High Court cases

Chief Executive Officer of Customs v El Hajje (2005) 79 ALJR 1289, 218 ALR 457

The extent to which averment provisions may be used to prove an ultimate fact in issue was considered in this decision. The decision arose from an excise prosecution under the *Excise Act 1901*. Although it deals with the effect of the averment provision in s144 of the Excise Act, the decision will apply to similarly worded averment provisions in other federal legislation, such as s255 of the *Customs Act 1901* and s8ZL of the *Taxation Administration Act 1953*. These three sections provide that averments of fact by a prosecutor shall be prima facie evidence of the matter or matters averred.

The respondent was apprehended in Victoria driving a truck that was found to contain a large quantity of 'cut tobacco' upon which excise duty had not been paid. At the time s117 of the Excise Act proscribed the possession, without authority, of manufactured or partly manufactured excisable goods upon which excise duty had not been paid. The appellant commenced proceedings in the Victorian Supreme Court in respect of the respondent's alleged contravention of s117.

In its statement of claim the appellant averred, amongst other matters, that the appellant 'had in his possession, custody or control manufactured excisable goods, namely a quantity of cut tobacco weighing 691.48 kilograms'. The Victorian Court of Appeal identified this as an averment that the goods fell within a statutory description and held it to be an averment of a question of law, citing the judgment of Fullagar J in *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51. There were no averments of the facts constituting manufacture. Given the court's view that tobacco leaf might be cut for purposes not connected with manufacture into a product suitable for consumption, the court held that this was an averment of the ultimate fact in issue.

The majority of the High Court, comprising McHugh, Gummow, Hayne and Heydon JJ, held that the Victorian Court of Appeal had erred in two respects. First, *Hayes* was a decision about what constituted an appeal on a point of law, and was, therefore, distinguishable. Second, whether tobacco leaf might be cut for purposes other than producing a commodity was beside the point. The term 'cut tobacco' was not defined in the Excise Act and 'tobacco' was defined broadly in the relevant schedule to be tobacco leaf 'subjected to any process other than curing the leaf as stripped from the plant'.

Section 144 of the Excise Act has the effect that averments of matters of fact by the prosecutor in the information, complaint, declaration or claim shall be prima facie evidence of the matters averred. Where a matter averred is a mixed question of law and fact the averment shall be prima facie evidence of the fact only. The majority concluded that there was nothing in the wording of this provision or its legislative history prohibiting its use to aver an 'ultimate fact in issue'. In reaching this conclusion the majority noted that there were a number of elements to a contravention of s117, any one of which, if not admitted by a defendant, might comprise an ultimate fact in issue. Properly analysed, the averment complained of made mixed allegations of fact and law:

> that the tobacco had been subjected to one or more manufacturing processes and, for that reason, fell within the reach of section 117 … The former is an allegation of fact; the latter may be an allegation of law.

In a separate judgment, Kirby J agreed with this conclusion of the majority.

The matter was remitted to the Victorian Court of Appeal for it to consider the question whether, taking the impugned averment into account, the appellant had established the requisite elements of the alleged contravention of s117 beyond reasonable doubt, that being the standard of proof required as a result of the High Court's decision in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

Christopher O'Donnell

Fingleton v The Queen (2005) 79 ALJR 1250, 216 ALR 274

In *Fingleton v The Queen* the High Court finally brought to an end the well-publicised criminal proceedings against the chief magistrate of Queensland, Ms Diane Fingleton.

Ms Fingleton was convicted of an offence under the *Queensland Criminal Code* which prohibits unlawful retaliation against a witness. Following the jury verdict an alternative charge of attempting to pervert the course of justice did not require a verdict. Ms Fingleton was sentenced to a term of imprisonment. On appeal to the Court of Appeal of the Supreme Court of Queensland the conviction was confirmed but the sentence was reduced. By the time her case reached Canberra Ms Fingleton had completed her prison sentence.

