Andrew Yuile's High Court Judgments

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JUNE

EQUITY

Power of a court to set aside a perfected judgment – Fraud

Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers and Managers Appointed) [2018] HCA 12 (21 March 2018) concerned the scope of the equitable power of the Supreme Court of a state to set aside its own perfected judgment. The proceedings concerned a dispute about the interpretation of a lease executed between the parties and, in particular, whether the lease provided for a transfer of lease premises and licences for 'NIL' consideration. That dispute turned on whether the respondent had struck through the word NIL when the lease was executed. No original of the lease was found and copies of the lease produced to the Court by the parties were inconclusive, but tended to suggest the word was not struck through. However, unbeknown to the respondent, junior counsel for the appellant had been told by an employee of the Liquor and Gambling Commissioner (Commissioner) about another copy of the lease (the "third copy") that showed the strike through more clearly. The employee was instructed not to copy the lease, to avoid its discovery, and later subpoenas were directed at files held by the Commissioner that did not contain the additional copy of the lease, meaning that the third copy was never produced to the respondent. A fourth copy was, however, produced to the Court as part of a further file, but was never called on. At first instance, the South Australian Supreme Court found for the appellant, largely because of a finding that the word NIL was not struck through. The respondent later found out about the third and fourth copies and brought proceedings to set aside the judgment and to get a new trial. The respondent alleged malpractice on the part of the appellant and argued that the judgment could therefore be set aside. The primary judge and the Court of Appeal accepted those arguments. The High Court held that the equitable power to set aside was limited to actual fraud, though there were other grounds for setting aside not relevant in this case. Malpractice was not sufficient. Fraud had to be clearly pleaded and proved, which had not occurred. The proper application was a new proceeding seeking to rescind the perfected orders, not an application in the original proceedings. Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Full Court of the Supreme Court (SA) allowed.

CRIMINAL LAW

Murder and manslaughter – Appeal on conviction – Acting on incorrect advice – Miscarriage of justice

In *Craig v The Queen* [2018] HCA 13 (21 March 2018) the High Court considered whether there had been a miscarriage of justice as a result of incorrect advice given by counsel. The appellant was convicted of murdering his partner. He claimed that they had been drinking and had an argument, and his partner picked up a knife. The appellant disarmed her, but accidentally cut her neck. He admitted the act, but argued that the requisite intent was not present. The appellant did not give evidence at the trial. He was advised by his counsel that if he gave evidence, it was likely he would be cross-examined on his criminal history, which included a conviction for a fatal stabbing; and on inconsistencies between his evidence and his statement to police. The second part of the advice was correct, but the first part was not. The appellant appealed his conviction arguing that the trial miscarried because his decision not to give evidence was based on the incorrect advice. The Court of Appeal rejected that argument, holding that there was a sound forensic reason not to give evidence. The High Court held that to find that a trial was not fair requires satisfaction that the accused wished to give evidence and the incorrect advice effectively deprived the accused of the chance to do so. That finding does not depend on an assessment of whether an objectively rational justification for the original decision can be discerned. Instead, the appellate court looks to the nature and effect of the incorrect advice on the accused's decision. In this case, the Court of Appeal's conclusion was correct, as the evidence did not show that the appellant's trial would have been conducted differently had the incorrect advice not been given. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Qld) dismissed.

ADMINISTRATIVE LAW

Appeal from Supreme Court of Nauru – Migration

In *WET044 v The Republic of Nauru* [2018] HCA 14 (11 April 2018) the High Court dismissed an appeal from a decision of the Nauru Supreme Court, rejecting an application for asylum. The appellant arrived by boat to Australia and was transferred to Nauru, where he lodged an application to be recognised as a refugee. The application was rejected by the Secretary of the Department of Justice and Border Control of Nauru. On review before the Refugee Status Tribunal (RST), the appellant submitted additional material, including "country information" (generalised information about a country) in support of his claims. The RST affirmed the Secretary's decision. The Supreme Court affirmed the RST's decision on review. Before the High Court, the appellant argued that the RST had failed to consider the country information and had failed to afford him procedural fairness by failing to put to him other country information that it relied on. The High Court rejected both grounds. On the appellant's country information, the Court held it should not be inferred that the RST would ignore the information, having read and referred to the submissions to which the information was attached. In any event, the information was not such as to require comment from the RST: most of it was before the Secretary in other forms and did not contradict the Secretary's opinions. The Court identified several pieces of information that were not expressly mentioned by the RST, but which the Court found were covered by other material or contained only general information. On the RST's country information, the Court held that it was information already known to the appellant. Procedural fairness did not require that it be brought to his attention. Kiefel CJ, Gageler and Keane JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

