

SHORT PARTICULARS OF CASES

NOVEMBER 2021

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THE QUEEN v ROLFE (D2/2021)

Court sought to appeal from: Full Court of the Supreme Court of the Northern Territory [2021] NTSCFC 6

Date of judgment: 13 August 2021

Application for special leave to appeal referred: 10 September 2021

The respondent is a member of the Northern Territory Police Force. In 2019 the respondent was part of police operation seeking to arrest the deceased for breach of suspended sentence. During the course of the arrest the deceased stabbed the respondent with a pair of scissors and the respondent shot the deceased three times with his police issue handgun. The police transported the deceased to Yuendumu police station and administered first aid, but the deceased died a short time later from injuries sustained from the gunshots. The respondent is charged with murder contrary to section 156 of the *Criminal Code Act 1983* (NT) ('the Code') or in the alternative, charged with manslaughter contrary to section 160 of the Code. In the further alternative, the respondent is charged with engaging in a violent act which causes the death of the deceased contrary to section 161A(1) of the Code.

The respondent's trial before jury was scheduled to commence in August 2021. The trial judge, Acting Justice Mildren, heard a number of voir dires to make necessary rulings prior to the commencement of trial. In July 2021, during the course of that process, his Honour referred several questions to the Full Court under section 21 of the *Supreme Court Act 1979* (NT). Broadly, those questions related to the availability to the respondent of various defences arising from provisions of the *Police Administration Act 1978* (NT) ('PA Act') and their application to acts or omissions done or made by a police officer acting in the capacity of a public official under an authorising law.

On 13 August 2021 the Full Court of the Supreme Court of the Northern Territory (Southwood, Kelly and Blokland JJ, Mildren and Hiley AJJ) confirmed the respondent could use three separate defences in the trial, including that he should not be held criminally liable because he was acting in "good faith" in his role as a police officer.

On 19 August 2021 the applicant made an application for expedited hearing of an application for special leave to appeal to this Court from the decision of the Full Court of the Supreme Court of the Northern Territory. The applicant also applied for a stay on the respondent's trial before jury. On 23 August 2021 Justice Gleeson granted that stay until the hearing of the application for special leave to appeal on 10 September 2021.

On 10 September 2021 Chief Justice Kiefel, Justice Keane and Justice Gleeson referred the application for special leave to appeal to the Full Court to be argued as if on appeal. By consent, the respondent's trial before jury was further stayed pending further order of this Court.

Broadly, the proposed grounds of appeal for consideration by this Court are that:

- the Full Court of the Supreme Court of the Northern Territory erred in finding that “performance of a function” under the PA Act could be determined by references to the “core functions of the Police Force” in the PA Act.
- the Full Court erred in finding that it would be open to the jury to find that at the time the respondent fired the second and third shots, he was acting with the dual purpose of arresting the deceased who was violently resisting and trying to defend a police colleague when determining whether the act done (namely, the use of lethal force) was done by the respondent in “the performance of a function” under the PA Act.

NSW COMMISSIONER OF POLICE v COTTLE & ANOR (S56/2021)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2020] NSWCA 159

Date of judgment: 5 June 2020

Special leave granted: 12 April 2021

On 1 December 2016 Mr Trevor Cottle, who was then a member of the NSW Police Force, was notified of the Police Commissioner's decision under section 72A of the *Police Act 1990* (NSW) ("the Police Act") to cause him to be retired on medical grounds. Mr Cottle commenced proceedings in the Industrial Relations Commission of New South Wales ("the IRC") pursuant to s 84 of the *Industrial Relations Act 1996* (NSW) ("the IR Act") claiming that the decision amounted to unfair dismissal. On application by the Police Commissioner, Murphy C held that the IRC lacked jurisdiction to determine Mr Cottle's application and dismissed the proceeding. Mr Cottle successfully appealed to the Full Bench of the IRC, which held that the IRC did have jurisdiction and set aside the primary decision.

