Court Notes

Supreme Court of the NT
By Mark Hunter, SFNT

D -v- Gokel & Ors
Supreme Court No JA19 of 1998 - delivered 26 May 1998

Criminal Law - Mandatory Sentencing - Section 53AE (2) *Juvenile Justice Act*

Justice Angel considered an appeal against the severity of a 28 day detention order imposed on a juvenile by Gillies SM for the unlawful use of a motor vehicle, contrary to s218(1) of the Criminal Code.

On 20 January 1998 the appellant appeared for the first time before the magistrate and pleaded guilty to two charges under s218 committed on 14 January 1998. A finding of guilt was recorded by the magistrate and the charges were adjourned until March to allow the preparation of a pre-sentence report.

When the case came back before the magistrate in March a fresh charge was laid by the prosecution in relation to a third offence under s218(1) committed in December 1997. The appellant pleaded guilty to this charge as well. It was the sentence for this offence which became the subject of the appeal, the magistrate having considered himself bound by s53AE(2) of the *Juvenile Justice Act* to impose a 28 day detention order.

Section 53AE(2) makes mandatory a detention order of not less than 28 days where a juvenile has "... once or more been found guilty of a property offence."

HELD:

1. The appeal is dismissed
2. The language of s53AE(2) is clear and without ambiguity.

His Honour considered the decision of Martin CJ in *Schluter* (1997) 6 NTLR 194 which concerned the construction of s78A(2) of the *Sentencing Act* which is in almost identical terms to s53AE(2). Section 78A(2) provides for a minimum term of 90 days imprisonment where an adult has "... once before found guilty of a property offence." The Chief Justice in that decision determined that the section did not operate in the absence of a previous conviction and passing of sentence because the intention of the legislature must have been that the prospect of mandatory imprisonment act as a deterrent against the commission of further offences. Justice Angel specifically disagreed with the reasoning of Martin CJ.

In his judgment Justice Angel observed with regret that his construction of the section may leave juveniles at the mercy of the manner of prosection.

APPEARANCES

Appellant

Counsel:	Howse
Solicitors	NAALAS

Respondent

Counsel	Rowbottom
Solicitors	DPP

COMMENTARY

A ruling by the Court of Criminal Appeal on the correct construction of s53AE(2) and s78A(2) should be sought.

Federal Court

By Thomas Hurley, Barrister, Vic, NSW, ACT (Editor, Victorian Administrative Reports)

Trade Marks

Trade marks - whether trade marks inherently adapted to distinguish goods - "OREGON".

In ***Blount Inc. v Registrar of Trade Marks*** ([1998] FCA 440; 1 April 1998) the delegate of the Registrar of Trade Marks concluded that registrability of the applicant's trade mark "OREGON" depended upon whether the mark was able to distinguish the designated woodworking goods from those of other traders. The delegate concluded it did not and rejected the application for registration. On appeal under s35 *Trade Marks Act* 1995 (Cth) Branson J considered the nature of the appeal. She observed that the 1995 Act intended to effect a change in trade mark law concerning distinctiveness which would be protected as a trade mark but not at the expense of bona fide use of the same word constituting the trade mark in its descriptive sense. Branson J concluded that the applicant had established that the use of the word OREGON did distinguish its goods and the application for registration should not have been rejected.

Costs - public interest litigation.

In ***Friends of Hinchinbrook Society Inc. v Minister for the Environment (Cth)*** ([1998] FCA 432; 30 April 1998) a Full Court concluded that the High Court in *Oshlack v Richmond River City Cou cil* did not lay down a rule governin costs orders in public interest litigatio but affirmed the width of the discretio conferred upon a court. The Full Cou ordered that the appellant, who had pe sisted in unsupportable claims, pay th costs of the respondent.

Federal Court - class action - securit for costs.

In ***Ryan v Great Lakes Counc*** ([1998] FCA 407; 24 April 1998) Wilcox dismissed an application by the respon ent who, as former employer, resiste claims in a representative action brougl against it by its former employees und Part IVA of *Federal Court of Australi Act*. He accepted the approach of Merk J in *Woodhouse v McPhee* (of 24 Decen ber 1997) to the effect that an order f security for costs should not be made it would stultify proceedings unless th security be obtained from the represente party. Wilcox J agreed that the "financi pool" approach, whereby those behir a nominal plaintiff are invited to contri ute to a fund for security for costs, w contra indicated by s43(1A) of the *Fe eral Court of Australia Act* which pr vented the making of a costs order again a represented party.

Social security - pensions - failure pensioner to obtain comparable foreig pension.

In ***Gidaro v Secretary, DSS*** ([199 FCA 400; 24 April 1998) Burchett J co sidered the provisions of the *Social S curity Act* which enable the Secretary suspend an aged pension under s78A where a pensioner has failed, after noti under s69A, to take reasonable action obtain a comparable foreign payment

Bankruptcy - costs awarded to gover ment department - who is judgment cre tor.

In ***Maley v NSW Department of Hou ing*** ([1998] FCA 374; 17 April 1998) Davi J concluded that the "Department Housing" of NSW was not a "person body entitled" to receive an award costs in an application for a breach of t *Residential Tenancies Act* 1992 (NS as distinct from the Tenancy Comm sioner. He concluded a bankruptcy n tice founded on such an order be aside.

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Immigration - refugee status - deserters.