CONSTITUTIONAL LAW

Chapter III – Jurisdiction of state tribunals not 'courts of a State' – Federal jurisdiction – Inconsistency

State of New South Wales v Garry Burns [2018] HCA 15 (18 April 2018) concerned the scope of state parliaments to confer on a state tribunal jurisdiction to deal with matters within ss 75 and 76 of the Constitution. Mr Burns made complaints to the Anti-Discrimination Board of New South Wales under the *Anti-Discrimination Act 1977* (NSW) regarding statements made about him by a Ms Corbett and a Mr Gaynor. Mr Burns was at all times a resident of NSW, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland. Each case came before the Administrative Decisions Tribunal (ADT) or its successor, the Civil and Administrative Tribunal of New South Wales (NCAT). The issue before the High Court was whether NCAT had jurisdiction to deal with the matters. That question arose because s 75(iv) of the Constitution confers original jurisdiction on the High Court in matters between residents of different states. It was common ground that although NCAT was exercising the judicial power of the state, it was not a "court of a State" within the meaning of Ch III of the Constitution. The question was whether a state parliament could confer on such a body jurisdiction to deal with a matter within ss 75 or 76 of the Constitution. Two arguments were put. First, by implication from the Constitution, a state law cannot confer adjudicative authority to deal with a matter in ss 75 or 76 on a state body other than a court of a state within the meaning of

Ch III ("implication argument"). Second, any such conferral would be inconsistent with s 39(2) of the *Judiciary Act 1903* (Cth), by which the Commonwealth has conferred federal jurisdiction on courts of the states, and therefore invalid under s 109 of the Constitution ("inconsistency argument"). The Court unanimously held that NCAT could not be conferred jurisdiction to deal with matters falling within ss 75 or 76. Kiefel CJ, Bell and Keane JJ jointly upheld the implication argument and did not deal with the inconsistency argument. Gageler J, writing separately, also upheld the implication argument, but rejected the inconsistency argument. Nettle J, Gordon J and Edelman J, each writing separately, upheld the inconsistency argument but rejected the implication argument. Appeal from the Court of Appeal (NSW) dismissed.

MIGRATION LAW

Fast track visa process – Protection visas – Review by the Immigration Assessment Authority – Unreasonableness

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 (18 April 2018) concerned review by the Immigration Assessment Authority (IAA) of the decisions of delegates, and whether the IAA had acted unreasonably in not getting information from the plaintiff. The plaintiff sought a protection visa, claiming that he would be at risk of harm if returned to Iran. Because of the circumstances of his arrival in Australia, the plaintiff was a "fast track applicant." If a decision by a delegate of the Minister is made to refuse a protection visa to such an applicant, the decision is automatically referred to the IAA for review. The IAA may not set the decision aside or substitute its own decision; it may only affirm or remit the matter to the Minister (though it can do so with directions for future findings). Subject to certain limited exceptions, the IAA must conduct the review on the papers. One exception is that the IAA may seek or accept additional information from the applicant, in writing or at a hearing, but can only consider "new information" (information not before the Minister when the original decision was made) if certain criteria are met, including that there are "exceptional reasons" for doing so. In this case, the plaintiff's protection claims were based on his claimed Christian faith. The delegate spoke by telephone with the Minister of the plaintiff's church, who said the plaintiff had attended the church only limited times. The delegate did not provide particulars of that information to the plaintiff or seek his comment on it. The delegate refused the application because he did not believe that the applicant was a Christian. The matter was referred to the IAA and the plaintiff made submissions and included additional information about his claims, including material from the Minister. He also asked the IAA to interview him, the Minister and members of the congregation. The IAA declined to do so, but did take into account the new documentary material from the Minister (but not the congregation). The IAA gave reasons for those decisions. The IAA affirmed the delegate's decision on the basis that he had no real commitment to Christianity. In the High Court it was alleged that the delegate had failed to provide procedural fairness, and that the IAA had acted unreasonably by failing to interview the plaintiff or to take into account the information from the congregation. The Court held that an error in a decision of a delegate has no continuing legal operation once a decision is made by the IAA. It has no legal bearing on the position of the visa applicant. Applicants must therefore be able to identify independent grounds in the IAA's decision to challenging that decision. A breach of procedural fairness by the delegate might lead to error in the IAA's decision if the IAA also failed to provide a chance to respond to relevant information, but the delegate's failure could be overcome through procedures and powers available to the IAA to grant the applicant the lost chance to comment. In this case, the material from the Minister was not material that would be the reason for refusing a visa (within s 57(2) of the *Migration Act 1958* (Cth)) and there was no breach of s 57(2) in not seeking comments on it from the plaintiff. The Court also considered what might amount to "exceptional circumstances" leading to the IAA accepting new information, and the circumstances in which a failure to get new information might be unreasonable. In this case, the IAA's exercise of discretion not to get the new information was reasonable and justified having regard to the reasons it gave in its decision. Gageler, Keane and Nettle JJ jointly; Gordon J and Edelman J each separately concurring. Answers to questions in special case given.