The case is instructive in many respects, not the least being that the protracted proceedings continued for years before it was noticed around the time of the special leave application that the criminal activity alleged could not be maintained against her. This was because of an immunity provided for in the Criminal Code itself and by extension in the *Magistrates Act 1991* of Queensland.

In the High Court, Chief Justice Gleeson said about this prosecution at [55]:

> The appellant should not have been held criminally responsible for the conduct alleged against her. By statute, she was entitled to a protection and immunity that was wrongly denied to her.

The proceedings revolved around correspondence from Ms Fingleton to another magistrate, Mr Gribbin which it was said gave rise to the alleged offence or the alternative charge of attempting to pervert the course of justice. Mr Gribbin filled a post as a coordinating magistrate and was also an office bearer in the Magistrates Association at some time.

In the course of her work as chief magistrate Ms Fingleton ordered the transfer of a magistrate named Thacker to Townsville. In pursuit of an application by Ms Thacker to have that transfer reviewed by an appeals committee Ms Thacker was in touch with Mr Gribbin. She sought assistance from the Magistrates Association about the history and proceedings surrounding transfers of magistrates.

Mr Gribbin provided an affidavit for Ms Thacker to use in the review proceedings that was critical of Ms Fingleton's approach to transfers of magistrates. He described some of them as 'forced transfers' and said magistrates generally felt 'susceptible to arbitrary, unadvertised, involuntary transfers'.

After becoming aware of Mr Gribbin's affidavit and involvement in the appeal against the transfer of Ms Thacker, Ms Fingleton e-mailed Mr Gribbin calling on him to show cause why his appointment as coordinating magistrate should not be withdrawn. It is that e-mail that became central to the case and its contents are set out at [18].

The email makes interesting reading and is referred to at some length in the judgments of McHugh J and Kirby J.

In effect the chief magistrate was calling on Mr Gribbin to show cause why he should not be removed from his post as coordinating magistrate given that Mr Fingleton was of the view that his action in supplying an affidavit in Ms Thacker's support was 'disloyal' and manifested 'a clear lack of confidence by you in me as chief magistrate'.

McHugh J and Kirby J found that even apart from her protection and immunity by statute, at her trial her defence was not properly put to the jury by the trial judge. Ms Fingleton's evidence was to the effect that she believed that Mr Gribbin was not loyal to her and that she had 'reasonable cause' to call on him to show why he should continue in his post. As a result the Crown needed to prove that her belief did not amount to a 'reasonable cause' for her to be convicted. It is hard to see given the reference throughout the various High Court judgments to the continuing friction between Fingleton and Gribbin and the affidavit in the Thacker incident why she would not have had reasonable cause to act in that way.

Ali v The Queen (2005) 79 ALJR 662, (2005) 214 ALR 1

Ali v The Queen also deals with matters in Queensland, this time involving allegations of flagrant incompetence of counsel.

The appellant and his partner were charged with a number of offences relating to the death of their child. The appellant was convicted of murder and the mother of manslaughter. The appellant also was convicted of improperly interfering with the corpse and concealing the birth of the child.

On appeal to the Queensland Court of Appeal the appellant claimed that his counsel had been incompetent in a number of ways. Some of these revolved around alleged failures to object to evidence. Another related to a theory or alternative hypothesis consistent with the appellant not being guilty of murder that he said his counsel should have put to the jury.

In the High Court, the chief justice was unimpressed by the suggestion that trial counsel should have referred to a particular theory of the case consistent with the appellant's innocence on the murder charge. His Honour referred to what he had previously said in *R v Birks*: (1990) 19 NSWLR 676 and *TKWJ v The Queen*: (2002) 212 CLR 214 regarding alleged shortcomings of trial advocates.

Birks is well-known to those who practice in New South Wales, in particular for his Honour's often quoted comment: 'Damage control is part of the art of advocacy'.

