

## SHORT PARTICULARS OF CASES

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**CHETCUTI v COMMONWEALTH OF AUSTRALIA (M122/2020)**

Court appealed from: High Court of Australia  
[2020] HCA 42

Date of judgment: 26 November 2020

The appellant was born in Malta on 8 August 1945. At that time, Malta was a British protectorate, the King of the United Kingdom was Malta's sovereign, and any person born within the King of the United Kingdom's 'dominion and allegiance' was deemed to be a natural born British subject. The appellant arrived in Australia on 31 July 1948 on a British passport. He has lived continuously in Australia, except between 22 November 1958 and 19 July 1959 when he travelled to Malta.

On 1 July 1949, the *British Nationality Act 1948* (UK) commenced. This act made the appellant a citizen of the United Kingdom and Colonies ('citizen of the UK') and he retained his status as a British subject. On 26 January 1949, the *Nationality and Citizenship Act 1948* (Cth) came into effect recognising citizens of the UK as British subjects. On 21 September 1964, the *Malta Independence Act 1964* (UK) commenced and the appellant became a Maltese citizen.

On 28 April 1993, the appellant was convicted of murder and sentenced to imprisonment for 24 years with a minimum term of 18 years. (On 6 April 2011, he was convicted of assault occasioning actual bodily harm and sentenced to two years' imprisonment to be served concurrently with his previous sentence). On 1 September 1994, the appellant was deemed to be granted an Absorbed Person visa. On 2 July 2019, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled his visa.

On 12 June 2020, the appellant filed a writ of summons in the High Court seeking, among other relief, a declaration that he is not an alien. On 29 October 2020, Nettle J ordered the Special Case filed by the parties be referred for his consideration. The appellant argued that, because he was a British subject when he arrived in Australia, he was not an 'alien', was instead a 'non-alien' and s 51(xix) of the *Constitution* therefore did not apply to him. He argued that, although the meaning of alien changed as Australia emerged as an independent sovereign power, he had arrived before the sovereign of Australia and Britain became divisible and had taken no active step to sever his allegiance to the Crown in right of Australia. As a result, he cannot now be regarded as an alien.

The respondent argued that, even if the appellant could not have been conceived of as an alien according to the ordinary understanding of the term at the time, the Parliament's power to treat him as an alien was not frozen in time and the legislative power with respect to aliens has evolved over time. In the alternative, the respondent argued that, at the time of the appellant's arrival, Australia had already emerged as an independent sovereign nation. As a result, the Parliament could treat him as an alien from the time of arrival. In the further alternative, the respondent argued that, from the time of Federation in 1901, it was open to the Parliament to treat British subjects born abroad as aliens.

Nettle J observed that the central characteristic of alienage is lack of permanent allegiance to Australia. Nettle J found that there can be no doubt that, generally speaking, it is within the legislative competence of the Parliament to treat a foreign citizen, who is not an Australian citizen, as an alien. The notion of allegiance to the

Imperial Crown which informed the earlier understanding of the term alien has ceased to apply. Therefore, the appellant, who became a citizen of the UK on 1 January 1949, subsequently became a citizen of Malta on 21 September 1964 and is not an Australian citizen, could be treated as an alien.

In addition, Nettle J accepted that, at the enactment of the *Statute of Westminster Adoption Act 1942* (Cth), Australia became sufficiently independent of the UK to be regarded as an independent sovereign and the relevant constitutional conception of the Crown became the Crown in right of Australia. It was thus open to Parliament to treat the appellant as an alien upon his entry to Australia. Nettle J declined to decide the respondent's further alternative contention in relation to Federation.

The grounds of appeal are that:

- The learned primary judge erred in finding that it is within the legislative competence of the Commonwealth Parliament to treat the appellant as an 'alien' as that term is used in section 51(xix) of the *Constitution*;
- The learned primary judge erred in finding that by reason of the enactment of the *Statute of Westminster Adoption Act 1942* (Cth), Australia became sufficiently independent of the United Kingdom to be regarded as an independent sovereign nation. Australia did not become an independent sovereign nation until the completion of an evolutionary process that occurred between the commencement of the *Nationality and Citizenship Act 1948* (Cth) on 26 January 1949 and the commencement of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK) on 3 March 1986. The appellant became a subject of the Queen of Australia during that evolutionary process.