JULY

CONSTITUTIONAL LAW

Citizenship – Section 44(i)

In *Re Gallagher* [2018] HCA 17 (9 May 2018) the High Court held that Senator Katy Gallagher had been ineligible when she stood for election as a Senator in May 2016. Section 44(i) of the Constitution provides that a person shall be incapable of being chosen as a Senator or Member of the House of Representatives if they are a "subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power." In *Re Canavan* [2017] HCA 45 the High Court accepted that the s 44(i) rule is subject to a qualification – a "constitutional imperative" – that the "Australian citizen not be irremediably prevented

by foreign law from participation in representative government." The qualification applies where the person has taken all steps reasonably required by the foreign law to renounce their foreign citizenship. Senator Gallagher was a citizen by descent of the United Kingdom. Relevant papers and payment details were received by the UK Home Office on 26 April 2016. The fee was paid on 6 May 2016. On 31 May 2016, Ms Gallagher lodged her nomination for the Senate. On 20 July 2016, the Home Office sought from her additional documents, which were provided. On 2 August 2016, Ms Gallagher was returned as a Senator for the ACT. On 16 August 2016, her renunciation was registered by the Home Office. Senator Gallagher argued in the High Court that she did not cease to be a foreign citizen before her nomination because of matters beyond her control, which were an irremediable impediment to her participation in the 2016 election. The constitutional imperative was therefore engaged. The High Court held that the impediment must be a result of the foreign law itself. In this case, there was no aspect of UK law that prevented denunciation. It was only ever a question of timing. The "exception is not engaged by a foreign law which presents an obstacle to a particular individual being able to nominate." Accordingly, Senator Gallagher was not capable of being chosen as a Senator. Her seat was to be filled by a special count of the ballot papers. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Gageler J and Edelman J separately concurring. Answers given to Questions Referred.

CRIMINAL LAW

Appeal against conviction – Prior inconsistent statement – Application of 'proviso' without notice

In *Collins v The Queen* [2018] HCA 18 (9 May 2018) the Court found that the Court below erred in deciding, without notice, that no substantial miscarriage of justice had occurred (the proviso) notwithstanding error in the trial. The appellant was convicted of several sexual offences, including rape. At the trial, the complainant's mother gave evidence that the complainant had told her she had been raped. The complainant gave similar evidence of what she had said. In cross-examination, the mother conceded that at the committal (seven years earlier), her evidence had been that the complainant told her she "may have been raped" and that she had been drinking wine and didn't remember everything. The mother also accepted that her memory from the committal was her best recollection and better than her memory at trial. The jury was instructed that they could use the account from committal in assessing the mother's credibility and reliability, but the committal evidence was not evidence of what had been said. On appeal, the Court of Appeal found that the jury had been misdirected: the mother had adopted her evidence from the committal, and so it was evidence of what had been said. It could be used in assessing credibility of the complainant's evidence. Nonetheless, the Court of Appeal held that the proviso applied and dismissed the appeal. The Court took that view notwithstanding a concession by the prosecutor that the proviso did not apply, and without allowing the appellant to be heard on the point. The High Court held that whether there has been a substantial miscarriage of justice "calls for a judgment upon which the parties are entitled to be heard." The Court was not bound by the prosecution's concession, but was obliged to give the appellant a chance to be heard. The High Court also rejected a notice of contention of the Crown, asserting that there had been no misdirection. Last, the High Court considered for itself the proviso. The Court held that the mother's earlier account, if accepted, was capable of affecting the jury's consideration. It was not possible to conclude that no substantial miscarriage of justice had occurred. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Court of Appeal (Qld) allowed.

