acts of each kind on numerous occasions over a period of up to three years. His Honour directed the jury that they were to deliver a verdict of guilty if satisfied beyond reasonable doubt that the applicant had committed any two or more acts of sexual exploitation of any one or more of the "types" particularised in the information, over a period of not less than three days. They were not asked any questions as to the basis for the verdict. Consequently, the jury never identified the particular two or more sexual acts as to which they were unanimously satisfied.

On 13 September 2017, this Court delivered judgment in *Chiro v The Queen (Chiro).* On 24 October 2017, the Parliament of South Australia enacted the Amendment Act. On 15 February 2019, the applicant applied for permission to

appeal to the Court of Criminal Appeal, in effect relying on Chiro, together with an application for extension of time. The applicant submits that, but for the effect of s 9(1) of the Amendment Act, in view of the decision in *Chiro,* the jury not having been asked to identify the two or more acts about which they were satisfied, and the sentencing judge having sentenced the applicant on the basis he committed all the offences described by the victim, the sentence would be liable to be set aside as manifestly excessive.

On 30 August 2019 Gordon J ordered that the applicant's application to appeal to the Court of Criminal Appeal be removed into this Court. Notices of Constitutional Matter had been served. The Attorneys-General for South Australia, Tasmania, New South Wales, Queensland and Victoria have filed Notices of Intervention.

The questions raised are:

(1) does s 9(1) on its proper construction apply to the applicant's appeal; and

(2) if so, is s 9(1) inconsistent with Chapter III of the Constitution, and invalid, because
it impermissibly:
   (a) directs the manner or outcome of the exercise of the appellate jurisdiction of the Supreme Court of South Australia (including in the exercise of federal jurisdiction) and/or this Court;
   (b) excludes judicial review for jurisdictional error of a sentencing decision of an inferior court of record; and/or
   (c) impairs the institutional integrity of the Supreme Court of South Australia and/or the sentencing court (being a court of a State)?

MOORE v SCENIC TOURS PTY LTD (S285/2019)

Court appealed from: New South Wales Court of Appeal
[2018] NSWCA 238

Date of judgment: 24 October 2018

Special leave granted: 13 September 2019

Mr David Moore booked a two week European river cruise with Scenic Tours Pty Ltd ("Scenic") which was scheduled to leave Amsterdam on 3 June 2013. Mr Moore's cruise however was seriously affected by high water levels on the Rhine and Main Rivers. As a result, bus travel replaced luxury boat travel for parts of that overall journey. Similar problems also affected a number of Scenic's other European river cruises around that time. Mr Moore later commenced representative proceedings on behalf of both himself and others ("the Group Members") who had booked on those other river cruises.

The main issues at trial were whether Scenic had supplied services to Mr Moore (and each other Group Member) without due care and skill. This was said to be in contravention of s 60 of the Australian Consumer Law ("ACL") ("the Care Guarantee"). It was also submitted that those services were not fit for the purpose for which Mr Moore and each Group Member acquired them. This was said to be in contravention of s 61(1) of the ACL ("the Purpose Guarantee"). It was further alleged that the services were not of a nature and quality as could reasonably be expected. This was said to be in contravention of s 61(2) of the ACL ("the Result Guarantee"). Collectively these guarantees are known as the Consumer Guarantees.

Justice Garling found in favour of Mr Moore, holding that Scenic had failed to comply with the Consumer Guarantees. A judgment of $16,539.85, inclusive of interest, was then awarded.

On 24 October 2018 the Court of Appeal (Sackville & Barrett AJJA, Payne JA) allowed Scenic's appeal in part. Their Honours held that Justice Garling had erred in finding that the services to be provided by Scenic included informing Mr Moore *before the commencement of a cruise* of events that might have an adverse impact on the scheduled itinerary. The Court of Appeal however found that Justice Garling had correctly held that Scenic had failed to comply with the Purpose Guarantee. This was because the services it provided to Mr Moore were not reasonably fit for the particular purpose for which he acquired them, namely experiencing a cruise in accordance with the itinerary published in Scenic's brochure.

The Court of Appeal also held that Justice Garling had erred in awarding damages under s 267(4) of the ACL due to Scenic's failure to comply with the Purpose and Result Guarantees. This was because s 275 of the ACL picked up and applied s 16 of the *Civil Liability Act 2002* (NSW) ("Civil Liability Act") as a surrogate federal law. The Court of Appeal found that s 16 of the Civil Liability Act applied notwithstanding that Scenic's contraventions of the Purpose and

Result Guarantees occurred outside Australia. Their Honours found that there was a sufficient geographic connection with New South Wales because s 16 applied to a claim for damages in a New South Wales court.

The Appellant has filed a Notice of Constitutional Matter, while the Attorney-General of the Commonwealth filed a Notice of Intervention.

In this matter, the grounds of appeal include:

- While correctly finding that s 79 of the *Judiciary Act 1903* (Cth) cannot pick up and apply s 16 of the Civil Liability Act as a Commonwealth law directing a court exercising federal jurisdiction in how it is to fix damages under s 267(4) of the ACL for breach of the statutory guarantees in ss 60 and 61 of the ACL (CA [359]), the Court of Appeal erred in finding that s 275 of the ACL operates to apply s 16 of the CLA as a Commonwealth law to achieve that same result (CA [388]-[391]).

COUGHLAN v THE QUEEN (B60/2019)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2019] QCA 65

Date of judgment: 16 April 2019

Special leave granted: 18 October 2019

Between about 5:00pm and 6:00pm on 18 July 2015 a house owned by Mr Eamonn Coughlan was destroyed by an explosion and fire. At the time of the explosion Mr Coughlan was walking from the back yard towards the front of the house, and he suffered burns from the blast. He immediately ran down the road and then rode away on a motorbike that he had left in a nearby car park. After 9:00pm that evening Mr Coughlan walked into a police station, where he was later interviewed by officers. The next day, Mr Coughlan made a claim on an insurance policy for the house.