The grounds of the respondent's notice of contention are that:

- The learned primary judge, in determining the point at which Australia became sufficiently independent of the United Kingdom that it was within the power of Parliament under s 51(xix) to treat British subjects as aliens, erroneously decided that this had not occurred by the time of:
  - the Balfour Declaration in 1926; or
  - alternatively, the enactment of the *Statute of Westminster 1931* (UK);
- The learned primary judge failed to decide that, upon and from the creation of the Australian body politic in 1901:
  - that body politic, while not independent of the British Empire, nevertheless had a membership distinct from that of the British Empire; and
  - it was within the power of Parliament under s 51(xix) to specify criteria for membership of that body politic, and in doing so treat British subjects as aliens (irrespective of the time when that power was actually exercised).

The Attorney-General of South Australia has intervened in the appeal.

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**WORKPAC PTY LTD v ROSSATO & ORS (B73/2020)**

Court appealed from: Full Court of the Federal Court of Australia  
[2020] FCAFC 84

Date of judgment: 20 May 2020

Special leave granted: 26 November 2020

The first respondent, Mr Rossato, was a qualified and experienced production employee in the open cut black coal mining industry. He was an employee of the appellant, WorkPac, (a labour hire company specialising in the provision of labour to black coal mining industry) between 2014 and 2018, during which period six consecutive contracts of employment were made between him and Workpac. Workpac regarded Mr Rossato as a casual employee throughout all six contracts and paid him accordingly.

After his employment ended, Mr Rossato wrote to WorkPac claiming that he was not a casual employee and instead claimed to be a permanent employee. Accordingly, he claimed outstanding entitlements to paid annual leave, carer's leave and compassionate leave, as well as public holiday pay entitlements under the *Fair Work Act 2009* (Cth) ("FW Act") and an enterprise agreement made under the FW Act known as the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012* ("Enterprise Agreement").

The appellant commenced proceedings in the Federal Court of Australia in which it sought various declarations with respect to its employment of Mr Rossato. Chief Justice Allsop directed that the jurisdiction of the Court be exercised by a Full Court and granted leave to the Minister for Jobs and Industrial Relations and the Construction, Forestry, Maritime Mining and Energy Union to intervene in the proceedings.

On 29 May 2020 the Full Court, comprised of Bromberg, White and Wheelahan JJ, held that in each of his employment contracts Mr Rossato was "other than [a] casual employee" within the meaning of the FW Act and not excluded from the entitlements to paid leave and public holiday pay entitlements. The Court also held that Mr Rossato was not a casual employee for the purposes of the Enterprise Agreement.

In November 2020 Workpac sought, and was granted, special leave to appeal to the High Court of Australia from the decision of the Full Federal Court of the Federal Court.

Broadly, the grounds of appeal are that the Full Court should have held that:

- Mr Rossato was a casual employee for the purposes of the FW Act; and
- Mr Rossato was a casual FTM for the purposes of the Enterprise Agreement.

In the alternative, the Full Court should have held that:

- The amount by which Mr Rossato's remuneration exceeded the amount to which he would have been entitled as a permanent employee, or the amount of his casual loading, be applied or appropriated in discharge of his entitlements under the FW Act and the Enterprise Agreement as a permanent employee.

**DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2019  
(M131/2020)**

Court appealed from: Court of Appeal of the Supreme Court of Victoria  
[2020] VSCA 181

Date of judgment: 2 July 2020

Special leave granted: 11 December 2020

On 13 August 2019, the acquitted person pleaded not guilty to intentionally (or recklessly) causing serious injury. The definition of ‘recklessly’ was an issue before the County Court Judge who directed the jury. The prosecution (‘DPP’) submitted that the jury should be directed consistently with *Aubrey v The Queen* (2017) 260 CLR 305, that is, ‘recklessly’ means ‘foresight of the possibility of the causation of serious injury’. The DPP further submitted that *R v Campbell* [1997] 2 VR 585 was incorrect in defining ‘recklessly’ as ‘foresight of the probability’ of causation of serious injury. The Judge directed the jury that ‘recklessly’ required ‘foresight of probability’.

The DPP referred the point of law to the Supreme Court of Victoria (Court of Appeal) for consideration and opinion pursuant to s 308 of the *Criminal Procedure Act 2009* (Vic). Maxwell P, Emerton and McLeish JJA delivered a joint judgment. Priest and Kaye JJA each delivered separate judgments. Each concluded that the correct interpretation of ‘recklessly’ was that stated in *Campbell*: foresight of the probability of causing serious injury.

The acquitted person has made submissions in the Court of Appeal, the special leave application and this appeal.

The ground of appeal is that:

- The Supreme Court of Victoria (Court of Appeal) erred in determining that the meaning of “recklessly” in s 17 of the *Crimes Act 1958* is that stated by the Court of Appeal in *R v Campbell*, being that the accused had foresight of the probability of the relevant consequence and proceeded nevertheless.