ADMINISTRATIVE LAW

Appeal from Supreme Court of Nauru – Migration

In CRI026 v The Republic of Nauru [2018] HCA 19 (16 May 2018) the High Court dismissed an appeal from the Nauru Supreme Court. The appellant applied for recognition as a refugee or a person owed complementary protection. His claim was made on the basis of fear of harm in Pakistan from the Muttahida Qaumi Movement (MQM). The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal (RST) affirmed the refusal on the basis that the appellant could relocate to a different part of Pakistan. The Supreme Court dismissed an appeal. Towards the end of its reasons, the RST made an obviously incongruent observation, that the appellant would not face a real possibility of persecution in Sri Lanka. It also incorrectly referred to him being of Tamil ethnicity. On appeal to the High Court, the appellant argued that the RST erred in its consideration of complementary protection by applying a reasonable relocation test when there is no such test in Nauruan law; by failing to consider whether it was reasonable for his family to relocate; failing to consider whether the MQM had power in the place of relocation; and by referring to Sri Lanka. The Court held that international law and practice showed that "unless the feared persecution emanates from or is condoned or tolerated by state actors (which is not an issue in this

case), an applicant's ability reasonably to relocate within a receiving country, including the ability safely and legally to travel to the place of relocation, is relevant to whether the applicant is in need of complementary protection." In relation to point about the appellant's family, the Court held that no substantial argument had been articulated on that point and the RST did not need to consider it. The Court also held that there was sufficient material to support the RST's finding on the MQM's scope of power. On the erroneous statements of the RST, the Court held that they were typographical errors that did not impact on the RST's reasoning process. The Court did not, therefore, need to determine a further argument about whether the RST had power to issue a corrigendum. Kiefel CJ, Gageler and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

Appeal from Supreme Court of Nauru – Migration

In *DWN027 v The Republic of Nauru* [2018] HCA 20 (16 May 2018) the High Court dismissed an appeal from the Nauru Supreme Court. The appellant applied for recognition as a refugee or a person owed complementary protection. His claim was made on the basis of fear of harm in Pakistan from the Taliban. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal (RST) affirmed the refusal on the basis that the appellant could relocate to a different part of Pakistan. The Supreme Court dismissed an appeal. On appeal to the High Court, the appellant argued that the RST erred in its consideration of complementary protection by taking into account a relocation test when such a test was not part of the law of Nauru; by failing to consider integers said to be relevant to reasonable relocation; and by failing to give primary consideration to the best interests of his children. On relocation, the Court reiterated its holding from *CRI026 v Republic of Nauru* about the applicability of a reasonable relocation test. The Court also held that the RST had not failed to take into account the integers claimed by the appellant. Last, the Court held that it was unnecessary to consider whether the RST was bound to take into account the best interests of the child, because the appellant had not argued before the RST that this factor had to be considered, and also had put forward no persuasive evidence of the adverse impact on his child of refusal of the claim. Kiefel CJ, Gageler and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

Appeal from Supreme Court of Nauru – Migration

In *EMP144 v The Republic of Nauru* [2018] HCA 21 (16 May 2018) the High Court dismissed an appeal from the Nauru Supreme Court. The appellant applied for recognition as a refugee or a person owed complementary protection. His claim was made on the basis of fear of harm in Nepal by reason of his political views. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal (RST) affirmed the refusal. It accepted that the appellant had suffered serious harm in the past and that he might again in the future in his home area, but it found that the appellant could relocate to a different part of Nepal. The Supreme Court dismissed an appeal. On appeal to the High Court, the appellant argued that the RST erred in its consideration of complementary protection by applying a reasonable relocation test when there is no such test in Nauruan law; by failing to alert the appellant to the fact that the relocation issue might be determinative; by failing to consider reasons the appellant gave for why he could not relocate; and failing to understand country information about Nauruan citizenship law. On relocation, the Court reiterated its holding from *CRI026 v Republic of Nauru* about the applicability of a reasonable relocation test. The Court further held that the RST had considered all the relevant relocation information. The appellant's representatives had also been on notice of the relocation issue and its significance from the outset. The Court further held that the RST had not failed to take into account the relevant information, and had not misunderstood the country information. Kiefel CJ, Gageler and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

