

SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2022

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MITCHELL v THE KING (A14/2022);
RIGNEY v THE KING (A15/2022);
CARVER v THE KING (A16/2022);
TENHOOPEN v THE KING (A17/2022)

Court appealed from: Supreme Court of South Australia
Court of Appeal
[2021] SASCA 74

Date of judgment: 10 August 2021

Special leave granted: 17 June 2022 (A14/2022 - A16/2022)

Special leave referred: 18 August 2022 (A17/2022)

The appellants (Mitchell, Rigney and Carver) were granted special leave on 17 June. After that, Tenhoopen's application for special leave to appeal was filed and his application referred to a Full Court to be argued as on appeal together with the three appeals. Together, they are referred to as "the appellants".

The appellants were tried on an Information charging a single joint offence of murder. The prosecution case at trial was that each of the appellants (together with another accused (Howell) who stood trial separately) agreed with each other to steal a substantial amount of cannabis from a house at Para Vista ("the grow-house"), which was being used to grow cannabis for commercial purposes ("the joint criminal enterprise"). On 9 October 2018, they all travelled in two cars to the vicinity of the grow-house and broke into the house where the deceased was living and guarding the cannabis. They violently assaulted the deceased by at least one blow to his head, which caused his death. They loaded the cannabis into one of the cars in which they had arrived and also into the deceased's car. Those two cars were then driven to Ingle Farm where the cannabis in the deceased's car was transferred into Mitchell's car (a blue Subaru) and the deceased's car abandoned. There was a great deal of circumstantial evidence relied upon by the prosecution. Circumstantial evidence established that one or more of the five men who were seen to walk near the grow-house broke into it. There was no evidence capable of proving which of the five men struck the blow or blows to the deceased's head which caused his death.

At trial the prosecutor identified two ways the accused were guilty of murder, namely: common law murder under s 11 of the *Criminal Law Consolidation Act 1935* (SA) ("the CLC Act"), and causing death by an intentional act of violence under s 12A of the CLC Act. The prosecutor originally opened to the jury on the basis that the foundational offences for statutory murder were "Robbery" and "Aggravated Serious Criminal Trespass in a Place of Residence with the Intent to Commit Theft", contrary to s 170 of the CLC Act. However later in the trial, upon being asked to elect, the prosecutor elected for the latter offence which does not include an act of violence as an element. Counsel for the accused submitted that under s 12A of the CLC Act, the foundational offence must include as an element an act of violence. The trial Judge rejected that submission.

The trial Judge directed the jury there were two ways by which the accused could be found guilty of murder: common law murder (or intentional murder), and constructive (or statutory) murder (s 12A). The trial Judge directed the jury as to the elements of each. The trial Judge said it was common ground that none of

the five men had planned to murder the deceased, and it was not alleged there had been a joint enterprise to kill him. Therefore, no question of guilt as to murder according to the principles of joint criminal enterprise arose. Consequently, the trial Judge only directed the jury how the accused could be guilty of murder according to the principles of extended joint criminal enterprise ("EJCE"). He said that the accused would be guilty of common law murder if they had contemplated that in carrying out the joint criminal enterprise, one or more of them might inflict violence on someone they came across in the house with the intention of killing that person or causing them serious bodily harm. He said further they would be guilty of constructive murder if they had contemplated that, in carrying out the joint criminal enterprise to commit the foundational offence, one or more of them might inflict an intentional act of violence on someone they came across in the house. The appellants were all convicted of murder, but the jury did not specify whether common law murder or constructive murder.

The appellants appealed to the Court of Appeal. Two grounds of appeal filed by Rigney were adopted by the other appellants. Carver and Tenhoopen also filed further grounds of appeal. In the Court of Appeal, it was contended that liability for constructive murder on EJCE principles required proof that the accused contemplated that one of their number might commit an act of violence causing death in the course of committing the foundational offence. The Court of Appeal unanimously dismissed the appeals. Peek AJA (with whom Kelly P and Doyle JA agreed (in short separate reasons)) upheld the correctness of the trial judge's directions on constructive murder, and found that constructive murder on the basis of EJCE did not require foresight of the possibility that death might, or would, result from an act of violence.