In ***Israelian v Minister for Immigration*** ([1998] FCA 447; 1 May 1998) R.D. Nicholson J concluded the RRT, considering an application for refugee status by an Armenian citizen who objected to military service in the Nagorno-Karabakh war, had been made where the RRT had failed to form a view about critical issues as to why the applicant claimed to be a member of the particular social group. He concluded the RRT failed to properly consider all the evidence of relevant government policy towards deserters and draft evaders.

Social security - appeal from AAT - "activity test".

In ***Spencer v Secretary, DSS*** ([1998] FCA 445; 1 May 1998) a Full Court concluded that the determination by the AAT that an applicant for the job search allowance failed to satisfy the statutory "activity test" because the applicant was not "actively seeking work" involved a question of fact. The Full Court concluded the question did not involve the further gloss of considering whether the applicant had "real prospects of obtaining" the work being sought.

Practice - subpoena - subpoena during trial.

In ***Diddams v Commonwealth Bank of Australia*** ([1998] FCA 9497; 12 May 1998) Branson J set aside under FCR Ord 27 r9 a subpoena which was issued and called on during trial where the process of particular discovery under Order 15 r8 had not been utilised.

Admiralty - damage to cargo - bill of lading - whether goods required to be refrigerated.

In ***Pacific Composites P/L v Transpac Container System*** ([1998] FCA 496; 11 May 1998) Tamberlin J briefly considered construction of bills of lading in finding that it was a requirement of the subject bill of lading that the goods be refrigerated during transit from Korea to Australia. He concluded that the "package" referred to in the amended Hague Rules applicable by reason of the *Carriage of Goods by Sea Act* (Cth) 1991 referred to the carton within which the goods were shipped rather than the container within which the carton was shipped.

Admiralty - admiralty claim - termination of demise charter.

In ***Patrick Stevedores No. 2 P/L v MV "Turakina"*** ([1998] FCA 495; 11 May 1998) Tamberlin J considered the operation of demise charters of ships. He concluded that a purported notice of withdrawal of a ship from a demised charter did not operate to terminate the charter at the time that arrest proceedings under the *Admiralty Act* 1988 (Cth) were commenced. He concluded that when the proceedings were commenced the court had jurisdiction to arrest the ship.

Federal Court - amendment - rule in *Weldon v Neal*.

In ***Rodgers v C of T*** ([1998] FCA 489; 11 May 1998) Branson J concluded that the abolition of the rule in *Weldon v Neal* effected by s59(2B) of the *Federal Court Act* did not authorise the court to make an amendment purporting to override the prohibition in s588FF(3) of *Corporations Law* which prevents a claim for a voidable transaction being made more than three years after the relation-back day.

Migration - refugee status - systematic persecution.

In ***Mohamed v Minister for Immigration & Multicultural Affairs*** ([1998] FCA 485; 11 May 1998) Hill J set aside a decision of the RRT whose reasons revealed that it had required an applicant to show alleged persecution was part of a course of "systematic action directed against him".

Agriculture - registration of therapeutic drugs - standing to seek review.

In ***National Registration Authority v Deputy President Barnett (AAT)*** ([1998] FCA 488; 8 May 1998) Carr J considered the extent to which an animal activist group could apply to the AAT to seek review of a decision by the National Registration Authority under the *Agricultural and Veterinary Chemicals (Administration) Act* 1992 to register the "Rabbit Calicivirus Injection". He considered whether the AAT had jurisdiction to review on the application of the group the decision of the NRA to impose two conditions on registration when the group complained of the absence of other conditions.

Migration - Class 816 Entry Permit - whether Department of Industrial Relations correctly assessed work exp ence.

In ***Bellaiche v Department of Im gration*** ([1998] FCA 478; 7 May 19 Sackville J reviewed authority as to process by which work experience o applicant was to be assessed for C 816 of the *Migration (1993) Regu tions*. He concluded that the IRT incorrectly acted on an assessment the applicant's experience at a date ot than the date of 1 November 1993 ferred to in the regulation.

Evidence - client legal privilege - not non-privileged conversation made provide legal advice.

In ***Pioneer Concrete (Vic) P/L Cacthklin P/L*** ([1998] FCA 475; 6 M 1998) Finn J concluded that a note of t conversation between a client's solici and the solicitor for another entity as p of a "watching brief" attracted the pri lege found in s118(c) of *Evidence A* 1995 (Cth). He concluded that lette written between the persons were al privileged.

Admiralty - arrest - expenses of arres

In ***Patrick Stevedoring No. 2 P/L "MV Turakina"*** ([1998] FCA 457; 5 Ma 1998) Tamberlin J considered that claim made for wages and other entitlemen by the crew of an arrested ship were n properly described as "expenses c Marshal" in relation the arrest withi Rule 41 of the *Admiralty Rules*. H declined to order that the Marshal b directed to require the plaintiff to mee the wages and other entitlements of th crew.

Bankruptcy - sequestration order - suf ficient cause not to make sequestratio order.

In ***Govedarica v Jovanovic*** ([1998 FCA 463; 4 May 1998) Mansfield J considered that "sufficient cause" had beer shown within s52(2)(b) of *Bankruptcy Act* 1966 (Cth) not to make a sequestration order against the respondent, notwithstanding proof of an act of bankruptcy, where it appeared the respondent had a greater claim against the petitioner. Application for sequestration order adjourned pending judgment on interlocutory applications in District Court proceedings.