

# Nupreme Court Notes

This month's reporter is Mark Hunter.

Criminal Law - Criminal Law (Conditional Release of Offenders) Act DPP -v- McCormack, Erlinson & Satour SC Nos. 30 and 33 of 1995

Judgment of Thomas J delivered 17 April 1996 (unreported).

Application to the Supreme Court for remedy on the nature of Certiorari to quash sentences imposed in the Alice Springs Court of Summary Jurisdiction.

E and S had pleaded guilty to various offences in separate proceedings before a magistrate. Each was convicted and released conditionally upon entering a recognisance good behaviour bond with condition that he perform a specified amount of "unpaid community service". In each case an order was made in respect of restitution.

In neither case did the Magistrate have a report from the Department of Correctional Services at the time of sentencing. In neither case did the Magistrate specify the section of the *Criminal Law (Conditional Release* of Offenders) Act ("the Act") under which he was proceeding.

In sentencing E, the Magistrate remarked:

"...I think strictly speaking I should have you assessed for community paid service, but this is not a CSO, its a condition of bond so it's a little bit different."

The question for determination by Thomas J was whether a magistrate has the power to make an order for unpaid community service work pursuant to section 5 of the Act (Part III) without complying with the provisions of Part V of the Act which deals specifically with Community Service Orders.

On the hearing of the application, it was agreed between the parties that the Magistrate complied with none of the provisions of Part V of the Act and did not purport to deal with E or S in accordance with that Part.

Held that the Magistrate was entitled under section 5(1) of the Act to impose a recognisance good behaviour bond with a condition that the offender perform unpaid work.

Acknowledged the practical difficulties associated with utilising Section 5 in this way but stated that the legislature may well have intended to give judges and magistrates a wide scope of powers.

Rejected the plaintiff's alternate submission that the sentence was a nullity and should be corrected in view of the fact that it could not be carried out in the absence of directions from the Magistrate as to how the unpaid work was to be performed.

Thomas J noted that the Court of Summary Jurisdiction has power to vary the terms of a recognisance pursuant to section 7 of the Act and further stated:

"...Organisations across a whole range of activities are continually

seeking the services of volunteer workers. Each of the second defendants could carry out volunteer work of su :h a nature and, if required, be able to obtain proof that such unpaid community service had been done."

Her Honour observed that unpaid community service with some organisations would not require the supervision of the Department of Correctional Services.

The application of the plaintiff was refused.

#### COMMENTARY

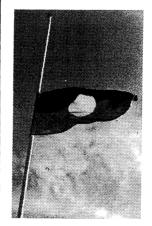
The Criminal Law (Conditional Release of Offenders) Act was abolished on 1 July 1996.

The old sections 5 and 7 are reproduced in similar terms as sections 13 and 14 of the *Sentencing Act* 1995. Division 4 of Part 3 of the *Sentencing Act* 1995 reproduces Part IV of the old Act in similar terms.

The judgment of Justice Thomas should, in these circumstances, continue to carry weight.

(more Supreme Court Notes on page 13)

## ABORIGINAL DEATHS IN CUSTODY



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Criminal Law - Appeals - Section 63 Justices Act

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Zanco -v- McGeorge. SC No JA48 of 1995

Judgment of Martin CJ, delivered 12 July 1996 (unreported)

The appellant had been dealt with by a magistrate in respect of a charge of behaving in a disorderly manner in a public place. The Magistrate did not make a formal finding of guilt but "cautioned and discharged" the appellant without proceeding to conviction. The appellant sought to have the Magistrate's finding that the offence was proved set aside by the Supreme Court.

Martin CJ found that the Magistrate had purported to dismiss the complaint pursuant to section 74 (2)(a) of the *Justices Act* in view of the fact that his only options pursuant to section 69 of the *Justices Act* were to convict, dismiss the complaint or make an order against the defendant.

Held that section 163 of the *Justices Act* prohibits an appeal to the Supreme Court from a dismissal order. This was despite the fact that there had been a finding of guilt. Martin CJ described the appeal as "incompetent".

Held the prohibition on a right of appeal applies equally between complainants and defendants.

His Honour suggested that the appellant "may perhaps take some comfort" from the comments of the New South Wales Supreme Court in *Collector of Customs -v- Tallerman Co Pty Ltd* (25FLR 213) where the Court considered an appeal against a dismissal pursuant to section 19B of the *Crimes Act*, 1914 (Cth):

"The dismissal is no mere technicality – it is a substantive dismissal. It contains no element of conviction and hence no element of sentence."

Martin CJ observed that it would be preferable if magistrates used the language of the statute when dealing with cases pursuant to section 75(2) of the *Justices Act*.

#### COMMENTARY

Section 75(2) was abolished on 1 July 1996 when the Sentencing Act and the Sentencing (Consequential Amendments) Act came into operation. Section 7 of the Sentencing Act outlines various sentencing options upon a finding of guilt, including the imposition of a fine or community service order without conviction.

A further option is to order the dismissal of the complaint without conviction (this reproduces the old section 75 (2)). Section 8(3)(b)(i) allows for <u>sentence</u> appeals from non-conviction orders. An appeal against a finding of guilt is not especially provided for in the *Sentencing Act*.

Section 163 of the *Justices Act* allows for an appeal from a "conviction, order or adjudication" but not from an order dismissing a complaint of an offence. It appears that Martin CJ was of the view that a finding of guilt does not constitute an "adjudication".

The Sentencing (Consequential Amendments) Act amends provisions in more than forty statutes. Where previously various regulatory bodies were only entitled to act upon a conviction, they now can make the same decisions on the basis of a finding of guilt by a court. Persons who may be affected include auctioneers, architects, dentists, real estate agents and lawyers.

In the absence of a right of appeal against a finding of guilt (at least where the complaint is subsequently "dismissed') query:-

1. Whether circumstances may arise where serving a client's interests will require a lawyer to urge the judicial officer to record a conviction (e.g. in submissions on sentence following a finding of guilt in a defended case).

2. Whether section 8(3)(b)(i) is intended to limit appeals from non conviction <u>orders</u> to severity appeals. Can this provision be reconciled with section 163 of the *Justices Act*?

Criminal law - Costs - Section 77 Justices Act

(from page 12)

### *Harlan -v- Hayward.* SC No. JA37 of 1995

Ruling of Kearney J delivered 7 May 1996 (unreported)

On 30 January 1996 Kearney J had quashed a conviction imposed in the Court of Summary Jurisdiction at Darwin and set aside the penalty imposed.

The appellant was awarded the costs of his successful appeal. His Honour reserved the question of the award of costs in the lower court in order to receive and consider written submissions from both parties.

Held that the Supreme Court is not limited to awarding costs in respect of appellate proceedings.

His Honour referred to Section 77(2) of the *Justices Act* which sets out when an order for costs must not be made (e.g. where the defendant unnecessarily prolongs proceedings) and ruled that none of the grounds were manifest in this case.

Kearney J rejected the respondent's submission that in the absence of an appeal lodged against the Magistrate's refusal to award costs, the Supreme Court has no power to award costs in respect of the lower court proceedings. His Honour considered section 163 of the *Justices Act* which allows a right of appeal from a "conviction, order or adjudication".

Held that an order in relation to costs is a matter consequential to the result and the proper course is for an appeal to be lodged against the conviction and then, if successful, an application made for costs in the lower court proceeding.

The appellant was awarded costs in respect of the Court of Summary Jurisdiction.

#### Appellant

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Counsel:	Norman
Solicitors:	Norman & Associates
Respondent	
Counsel:	Noble
Solicitors:	DPP