The Police Commissioner commenced proceedings in the Supreme Court of New South Wales seeking judicial review of the decision of the Full Bench. Acting Justice Simpson concluded that the reasoning in a previous decision of this Court with respect to the dismissal of a probationary constable pursuant to s 80(3) of the Police Act, *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1 ("*Eaton*"), bound her Honour to conclude that Part 6 of Ch 2 of the IR Act (in which s 84(1) is located) did not apply to police officers in respect of whom a decision under s 72A of the Police Act had been made. Her Honour declared that the IRC lacked jurisdiction to hear and determine Mr Cottle's application, quashed the orders of the Full Bench and ordered that the IRC dismiss Mr Cottle's application.

The Court of Appeal unanimously allowed an appeal by Mr Cottle. President Bell (with whom Justices Basten and Payne agreed) held that Acting Justice Simpson erred in holding that *Eaton* bound her Honour to conclude that the IRC did not have jurisdiction. His Honour considered that the terms and context of s 80(3) of the Police Act were different to those concerned with medical discharge in s 72A of the Police Act. There was no reason to read down the broad and unqualified language in s 218 of the Police Act that nothing in it affected the operation of the IR Act in circumstances where s 80(3) of the Police Act, which his Honour considered caused s 218 of the Police Act to be read down in *Eaton*, had no application.

The sole grounds of appeal is:

- The Court of Appeal erred in finding that the IRC had jurisdiction to hear and determine the Mr Cottle's unfair dismissal claim made under Part 6 of Chapter 2 of the IR Act.

WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR v VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) & ORS (S60/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 168

Date of judgment: 7 October 2020

Special leave granted: 12 April 2021

This appeal concerns the proper construction of the obligation to “give possession of the aircraft object to the creditor” contained in Art XI(2) of the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (“the Protocol”) incorporated into the laws of the Commonwealth by the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth).

The Appellants are the legal and beneficial owners of four aircraft jet engines, along with associated parts and records, leased to the First Respondent and sub-leased to the Second and Fourth Respondents. On 20 April 2020, the Third Respondents were appointed administrators of the other Respondents. The appointment was an insolvency event under Art XI(2) of the Protocol and the leases, triggering certain rights of possession over the engines to the creditors. In June 2020 the Second Appellant sought the return of its engines to the delivery location under the leases, being in Florida, United States of America, and insisting that the Third Respondents comply with their obligations to “give possession” of the engines to the Appellants under Art XI of the Protocol. The Third Respondents purported to notify the Appellants that they disclaimed the engines and stated that they were unable to physically deliver them, being attached to four different aircraft located in Australia and owned by third parties. On 26 July 2020 the Appellants commenced proceedings in the Federal Court of Australia.

Justice Middleton held that the words “give possession” in Art XI(2) meant to give possession physically and ordered that the Respondents deliver the engines, associated parts and records, or cause them to be delivered, in a specified manner to the location in Florida at their expense. His Honour considered that the obligation to give possession in Art XI(2) must be exercised in a “commercially reasonable” manner (as that phrase is used in Arts XI(13) and IX(3) of the Protocol) and the manner of giving possession would be deemed by Art IX(3) to be commercially reasonable if exercised in conformity with a provision of the agreement between the parties, namely, the redelivery obligations under the leases, provided the provision is not manifestly unreasonable.

An appeal by the Respondents was unanimously allowed by the Full Court of the Federal Court of Australia (McKerracher, O’Callaghan and Colvin JJ) (“the Full Court”). Their Honours held that “give possession” in Art XI(2) requires a debtor or insolvency administrator to do no more than to afford the creditors an opportunity to take possession of the aircraft objects. It does not impose a requirement to effect redelivery according to the terms of any underlying contractual arrangements with the creditor.

The grounds of appeal are:

- The Full Court erred by construing Art XI(2) of the Protocol to mean that a debtor or insolvency administrator must do no more than that which is necessary to pass to the creditor the form of possession that the creditor could have taken in the exercise of a self-help right to take possession.
- The Full Court erred by construing “give possession” to require only a mere “opportunity to take possession”, and erred by failing to apply Art XI(13) which imposed a mandatory condition upon the exercise of each remedy under Art XI, and when read with Art IX(3) deemed the exercise of a remedy in a manner consistent with the parties’ agreement to be commercially reasonable.
- The Full Court erred by impermissibly nullifying the debtor’s contractual obligation to redeliver and failing to recognise the priority afforded to creditors with an “international interest” contrary to Art XI(9),(10),(12).