The grounds of appeal in this Court are, in the main, similar for all appellants. One of the grounds of appeal concerns whether the principles of EJCE apply to s 12A murder at all. This issue was not the subject of a ground of appeal, or argument, before the Court of Appeal.

The grounds of appeal include:

- The court below erred in law in considering that the doctrine of extended criminal enterprise (the doctrine) applied to cases under s 12A of the *Criminal Law Consolidation Act 1935* (SA) (statutory murder) and in upholding the directions given by the trial judge on this basis of liability.
- The court below erred in law in holding that a defendant could be convicted of the offence of murder or statutory murder, according to the doctrine, without proof that the defendant foresaw or contemplated an intentional act of violence by another:
 - a) causing the death of a person; or
 - b) having the capacity to, or capable of, causing the death of a person; or
 - c) acting with murderous intention;

and with that awareness or knowledge continuing to participate in the joint criminal enterprise.

ENT19 v MINISTER FOR HOME AFFAIRS & ANOR (S102/2022)

Date application for a constitutional or other writ filed: 6 July 2022

Date further amended application referred to Full Court: 5 September 2022

The Plaintiff is a citizen of Iran who was detained in December 2013, when he arrived in Australia without a valid visa. The Plaintiff later applied for a protection visa. Subsequently, he pleaded guilty to an offence of people smuggling under s 233C of the *Migration Act 1958* (Cth) (“the Act”), whereupon he was sentenced to 8 years’ imprisonment (backdated to December 2013). The sentencing judge found that the Plaintiff had acted out of desperation for his circumstances, particularly a desire to join family members who had already come to Australia, and that the weight given to the factor of general deterrence should be reduced to a small extent.

Upon his release on parole in December 2017, the Plaintiff was immediately returned to immigration detention. In July 2018, the Immigration Assessment Authority found that the Plaintiff had a well-founded fear of persecution in Iran as a Christian, and that Australia’s protection obligations under the United Nations Refugees Convention were engaged in respect of him. The Plaintiff’s application for a protection visa nevertheless was then refused by the First Respondent (“the Minister”) personally on two occasions: firstly under s 501(1) of the Act and, after that decision had been set aside by the Federal Court, under s 65 of the Act. The second decision, too, was set aside by the Federal Court.

On 27 June 2022, the Plaintiff’s application for a protection visa was again refused by the Minister under s 65 of the Act (“the Decision”), on the basis that the Minister was not satisfied that the grant of the visa was in the national interest (the criterion in cl 790.227 of the *Migration Regulations 1994* (Cth) (“the Regulations”). In so deciding, the Minister observed that pursuant to s 197C(3), the Plaintiff would not be returned to Iran, and acknowledged that the Plaintiff would face prolonged or indefinite detention in Australia as a result of the refusal to grant him a visa. The Minister found however that that consideration was outweighed by the national interest considerations arising from the prospect of granting a protection visa to a person convicted of people smuggling and the importance of safeguarding Australia’s territorial and border integrity. The Minister stated that the grant of a visa to a person convicted of people smuggling might erode the community’s confidence in the protection visa program.

The Plaintiff then commenced proceedings in this Court, contending that the Decision was made for the purpose of general deterrence of people smuggling and that it infringed the separation of powers required under the *Constitution*, because the Executive had acted for a punitive purpose and had exercised an administrative power in a judicial manner. The Plaintiff also submits that the Act did not authorise the Decision in circumstances where the criminal consequences of the conduct sought to be deterred were prescribed in the Act, and he had served the punishment that had been imposed judicially, where he posed no risk to the Australian community and where he satisfied all other criteria for a protection visa. The Plaintiff further submits that the Minister breached a procedural fairness obligation under s 57 of the Act by failing to give the Plaintiff particulars of news publications about his sentencing to which the Minister had had regard, and that the Minister had failed to take into account relevant considerations including the Plaintiff’s reason for having engaged in people smuggling.