AUGUST

NEGLIGENCE

Personal injury – Assessment of damages – Future losses

In *Amaca Pty Limited v Latz; Latz v Amaca Pty Limited* [2018] HCA 22 (orders 11 May 2018; reasons 13 June 2018) the High Court held that damages to be awarded to Mr Latz should include amounts he would have received under his superannuation pension, but not his age pension. Mr Latz is 71 and has been diagnosed with terminal malignant mesothelioma. When diagnosed, he had retired from the public service and was receiving both a superannuation pension under the *Superannuation Act 1988* (SA) and an age pension under the *Social Security Act 1991* (Cth). He brought proceedings against Amaca, for whom he had worked installing asbestos fencing some 40 years earlier. Amaca did not dispute liability. Mr Latz argued that, but

for his illness, he would have continued to receive both the superannuation pension and the age pension for the remainder of his pre-illness life expectancy – around 16 years. A majority of the Full Court of the SA Supreme Court held that the value of both pensions were compensable losses. It also reduced the amount of damages to account for a reversionary pension that would be awarded to Mr Latz's partner on Mr Latz's death. Amaca appealed against the inclusion of the pensions as compensable losses; Mr Latz appealed against the reduction. A majority of the High Court upheld the inclusion of damages for the superannuation pension as part of compensation for loss of earning capacity. "Loss of earning capacity" has been described as a capital asset – capacity to earn money from the use of personal skills. Damages are awarded for loss of earning capacity, to the extent the loss has been or may be productive of actual financial loss. Superannuation benefits, like wages, are the product of the claimant's capital asset. Had the injury presented during his working life, the superannuation loss would be compensable. There was no reason in principle for a different result because the injury caused earlier presented after his retirement. However, the compensation should be reduced to account for the reversionary pension. The Court unanimously held that an amount for the age pension should not be included in the award for damages. It was not a result of or linked to a person's capacity to earn; it is not a form of property; and is not compensable. Bell, Gageler, Nettle, Gordon and Edelman JJ jointly; Kiefel CJ and Keane J jointly dissenting. Appeal from the Full Court of the Supreme Court (SA) allowed in part.

PROCEDURE – STAY OF PROCEEDINGS

Leave to amend – Stay until costs paid – Effective end of proceedings

In *Rozenblit v Vainer* [2018] HCA 23 (13 June 2018) the High Court allowed an appeal from a decision to stay proceedings until costs orders had been paid. The appellant brought proceedings alleging that the respondent fraudulently transferred shares owned by the appellant. He sought leave to amend his claim by three separate summonses. The first two summonses were refused with costs to be paid immediately. The appellant was unable to pay the costs ordered because he had very limited means. On the third occasion, the respondents sought an order under Order 63.03(3)(a) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), which allows for a stay to be ordered where costs have been ordered and those costs have been fixed but remain unpaid. The primary judge granted the application for leave to amend on condition that the proceedings be stayed until the costs were paid. The judge was aware that this would effectively end the proceedings. The appellant unsuccessfully appealed to a single judge of the Supreme Court and then the Court of Appeal. The High Court unanimously overturned the primary judge's decision. The Court noted the grave consequences of the stay order. Generally, a person is entitled to submit a bona fide claim for determination. Where a stay is sought based on unpaid costs, the circumstances of the case and the costs orders, as well as the actions of the parties would be relevant. A stay should be granted where it is the only practical way to ensure justice between the parties. In this case, the appellant had been prevented from pursuing a claim honestly made and there were insufficient grounds for the making of the order. There remained fair and practical ways to ensure justice between the parties. Kiefel CJ and Bell JJ jointly concurring; Keane J separately concurring; Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