The Respondents have filed a notice of contention raising the following ground:

- The Full Court, to the extent it did not otherwise do so, erred in failing to accept the Respondents’ construction argument that Art XI(2) of the Protocol requires an insolvency administrator or debtor to make an aircraft object available to a creditor, in the sense of giving the creditor the opportunity to take possession of that object, no later than the earlier of the end of the waiting period, and the date on which the creditor would be entitled to possession of the aircraft object if Art XI(2) did not apply.

COMMISSIONER OF TAXATION v CARTER & ORS (S62/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 150

Date of judgment: 10 September 2020

Special leave granted: 16 April 2021

The Respondents are the beneficiaries of a trust established by deed in July 2005 (“the Trust”). On 27 October 2015 the Appellant (“the Commissioner”) issued assessments to the Respondents for the income year ending 30 June 2014 (“the 2014 year”) pursuant to s 97 of the *Income Tax Assessment Act 1936* (Cth) (“the ITA Act”) on the basis that the Respondents had become automatically entitled under the terms of the Trust deed to income from the Trust for the 2014 year. The Respondents lodged objections to the assessment, which were disallowed by the Commissioner. Following the disallowance, on 30 September 2016, the Respondents executed disclaimers seeking to disclaim the default distributions made to them for the 2014 year (“the 2016 Disclaimers”), after previous disclaimers executed in 2015 were considered by the Commissioner to be ineffective.

The Respondents applied to the Administrative Appeals Tribunal (“the Tribunal”) for review under Part IVC of the *Taxation Administration Act 1953* (Cth) of the Commissioner’s decision to disallow their objections. The Respondents contended, amongst other things, that they had effectively disclaimed their entitlement to the income of the Trust in the 2014 year by the 2016 Disclaimers.

The Tribunal affirmed the Commissioner’s decision. Deputy President O’Loughlin held that while the 2016 Disclaimers may have been wide enough to disclaim the distributions, there was an implicit acceptance by failing to disclaim them in their entirety at an earlier time and that they were too late, occurring nearly 30 months after the Respondents had knowledge of the distributions. The Respondents appealed to the Federal Court.

The Full Court of the Federal Court (Jagot, Davies and Thawley JJ) unanimously allowed the appeal, set aside the decision of the Tribunal and in lieu thereof allowed the objections of each of the assessments for the 2014 income year. Their Honours held that the 2016 Disclaimers were effective to disclaim the default distributions in the 2014 year and the Tribunal erred in concluding that the Respondents had implicitly accepted the distributions or were too late to disclaim them. The Full Court further held that the 2016 Disclaimers extinguished the Respondents’ entitlement to the trust income such that the Respondents must be treated as never having been entitled to the income for the purposes of s 97 of the ITA Act.

The sole grounds of appeal is:

- The Full Court erred in finding that the 2016 Disclaimers operated retrospectively so as to disapply s 97(1) of the ITA Act in respect of the 2014 year.

TAPP v AUSTRALIAN BUSHMEN'S CAMPDRAFT & RODEO ASSOCIATION LIMITED (S63/2021)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2020] NSWCA 263

Date of judgment: 23 October 2020

Special leave granted: 16 April 2021

On 8 January 2011 Ms Tapp, who was then aged 19, suffered significant spinal injuries when the horse she was riding in a campdrafting competition organised by the Respondent (“the Association”) slipped and fell. Ms Tapp commenced Supreme Court proceedings against the Association for damages for personal injury. Ms Tapp contended, amongst other things, that the Association had breached its duty of care to organise, manage and provide the campdrafting event with reasonable care and skill by failing to plough the surface of the arena where Ms Tapp fell prior to the commencement of the competition on the day of the accident, stop the competition when the ground became unsafe and/or warn competitors (including Ms Tapp) that the arena surface had become unsafe.

On 4 November 2019 Justice Lonergan entered judgment for the Association. Her Honour found that Ms Tapp had not established any breach of the duty of care owed to her by the Association. Her Honour also held that at the time of the accident Ms Tapp was engaged in a dangerous recreational activity and the risk of falling from a horse during the competition was an obvious risk. The Association was therefore not liable for the result of the materialisation of the risk pursuant to s 5L of the *Civil Liability Act 2002* (NSW) (“the Act”).