The Minister and the Second Defendant (the Commonwealth of Australia) submit that the Plaintiff's constitutional challenge based on punitive purpose targets only the Decision itself and does not raise the validity of s 65 of the Act or cl 790.227 of the Regulations. The Defendants submit that the refusal of a visa that the Plaintiff did not hold could not be punitive, even if done for the purpose of general deterrence, which the Decision was not. The Defendants contend that the Minister's stated considerations of territorial and border integrity and community confidence in the protection visa program were non-punitive and that they related to the protection of the Australian community; they were not directed at the Plaintiff as an individual. The Defendants submit that the news publications about the Plaintiff were not a part of the reason for the Minister's refusal to grant the visa; rather, they were referred to only contextually in support of a conclusion that the grant of a visa to the Plaintiff would become known more generally. The Defendants contend that the Minister did not err by failing to consider any relevant information, as a consideration of the national interest permits a wide discretion and the Minister is entitled to ignore matters which otherwise could be taken into account. The Defendants submit that even if the Decision were set aside, the Plaintiff must remain in detention pursuant to ss 189 and 196 of the Act, rather than be released as sought by him.

On 5 September 2022, Justice Keane referred the Plaintiff's further amended application for consideration by the Full Court.

A notice of a constitutional matter was filed by the Plaintiff. No Attorney-General is intervening in the proceeding.

LAUNDY HOTELS (QUARRY) PTY LIMITED v DYCO HOTELS PTY LIMITED ATF THE PARRAS FAMILY TRUST & ORS (S125/2022)

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2021] NSWCA 332

Date of judgment: 21 December 2021

Special leave granted: 19 August 2022

By a contract dated 31 January 2020, the Appellant (“Laundy”) agreed to sell a pub business and premises in Sydney to the First and Second Respondents (together, “Dyco”) for \$11,250,000. The parties agreed to complete the sale and purchase on 31 March 2020. The terms of the contract included a requirement, in cl 50.1, that until completion Laundy carry on the business “*in the usual and ordinary course as regards its nature, scope and manner ...*”.

From 23 March 2020 however, the pub’s operations were curtailed in compliance with the New South Wales *Public Health (COVID-19 Places of Social Gathering) Order 2020* (“the Public Health Order”), which restricted pubs to selling only takeaway drinks and food. Dyco then asserted that Laundy was in breach of cl 50.1 (and other terms) and that the contract was frustrated. Laundy served a notice to complete, while Dyco (and its guarantors, the Third and Fourth Respondents) commenced Supreme Court proceedings.

Dyco alleged that the value of the pub’s assets had decreased by at least \$1,000,000. It sought a declaration that the contract was frustrated due to the pub’s inability to operate as a going concern, or Laundy’s inability to carry on the business in compliance with cl 50.1 of the contract. Dyco’s position in respect of the notice to complete was that Laundy was not entitled to serve it, as Laundy was in breach. Laundy proceeded to issue a notice of termination. Dyco contended (in the alternative to frustration) that that step was a repudiation of the contract, which Dyco accepted. Laundy cross-claimed for damages against Dyco and its guarantors.

On 17 May 2021, Darke J dismissed Dyco’s claim and awarded Laundy damages of \$900,000 plus interest. His Honour held that Laundy did not breach cl 50.1, as that provision could not require Laundy to conduct the business in a manner which would be unlawful. Darke J found that the contract was not frustrated and that Laundy was entitled to issue the notice to complete and to terminate the contract.

An appeal by Dyco and its guarantors was allowed by the Court of Appeal (Bathurst CJ and Brereton JA; Basten JA dissenting), which set aside the orders made by Darke J and ordered Laundy to return the deposit that had been paid by Dyco. The majority of the Court of Appeal found that cl 50.1 was an essential term of the contract that was not to be construed so as to be confined to conduct which was lawful. Laundy’s obligation to comply with it however was suspended while the Public Health Order was in effect, so as to avoid illegality. Laundy was obliged under the contract nevertheless to convey the pub as a going concern, which it could not do (Brereton JA expressly found that Laundy was in default by non-compliance with cl 50.1). The majority found that Laundy therefore was not entitled to serve the notice to complete and it was Laundy that had repudiated the contract by purporting to terminate it, a repudiation that was accepted by Dyco.