**FAIRFAX MEDIA PUBLICATIONS PTY LTD v VOLLER (S236/2020)**  
**NATIONWIDE NEWS PTY LIMITED v VOLLER (S237/2020)**  
**AUSTRALIAN NEWS CHANNEL PTY LTD v VOLLER (S238/2020)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2020] NSWCA 102

Date of judgment: 1 June 2020

Special leave granted: 8 December 2020

In 2017 the Respondent, Mr Dylan Voller, commenced defamation proceedings against each of the Appellants, claiming that certain comments posted by third parties on Facebook pages maintained by the Appellants were defamatory of him. The comments were made in response to news items and photos posted by the Appellants in relation to Mr Voller's incarceration in a juvenile justice detention centre.

Prior to the Appellants' filing of defences to Mr Voller's statements of claim, a separate question was formulated for determination. This was in view of the consideration that it would not be possible for Mr Voller's claims to succeed (after any findings in due course that defamatory imputations had been conveyed and if the Appellants also could not establish a successful defence) unless the impugned comments made by third parties had in fact been *published* by the Appellants. The separate question in each proceeding was as follows:

*Whether the plaintiff has established the publication element of the cause of action of defamation against the defendant in respect of each of the Facebook comments by third party users?*

That question was answered "Yes" by Justice Rothman on 24 June 2019.

Appeals by the Appellants were unanimously dismissed by the Court of Appeal (Basten and Meagher JJA and Simpson AJA). Their Honours found that the Appellants, although not actively involved in the making of each third-party comment posted on their Facebook page, had participated to the relevant degree in the communication of those comments. That was by the Appellants making their own posts on their Facebook pages publicly viewable and by inviting and facilitating the posting of publicly viewable comments by other users of Facebook. Such participation was sufficient for the Appellants to be found to have published the comments, as understood in the law of defamation.

In each appeal, the sole ground of appeal is:

- The Court of Appeal erred in concluding that, for the purposes of the tort of defamation, the Appellant was the publisher of third-party comments on its Facebook page.

**EDWARDS v THE QUEEN (S235/2020)**

Court appealed from: Court of Criminal Appeal of the Supreme Court of  
New South Wales  
[2020] NSWCCA 57

Date of judgment: 3 April 2020

Special leave granted: 8 December 2020

The Appellant was tried before a jury on an indictment containing six counts of aggravated sexual intercourse with a person aged above 10 and below 14 and one alternative count of indecent assault of a person aged below 16 contrary to ss 66C and 61M(2) of the *Crimes Act 1900* (NSW). On 22 May 2018, the jury found the Appellant guilty on all six counts of aggravated sexual intercourse.

Prior to the trial, the Crown disclosed to the defence the existence of a copy of the contents of the Appellant's mobile phone downloaded by police during their investigation ("the *Cellebrite Download*"). One business day prior to commencement of the trial, the Crown disclosed that it proposed to call a new witness. The Crown did not disclose that the witness' details had been obtained from the *Cellebrite Download* until after the parties had closed their cases and addressed the jury. The contents of the *Cellebrite Download* were not requested by the defence until after closing addresses and were provided by the Crown to the defence after the verdict was entered.

On an application for leave to appeal against conviction, the Appellant contended, amongst other things, that the Crown had breached its duty of prosecutorial disclosure in relation to the contents of the *Cellebrite Download*. The Court of Criminal Appeal (Leeming JA, Johnson and Harrison JJ agreeing) granted the Appellant leave to appeal and dismissed the appeal. The Court held that it was not part of the Crown's obligation to disclose how the new witness was identified in circumstances where the Crown had disclosed the existence of the *Cellebrite Download*. Nor was the Crown obligated to inform the defence, either in general terms or by specific reference to particular text messages, that the information extracted from the Appellant's mobile may be of utility to the defence.

The grounds of appeal are:

- The Crown failed to provide full and proper disclosure of the *Cellebrite Download* from which they obtained a critical witness; one business day prior to trial. 'Disclosure' by the Crown did not reach the standard applicable to s 142, s 62(1)(b)(c) or s 63(1)(2) of the *Criminal Procedure Act 1987* (NSW) or Rule 87 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) as they were intended;
- The Court below erred as, in light of findings made by it, there remains a reasonable doubt the offending occurred. The Court below failed to consider facts pertaining to the 'non-disclosure' and the miscarriage of justice, which was the result of the jury coming to an unsafe verdict given the evidence at trial.