The Court of Appeal (Basten JA and Payne JA; McCallum JA dissenting) dismissed an appeal brought by Ms Tapp. Justice Payne (with whom Justice Basten agreed) found that Ms Tapp had not identified the way in which it was alleged that the surface of the arena had deteriorated and therefore had not established that it was a cause of her fall. His Honour also found that the lack of evidence as to the deterioration of the arena surface meant it was not possible to identify the risk of harm and whether it was obvious within the meaning of the Act.

Justice McCallum would have allowed the appeal. Her Honour accepted Ms Tapp’s formulation of the risk of harm being “the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena”. Her Honour held that Ms Tapp had established on the evidence at trial that prior to her accident the surface of the arena had become unsafe and the Association should have suspended the event before she competed in order to repair it. Justice McCallum also found that the risk would not have been obvious to a reasonable person in Ms Tapp’s position.

The grounds of appeal are:

- The Court of Appeal erred in failing to find that the respondent breached its duty of care to Ms Tapp.
- The Court of Appeal erred in finding that the Association was not liable in negligence to the appellant by reason of s 5L of the Act.

ORREAL v THE QUEEN (B25/2021)

Court appealed from: Court of Appeal of the Supreme Court of Queensland
[2020] QCA 95

Date of judgment: 8 May 2020

Special leave granted: 16 April 2021

The Appellant was tried before a jury on an indictment containing two counts of rape and three counts of indecent dealing with a child. All charges related to an alleged incident with a complainant whose evidence included that the Appellant had inserted his finger and then his penis into her vagina. There was evidence that, at some unspecified date more than four days prior to the incident, a boy had had contact with the complainant's genitals using his tongue only and that on another occasion the complainant had been seen on a bed with a man other than the Appellant. The Appellant's defence case included a challenge to the complainant's credibility.

A medical examination of the complainant conducted on the day following the alleged incident found genital redness and a traumatic break of the hymen. Resulting medical evidence included that the complainant's genital injuries were consistent with penetration by a penis and/or fingers in the days preceding that examination. Other medical evidence included that the Appellant had at some point in his life acquired the herpes simplex virus type 1 ("HSV-1"), that HSV-1 was a very common virus transmittable via the mouth and/or genitals, and that the complainant too had tested positive for HSV-1. The trial judge, Judge Fantin, instructed the jury that the evidence as to HSV-1 could be taken into account but that it could not enable the jury to know when the complainant or the Appellant had contracted the virus.

The jury found the Appellant guilty on all counts, whereupon he was sentenced to imprisonment for eight years with a non-parole period of four years. The Appellant appealed, on grounds which included that the admission of the HSV-1 evidence was unfairly prejudicial and had given rise to a miscarriage of justice.

The Court of Appeal (Mullins JA and Bond J; McMurdo JA dissenting) dismissed the Appellant's appeal against conviction. This was after the Court of Appeal had unanimously held that the HSV-1 evidence was irrelevant and inadmissible.

The majority concluded that no substantial miscarriage of justice had occurred, as the HSV-1 evidence could not have borne upon the jury's assessment of the reliability and credibility of the complainant, and the evidence which had properly been admitted did prove the Appellant's guilt beyond reasonable doubt.

McMurdo JA however held that it was not possible to conclude that no substantial miscarriage of justice had occurred, as proof of guilt depended upon the complainant's evidence and the appellate court could not be satisfied that the jury's acceptance of that evidence had not been affected by a misuse of the HSV-1 evidence.

The grounds of appeal are:

- The majority of the Court of Appeal erred, in circumstances where the Crown case turned on the credibility of the complainant's evidence, by proceeding to conduct its own assessment of the admissible evidence adduced at trial and by proceeding, on the basis of that assessment, to conclude that no substantial miscarriage of justice had occurred as a result of the reception of the inadmissible and prejudicial evidence.
- The majority of the Court of Appeal erred, in circumstances where the Crown case turned on the contested credibility of the complainant's evidence, by proceeding to conduct its own assessment of the admissible evidence adduced at trial and by proceeding, on the basis of that assessment, to conclude that no substantial miscarriage of justice had occurred as a result of the direction by the trial judge and urgings by the prosecutor to the jury that they could act upon inadmissible and prejudicial evidence.