As regards the argument of incompetence of counsel in *Ali* at [7] Gleeson CJ had this to say:

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> The adversarial system is based upon the general assumption that parties are bound by the conduct of their legal representatives. Furthermore, that conduct, usually, can only be evaluated fairly in the light of knowledge of what is in counsel's brief, a knowledge that ordinarily is unavailable to an appellate court. An appellate court's speculation as to why a particular line was not pursued in cross-examination, or in address, will often be uninformed and fruitless. So it is in the present case. I can think of no good reason why trial counsel should have advanced the hypothesis in question. I can think of a number of good reasons why he might not have done so. Ultimately, however, I simply do not know. The argument that, because the hypothesis was not advanced, the appellant did not have a fair trial is hopeless.

In *Ali* at [25] Hayne J also dealt at some length with the suggestion that certain objections should have been taken by trial counsel. In that regard he was of the view that:

> the question is whether there could be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred.

Keith Chapple SC

McNamara (McGrath) v Consumer Trader and Tenancy Tribunal [2005] 79 ALJR 1789

This case, being an appeal from the New South Wales Court of Appeal, is significant because it concerns the construction of the expression 'statutory body representing the Crown', which is used in a number of NSW Acts, and departs from the reasoning of an earlier High Court decision in which that expression was considered.

The question on the appeal was whether s5(a) of the *Landlord and Tenant (Amendment) Act 1948* (NSW)('the LTA Act'), which provides that the Act does not bind 'the Crown in right of the Commonwealth or of the state', exempted the Roads and Traffic Authority of New South Wales from its operation.

It had been held below that the RTA came within s5(a) by reason of s46(2)(b) of the *Transport Administration Act 1988* (NSW), which provides that the RTA 'is, for the purposes of any Act, a statutory body representing the Crown'.

That conclusion was supported, but not strictly required, by *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376, in which a majority of the court held that the commissioner came within s5(a) of the Landlord and Tenant (Amendment) Act by reason of s4(2) of the *Transport (Division of Functions) Act 1932* (NSW) which provided that 'for the purposes of any Act the commissioner of railways shall be deemed a statutory body representing the Crown'.

However, in this case, a majority of the court held that s46(2)(b) of the Transport Administration Act did not bring the RTA within s5(a) of the Landlord and Tenant (Amendment) Act. McHugh, Gummow and Heydon JJ delivered the leading judgment. Gleeson CJ and Hayne J delivered brief judgments agreeing with them. Callinan J dissented.

McHugh, Gummow and Heydon JJ identified the issue, in broad terms, as whether the application of the Landlord and Tenant (Amendment) Act to the RTA would be, in legal effect, an application of it to the Crown. This depended on a finding that the operation of the LTA Act upon the RTA would result in some impairment of the legal situation of the Crown. Their Honours held that s46(2)(b) of the Transport Administration Act did not lead to such a finding.

In particular, the judgment of the plurality emphasised that the fact that a statutory body is a representative of the Crown is not sufficient to entitle it to the privileges and immunities of the Crown. This view had been proposed by Kitto J as one of the minority in *Wynyard Investments*, and accepted by a majority of the court in *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 79 ALJR 1 at 34-5. Accordingly, s5(a) of the LTA Act would not be invoked merely by establishing that the RTA 'represents' the Crown.

Further, their Honours construed s46(2)(b) of the *Transport Administration Act* to mean that, where a NSW Act uses the expression 'statutory body representing the Crown', this expression encompasses the RTA. An alternative construction, that for the purposes of all NSW Acts, the RTA is a statutory body representing the Crown was rejected.

In both these respects, the plurality departed from the reasoning of the majority in *Wynyard Investments*. Whilst that case, which concerned the construction of s4(2) of the T*ransport (Division of Functions Act) 1932*, did not control the construction of s46(2)(b) of the *Transport Administration Act*, this was not done lightly. In particular, regard was had to:

1. the reluctance of courts, absent clear legislative intent, to extend the immunities and privileges of the Crown to statutory corporations; and
2. the use of the expression 'statutory body representing the Crown' in NSW legislation in a way which did not suggest that reliance had been placed on *Wynyard Investments* in the drafting of that legislation.

In the result, the decision of the NSW Court of Appeal was reversed.

Matthew Darke