Supreme Court Judgments

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Appeal When fact becomes law

In *KG v Firth* [2019] NTCA 5, the Court of Appeal allowed an appeal from a decision of the Supreme Court allowing an appeal from an acquittal in the Youth Justice Court. Appeals from such acquittals were only permitted on questions of law or mixed law and fact by s144 of the *Youth Justice Act 2005* (NT). The Court of Appeal held at [23] there will only be error of law in making a wrong finding of fact or drawing an illogical inference if the finding or inference could only have been made or drawn by an irrational tribunal acting arbitrarily. Here, the trail judge's lack of satisfaction beyond reasonable doubt that the appellant knew his conduct was wrong was not irrational and arbitrary, even if the Supreme Court and the Court of Appeal might have come to a different conclusion.

Contract interpretation "Includes" delimits definition

In *Commonwealth of Australia v Trepang Services Pty Ltd* [2019] NTCA 2, the Court of Appeal reversed a decision of the trial judge and held that the word "includes" in a contractual definition effectively delimited the definition. "Material" was defined as "includes information and the subject matter of any category of Intellectual Property right". The court held the definition was not restricted to either of those examples and covered material generally such as documents or records in hard copy or electronic form. As a result, the respondent was required to deliver up all such material requested by the appellant accumulated over the life of the five-plus year contract. This interpretation was aided by delivery up being part of the services under the contract, the appellant needing the material after the contract was terminated, and by other contractual references indicating a broader coverage than the examples in the definition.

Government appointments How to "appoint"

In *JB & Ors v Northern Territory of Australia* [2019] NTCA 1 at [69], the Court of Appeal held that, if the enactment does not state how a public servant is to be appointed, it may be effected by communication of the appointment between the Director and the prospective employee and an acceptance by the employee of the appointment. The fact that the appointment is later recorded in a formal instrument does not alter the effectiveness of the earlier communication. The result here was that directions given by the superintendent of the Don Dale Youth Detention Centre were lawful because has had been validly appointed by an oral communication from the Director.

Jury directions *Stafford* direction where accused's interest raised

In *Wise v The Queen* [2019] NTCCA 10, the Court of Criminal Appeal allowed an appeal against conviction because the trial judge failed to give a *Stafford* direction where the prosecutor had suggested the accused was lying because he did not want to go to gaol. The court said at [27] that reference to the interest of a defendant in the outcome of a criminal trial may amount to an error of law on the basis that it undermines the presumption of innocence. In such a case the jury should be directed that the accused is presumed and it would be wrong to discount his evidence simply because he has an interest in the outcome.

Jury irregularity Non-evidence before jury

In *Nadjowh v The Queen* [2019] NTCCA 6, the Court of Criminal Appeal dismissed an appeal from a conviction despite the jury having before it material that was not in evidence. The court held that such an appeal is not from the trial judge's failure to discharge the jury but from the conviction, and therefore the effect of the non-evidential material on the jury needs to be assessed against the whole of the evidence. There is no rule that where inadmissible or prejudicial evidence is admitted through inadvertence a jury must be discharged. The verdict must be set aside unless this court is satisfied that the jury would have returned the same verdict if the irregularity had not occurred. It is for the Crown to make it clear that the irregularity did not affect the verdict. Here the material was the lower court file and some voire dire exhibits, none of which alone or in combination could have had a prejudicial effect on the jury when considered in light of the other evidence.

Sentencing 70% & 50% minimum non-parole

In *R v Cumberland* [2019] NTCCA 13, the Court of Criminal Appeal held that the 70% minimum non-parole period under s55 of the *Sentencing Act* applies only to a "specified offence" in that section and the 50% non-parole period under s54 applies to other offences. The 70% minimum applies to offences committed before the amendment to s55 if they are a "specified offence" other than offences under the *Misuse of Drugs Act*. A court sentencing an offender for a mixture of offences must give different non-parole periods accordingly. A court fixing an aggregate sentence under s52 must apply the 70% minimum where one of the offences is a specified offence under s55, but if this causes injustice, the court may disaggregate the sentences in the usual way.