Basten JA however would have dismissed the appeal, finding that Dyco was in breach of its obligation to complete the contract. His Honour found that there was no non-compliance with cl 50.1, as the provision must be taken to encompass such alterations as might occur through changes in the legal regime under which the business operated. Basten JA further found that in any event compliance with cl 50.1 was not a condition precedent to completion of the contract.

The grounds of appeal are:

- The Court of Appeal erred by concluding (by a majority of Bathurst CJ and Brereton JA) that where a COVID-19 Public Health Order restricted the operation of a hotel business, the subject of a contract for sale, the parties' obligations to achieve completion of the contract was suspended during such period of supervening illegality.
- In the absence of a finding that the contract had been discharged by frustration, the Court of Appeal ought to have found, on its proper construction and in the circumstances, that the purchasers were obliged to complete the contract upon the contractual dates.

The Respondents seek leave to file (out of time) a notice of contention in which they raise the following grounds:

- Clause 50.1 of the contract was an intermediate term, the breach or default of which would give rise to an entitlement of the purchasers to terminate the contract because the breach or default was sufficiently serious.
- The vendor's inability to comply with cl 50.1 had the result that it was not ready, willing and able to complete the contract.
- The effect of the supervening illegality was that no relief could be sought or granted in respect of any breach of cl 50.1 during the period of the supervening illegality.

QYFM v MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR (M53/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 166

Date of judgment: 15 September 2021

Special leave granted: 12 August 2022

In late 2011, the appellant (“QYFM”) was granted a Class BC Subclass 100 (Partner) visa. In 2013, he was convicted of importing a marketable quantity of cocaine and given a ten-year prison sentence with a non-parole period of seven years. His appeal against the conviction was dismissed and his original sentence affirmed by the Victorian Court of Appeal in 2014.

On 8 November 2017, his visa was cancelled by the Minister’s delegate acting under s 501(3A) of the *Migration Act* on the basis that he failed the character test and had been sentenced to a term of imprisonment exceeding 12 months. The Administrative Appeals Tribunal (AAT) affirmed the delegate’s decision. QYFM’s application for judicial review in the Federal Court was dismissed. QYFM was self-represented when the notice of appeal to the Full Court of the Federal Court was filed. He later had legal representation and so applied for leave to rely on an amended notice of appeal containing two new grounds. The Minister opposed such leave. The Full Court (McKerracher, Griffiths & Bromwich JJ) granted leave in respect of ground 1 but not ground 2. However, the Court ultimately dismissed the appeal on ground 1.

On the morning of the hearing of the Full Court appeal, Bromwich J notified the parties that prior to being appointed to the Federal Court (in 2016), he had appeared, in his capacity as the then Commonwealth Director of Public Prosecutions, at the hearing of QYFM’s appeal before the Victorian Court of Appeal. At the hearing before the Full Court, QYFM applied to have Bromwich J recuse himself on the grounds of apprehended bias. The Minister opposed this application. McKerracher J invited Bromwich J alone to deal with the recusal application. Bromwich J refused QYFM’s application and gave *ex tempore* reasons (later included in written form as part of the Full Court’s reasons). The appeal hearing then proceeded as described above.

The grounds of appeal are:

- The Full Court erred by proceeding to hear the Appellant’s appeal, after Bromwich J alone, rather than the Full Court, determined a question of apprehended bias raised by the Appellant.
- The Full Court erred in proceeding to hear the appeal below with Bromwich J as a member, where a fair-minded lay observer might reasonably have apprehended that his Honour might not bring an impartial mind to the resolution of the question the Full Court was required to decide.

SELF CARE IP HOLDINGS PTY LTD & ANOR v ALLERGAN AUSTRALIA PTY LTD & ANOR (S79/2022 & S80/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2021] FCAFC 163;
[2021] FCAFC 180

Dates of judgments: 7 September 2021;
13 October 2021

Special leave granted: 13 May 2022

Allergan Inc is the manufacturer of an injectable anti-wrinkle product, Botox, and is the owner of Trade Mark No 1578426 (“the TM”), which is for the wordmark BOTOX. The TM covers various classes including class 3, which includes anti-wrinkle creams (which Allergan Inc does not produce). Botox is administered by health care workers and is available only on prescription. It reduces the appearance of wrinkles for approximately four months after application.