ADMINISTRATIVE LAW

Appeal from Supreme Court of Nauru – migration

In *CRI028 v The Republic of Nauru* [2018] HCA 24 (13 June 2018) the High Court allowed an appeal from the Nauru Supreme Court. The appellant was born in "K District", an area of the Punjab. In 2004 he moved to Karachi (where his wife and child remain). In 2013, the appellant fled to Christmas Island and was transferred to Nauru. He applied for recognition as a refugee or a person owed complementary protection. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal (RST) accepted that the appellant had a well-founded fear of persecution, but affirmed the refusal on the basis that the appellant could relocate to K District. The RST's reasoning focused on whether K District was a "home area" of the appellant. In the alternative, the RST purported to consider reasonableness of relocation, but did not consider the fact that the appellant had a wife and child. The Nauru Supreme Court dismissed an appeal. The High Court held that the RST was distracted by the enquiry about whether K District was the appellant's home area. It failed to consider reasonableness of relocation having regard to all of the appellant's circumstances, in particular his wife and child. Gordon and Edelman JJ jointly; Bell J separately concurring. Appeal from the Supreme Court (Nauru) allowed.

DEFAMATION

Capacity to defame – Publication

Trkulja v Google LLC [2018] HCA 25 (13 June 2018) concerned whether Google defa med the appellant by publishing search engine results conveying that he was a criminal. The appellant alleged that Google defamed him by publishing images, text and autocomplete searches in its search engine that conveyed imputations that he is a "hardened and serious criminal in Melbourne" and had links with other criminals. Google brought a summary judgment application on three bases: (i) that it did not publish the allegedly defamatory material; (ii) that the matters in issue were not defamatory of Mr Trkulja; and (iii) that Google was entitled to immunity from suit. The primary judge rejected these grounds. On appeal, the Court of Appeal upheld the second ground, finding that the search results were not capable of bearing the defamatory imputations. The High Court said that whether words or images are capable of carrying a defamatory imputation is a question on which reasonable minds can differ, and a defamation pleading should only be disallowed with great caution. The Court held that at least some of the search results had the capacity to convey to an ordinary reasonable person that Mr Trkulja was somehow associated with the Melbourne criminal underworld. The results therefore had the capacity to convey one or more of the defamatory imputations. The Court of Appeal had erred in finding that the appellant's claim had no real prospect of success. The High Court was also critical of some of the Court of Appeal's reasoning with respect to the question of publication, the test for the conveying of the imputation, and findings of fact and law made. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Supreme Court (Vic) allowed.

CRIMINAL LAW

Trial by judge alone – Adequacy of reasons

In *DL v The Queen* [2018] HCA 26 (20 June 2018) the High Court held that the reasons given by the trial judge were not inadequate and dismissed an appeal from conviction. The appellant was charged with persistent sexual exploitation of a child under s 50(1) of the *Criminal Law Consolidation Act 1935* (SA). That sub-section created an offence where an adult person, "over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age." The appellant was tried by judge alone and convicted. On appeal, one of the grounds raised by the appellant was that the trial judge's reasons were inadequate. In the High Court, the issue was whether the trial judge's reasons failed to identify and disclose the reasoning leading to the finding that there had been two or more acts of sexual exploitation. The complainant had alleged a number of acts of sexual exploitation over several years. The complainant's evidence was central to the Crown case. The appellant drew attention to inconsistencies in the complainant's evidence and said it was not reliable. The trial judge described the complainant as having given evidence "in a forthright and convincing manner", as "a straightforward man", and as "a man endeavouring to tell the truth". The judge found he "was describing real events that happened to him and was not led by the suggestions of others." While there were inconsistencies in his evidence, the judge accepted that the complainant was a reliable witness as to the core allegations. A majority of the High Court held that the trial judge had ultimately concluded that the appellant sexually assaulted the complainant on numerous occasions over some years, which meant that the elements of the offence had been proved. The judge's findings on credit were an acceptance that the complainant was truthful and reliable about all of the sexual acts that he had described. The reasons were sufficient to identify and disclose the reasoning leading to a finding of two or more acts of exploitation. Kiefel CJ, Keane and Edelman JJ jointly; Bell J and Nettle J separately dissenting. Appeal from the Supreme Court (SA) dismissed.