Mr Coughlan told the police that he was trying to sell the motorbike and that he had arranged to meet a potential buyer at the house. He parked the motorbike away from the house as a safeguard against someone taking the bike without paying for it. Mr Coughlan had told his wife however that he was going to see people from the four-wheel-drive club. After the explosion, Mr Coughlan panicked. He rode for a considerable time, making many turns because he thought that someone might be following him. He could not find his mobile phone, so he did not try to call his wife or anyone else. He said that he did not go home because he did not want to take home whatever problem there was.

Mr Coughlan was later charged with arson and attempted fraud. After pleading not guilty, he represented himself at a trial before a jury. Expert witnesses were unable to conclude what had caused the explosion or what fuel had been involved. On 6 June 2018 the jury found Mr Coughlan guilty of both charges.

In an appeal against his conviction, Mr Coughlan (through legal representatives) contended that the jury's verdicts were unreasonable and could not be supported by the evidence. Matters raised included evidence given by witnesses that a man whose appearance and clothing differed from Mr Coughlan's was seen fleeing immediately after the blast, and scientific evidence as to petrol residue found on Mr Coughlan's pants and shoes. Mr Coughlan argued that the verdicts were unreasonable because his alternative hypothesis, that someone else had caused the explosion, was not excluded.

The Court of Appeal (Fraser and Morrison JJA and Mullins J) unanimously dismissed Mr Coughlan's appeal. Their Honours considered that it was open to the jury to be satisfied beyond reasonable doubt that it was Mr Coughlan who was seen running from the house and riding away on his motorbike, and that there was no foundation for a conclusion that Mr Coughlan was pursued by someone. The Court of Appeal found that the jury could rightly reject the

possibility that any of certain other persons in the vicinity of the house could have been involved in causing the explosion. Their Honours considered that the obvious explanation for petrol residue on Mr Coughlan's clothing was that Mr Coughlan had been involved in distributing petrol at the house. Although there was no obvious motive for Mr Coughlan to cause the explosion, the evidence might have suggested to the jury that Mr Coughlan had a volatile character and that the explosion was the result of a black mood of his.

The ground of appeal is:

- The Court of Appeal's analysis as to whether the verdicts of the jury were unsafe misapplied the principles in *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63 in that the analysis merely identified a pathway to a guilty verdict rather than weighing those matters which militated against a guilty verdict to determine whether the jury should have had a reasonable doubt as to the Appellant's guilt.

SWAN v THE QUEEN (S291/2019)

Court appealed from: New South Wales Court of Criminal Appeal
[2018] NSWCCA 260

Date of judgment: 23 November 2018

Special leave granted: 13 September 2019

In April 2013 Mr Alexander Kormilets was assaulted by two men during a home invasion. He was 78 years old at the time and he sustained severe injuries during that attack. After four months in hospital Mr Kormilets was released to a nursing home, but his condition steadily deteriorated. He died in December 2013.

In 2016 Mr William Swan and Mr Thompson Kimura were jointly tried for Mr Kormilets' murder. At issue during the trial was whether the prosecution had proven that their assault on Mr Kormilets had actually caused his death. The medical evidence established that the direct cause of Mr Kormilets' death was respiratory distress caused by a high concentration of fat emboli in small blood vessels in the lungs. It was also accepted that the presence of these fat emboli had resulted from an (intentionally) untreated fracture to Mr Kormilets' left femur, an injury caused by a fall. There was however conflicting evidence as to how that fall came about. The prosecution submitted that Mr Kormilets' fall was directly related to the decline in his health following the home invasion assault. Mr Swan submitted was that it was caused by the metastasis of a tumour found on Mr Kormilets' left kidney, an event unconnected to that incident.

On 20 May 2016 the jury found both men guilty of murder. Mr Swan was then sentenced to a minimum term of 19 years and 6 months imprisonment, with Mr Kimura receiving a slightly shorter sentence.

Upon appeal, Mr Swan submitted that the prosecution's closing address had encouraged the jury on a path of reasoning not properly open to it. This was because the prosecution had submitted that the jury could still be satisfied that *the decision not to treat* the fractured femur was *caused* by the injuries Mr Kormilets sustained during the home invasion. This was even if the fracture itself had been caused by metastasis of the tumour.

On 23 November 2018 the Court of Criminal Appeal (Bathurst CJ, Hoeben CJ at CL and R A Hulme JA) unanimously held that the jury could convict Mr Swan on the basis that, even if the fractured femur had been caused by metastasis of the tumour, the home invasion assault remained a substantial or significant cause of Mr Kormilets' death. Their Honours found that metastasis of the tumour would not have been an intervening event, breaking that chain of causation. The Court of Criminal Appeal found that there was sufficient evidence for the jury to infer

that the decision not to treat the fractured femur directly resulted from the injuries suffered by Mr Kormilets during the home invasion.

In this matter, the grounds of appeal are:

- The Court of Criminal Appeal erred by failing to come to the only conclusion available; namely, that the Crown case theory on cause of death the subject of complaint on appeal was not supported by the evidence, and to leave it to the jury caused a miscarriage of justice

- In the alternative, the Court of Criminal Appeal failed to consider the Appellant's sole ground of appeal as particularised; namely that a miscarriage of justice resulted from the Crown Prosecutor's closing address about causation, which encouraged a path of reasoning that was not properly open.