Sentencing Non-parole period or suspended sentence

In *Tran v The Queen* [2019] NTCCA 12, the Court of Criminal Appeal replaced a non-parole period of three years and two months with a suspended sentence of two years under a head sentence of four years and six months for supplying 12 kg of cannabis and 40.54 g of MDMA. The sentencing judge erred in determining the minimum period of imprisonment required, enabling the Court of Criminal Appeal to give a suspended sentence considering the nature of the offending, the absence of relevant prior convictions or breaches, the reasonable prospects of rehabilitation, the partial dependency on MDMA, and the public interest in children not being separated from their father.

Sentencing Supply large quantities of cannabis and mdma

In *R v Cumberland* [2019] NTCCA 14, the Court of Criminal Appeal increased a sentence to 8 years' imprisonment for the supply of cannabis to a minor, the supply of 60 times the commercial quantity of cannabis and the supply of 19 times the commercial quantity of MDMA. The prisoner was 20-22 years old at the time of offending with no priors and some psychological reasons for offending, but the court said where such a large quantity of drugs was involved, the quantity was a significant factor in sentencing with punishment, denunciation and general deterrence playing an important role. A non-parole period of 65 months and 1 week was set, with the 70% minimum under s 55 of the Sentencing Act applying only to specified offences and 50% to the remainder.

Sentencing Totality and interstate sentences

In *Ferguson v The Queen* [2019] NTCCA 11 the Court of Criminal Appeal reduced a sentence of 16 years and 155 days to 10 years for two counts of sexual intercourse without consent and one of lawful assault. After he absconded from the Territory and was originally sentenced, the offender was sentenced in South Australia to 15 years for manslaughter. The South Australian court took into account the Territory sentences in fixing that sentence. On appeal for manifest excess, the Court of Criminal Appeal said an adjustment for totality would normally be made to the sentence to be served second because it was passed second but here the Territory offence was passed first but to be served second. Judicial comity prevented the Territory court from accepting that the South Australian court's sentence miscarried as it took into account the Territory sentences. The appellant therefore had to show there was error in the Territory sentences, which there was as the total original sentence was excessive.

Suppression orders In civil proceedings of criminal youths

In *Nationwide News Pty Limited v Binsaris & Ors* [2019] NTCA 4 at [11], Southwood J held that there is no presumption in favour of suppressing the names of plaintiffs in civil proceedings involving their offending as youths. His Honour held at [28] that the power under s57(1)(b)(iii) of the *Evidence Act 1939* (NT) to prohibit publication of names of parties is constrained by (1) only the court in which the parties are named may make the order, (2) only the name of a party before the court may be prohibited, (3) prohibition must be in the interests of the administration of justice, and (4) the power must be exercised judicially. "Administration of justice" goes beyond the instant proceedings and is to be given the widest meaning but there must be good reason for displacing, or overriding, the fundamental principle of open justice.

Youths Knowledge that conduct is morally wrong – rebuttal of presumption

In *KG v Firth* [2019] NTCA 5, the Court of Appeal restored a trial judge's finding that the prosecution had not rebutted the presumption that a 13-year-old accused did not know his conduct was morally wrong under s43AQ of the *Criminal Code 1983* (NT) (see APPEAL – WHEN FACT BECOMES LAW above). The trial judge had rejected the opinion of an experienced child psychologist because he rejected five matters grounding the opinion. The Court of Appeal said that "wrong" carries its dictionary meaning and is the same or very similar to the common law concept of doli incapax. Evidence rebutting the presumption might come from admissions, the alleged conduct (but not merely as an inference from doing the act), surrounding circumstances including attempts at concealment or escape, the accused's background including education, upbringing, mental incapacity and prior convictions. A psychologist's opinion will ordinarily be given significant weight but it is not incumbent on the judge to accept the opinion on the ultimate issue.