In 2017, Allergan Inc and its subsidiary Allergan Australia Pty Ltd (together, “Allergan”) commenced Federal Court proceedings against the appellants (together, “Self Care”), over the branding and marketing of skin creams in Self Care’s Freezeframe range of products. Those products included Protox and Inhibox. The phrase “instant Botox® alternative” appeared on the packaging of, and in marketing material for, Inhibox, a product which had the effect of significantly reducing the appearance of wrinkles for some hours after application, and when applied daily over a 28-day period. Allergan claimed infringement of the TM under s 120(1) of the *Trade Marks Act 1995* (Cth) (“the Act”), and also contended that Self Care had made misleading or false representations in contravention of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth), “ACL”).

On 7 December 2020, Stewart J dismissed Allergan’s claim. His Honour found that the term PROTOX was intended to leverage off the fame of Botox and that it was used as a trade mark, but held that it did not so nearly resemble BOTOX that it would likely deceive or cause confusion. Stewart J held that the phrase “instant Botox® alternative” was not used as a trade mark, and therefore could not infringe the TM under the Act. His Honour also held that the phrase did not contravene the ACL by misleading consumers or by misrepresenting Inhibox’s performance or quality, as it said nothing about how long the product’s wrinkle-reducing effect would last.

An appeal by Allergan was unanimously allowed by the Full Court of the Federal Court (Jagot, Lee and Thawley JJ). Their Honours held that Stewart J had erred in considering deceptive similarity under s 120(1) of the Act by failing to address potential confusion in the minds of consumers as to the *source* of the Protox and Botox products. The Full Court held that s 120(1) was contravened because there was a real risk that consumers might wonder whether Protox was offered as an alternative product by those behind Botox, as the words’ similarity implied an association.

The Full Court held that the phrase “instant Botox® alternative” was used as a trade mark because, in view of its prominence on packaging and in website advertising, it was used to identify the Inhibox product and to distinguish it from the products of

other traders. Their Honours considered that although the word “alternative” implied that the two products were different, it did not necessarily imply that they were not associated or that they came from different sources. Their Honours therefore held that s 120(1) was infringed because “instant Botox® alternative” so nearly resembled BOTOX that it would likely deceive or cause confusion. The Full Court held that Self Care could not avoid infringement by reliance on s 122(1)(b)(i) of the Act, as the impugned phrase was not used in good faith to indicate Inhibox’s characteristics or intended purpose, nor by reliance on s 122(1)(d), as there was no distinguishing of Self Care’s product from Allergan’s in the manner of comparative advertising.

The Full Court found that “instant Botox® alternative” also constituted a representation as to the efficacy of Inhibox, as some reasonable consumers would consider that after ceasing the use of Inhibox they would obtain a long-lasting effect similar to that which was had from Botox. Since no scientific material supported such a representation, their Honours found that it was not reasonably made and that it was misleading or deceptive. The Full Court therefore held that Self Care had by its misrepresentation engaged in conduct that contravened s 18 of the ACL, and that it had also misrepresented the quality and performance characteristics of Inhibox in contravention of s 29 of the ACL.

In both appeals, Self Care’s grounds of appeal include:

- The Full Court erred in holding that Self Care infringed the TM by using “instant Botox® alternative” or “Protox”.
- The Full Court erred in holding that Self Care had used the phrase “instant Botox® alternative” as a trade mark within the meaning of s 120(1) of the Act.
- The Full Court erred in holding that the phrase “instant Botox® alternative” as used by Self Care constituted misleading or deceptive conduct for the purposes of ss 18 and 29 of the ACL.

By a notice of contention in each appeal, Allergan raises the following grounds:

- Having found that, in adopting the trade mark PROTOX, the intention was to leverage off the fame or reputation of BOTOX, the Full Court should also have held that the mark was fitted for that purpose and therefore likely to deceive or cause confusion, applying *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 at 657.
- Having found that, in adopting the trade mark “instant Botox® alternative”, the intention was to leverage off the fame or reputation of BOTOX, the Full Court should also have held that the mark was fitted for that purpose and therefore likely to deceive or cause confusion, applying *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641 at 657.