PAROLE

s 74AAA of the Corrections Act 1986 (Vic)

In *Minogue v Victoria* [2018] HCA 27 (20 June 2018) the High Court held that s 74AAA of the Corrections Act 1986 (Vic) does not apply to the plaintiff. In 1986, the plaintiff and a group of others placed a stolen car with an explosive in the vicinity of public buildings in Melbourne, including the Police complex and the Magistrates' Court. The car exploded and killed Constable Angela Taylor. The plaintiff was convicted of Constable Taylor's murder as a part of a joint enterprise in which the particular parts of the accused could not be proved. He was sentenced to life imprisonment with a non-parole period of 28 years. The non-parole period ended on 30 September 2016. On 3 October 2016 the plaintiff applied for parole. On 20 October 2016, the parole board decided to consider the application. On 14 December 2016, s 74AAA was inserted into the Act. That section provides that the Board must not make a parole order in respect of a prisoner "convicted and sentenced" to a term of imprisonment "for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer" unless the Board is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated. On 20 December 2017, s 127A was inserted into the Act. That section provides that

s 74AAA can apply to a person even if they have become eligible for parole or had asked for parole to be considered. Questions of construction and constitutional law were posed for the High Court, essentially concerning whether s 74AAA could apply to the plaintiff. The High Court held that s 74AAA could apply to the plaintiff even though he had applied for parole. The laws relating to parole could change and there was no accrued right to parole or the completion of an application. Section 74AAA is not limited to persons convicted of offences with an element that the accused know or be reckless as to whether the deceased was a police officer. Section 74AAA applies wherever the circumstances provided for in the section are present. On its proper construction, s 74AAA applies to a prisoner sentenced on the basis that the prisoner knew, or was reckless as to whether, the person murdered was a police officer. In this case, the plaintiff was not sentenced on that basis, as revealed by the sentencing remarks. The offence committed was indiscriminate and no particular person or class of persons was targeted. Section 74AAA therefore could not apply to the plaintiff. That conclusion also rendered it unnecessary to answer the constitutional questions raised by the case. Kiefel CJ, Bell, Keane, Nettle and Edelman JJ jointly; Gageler J and Gordon J separately concurring. Answers to questions in Special Case given.

APPEAL AGAINST CONVICTION

Application of the 'proviso'

In *Lane v The Queen* [2018] HCA 28 (20 June 2018) the High Court unanimously held that the 'proviso', that an appeal from a conviction involving an error may be dismissed if there has been no substantial miscarriage of justice, was not capable of applying. The appellant was involved in an altercation with the deceased. The deceased retreated with the appellant in pursuit before falling and hitting his head. The deceased got up, but fell again. After the second fall, he lost consciousness. He died in hospital nine days later. The jury acquitted the appellant of murder but convicted him of manslaughter. The appellant appealed his conviction. The Court of Criminal Appeal held that the trial judge erred by failing to direct the jury that in their consideration of manslaughter, they had to be unanimous on the factual basis on which they might convict – whether it was the first or second fall or both that caused the death. The Court of Criminal Appeal held, however, that the proviso applied. The evidence was not capable of supporting a finding that a deliberate act of the appellant caused the first fall and the jury should necessarily have so found. But there was no doubt that the second fall was caused by a punch thrown by the appellant after the first fall and a jury acting properly should have found the appellant guilty on that basis. In the High Court the only issue was the application of the proviso. The Court noted that some errors at trial precluded the application of the proviso. There might be a sufficient miscarriage of justice regardless of whether the Appeal Court thinks that, on the evidence, the conviction is inevitable. Where the application of the proviso arises from an error by misdirection, it is necessary to consider the nature and effect of the error in the particular case. In this case, it was relevant that the Crown case at trial included the possibility that the jury might convict based on the appellant's conduct leading up to the first fall. That matter was left to the jury. These matters together meant it could not be assumed that the jury was unanimous in finding that the appellant's actions leading up to the second fall established his guilt. The possibility of some jury members convicting based on the first fall could not be excluded, even if the appellate court thought the evidence in that respect could not support a conviction. It was not possible to speculate as to the jury's possible reasoning, nor to hold that the jury should have reasoned by rejecting a basis left to it by the Court and the Crown case. In the absence of a unanimity direction, the basis of the verdict was necessarily uncertain. Kiefel CJ, Bell, Keane and Edelman JJ jointly; Gageler J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed.