Recent criminal cases

Regina v Petroulias 11 March 2005 [2005] NSWCCA 75

This was an appeal from a decision of Sully J to grant a permanent stay of proceedings against the accused Petroulias on a charge of defrauding the Commonwealth under the now repealed provisions of s29D of the *Crimes Act 1914* (Cth). It was alleged that the accused, while an officer of the Australian Taxation Office, put the revenue of the Commonwealth at risk by causing private binding rulings and advance opinions to issue to taxpayers, by dishonest means. The court held unanimously that the decision of Sully J should be set aside. But the majority, comprising Spigelman CJ and Hunt A-JA, reached a different conclusion from Mason P as to how the trial for defrauding the Commonwealth should be conducted.

The charge against the accused was framed in the second 'economic imperilment' category of fraud identified by Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493 (at paragraph 30) and McHugh J in the same decision (at paragraph 73). The revenue of the Commonwealth was put at risk, it was alleged, because the binding (on the Commonwealth) nature of the rulings and opinions prevented the commissioner of taxation from assessing and recovering tax payable if the rulings and opinions were wrong. The rulings related to fringe benefits tax and deductibility.

The majority held that the issue raised was whether 'the commissioner of taxation has an arguable case to put that the rulings were wrong and, accordingly, that the risk to the revenue was such that the Commonwealth was in fact deprived of something of value' (at paragraph 11). According to the majority the resolution of this issue involved, first, a question of law for the trial judge and, second, a question of fact for the jury. The question of law was whether there was a possibility that the commissioner would win a case in which he was allowed to dispute the private rulings. The question of fact was whether the arguments of the commissioner that the rulings were wrong were sufficiently strong to justify the conclusion beyond reasonable doubt that the Commonwealth was in fact deprived of something of value by the issue of the private rulings.

The majority held (at paragraph 19) that it 'would not be appropriate for the trial judge to direct the jury that, depending on the view they have formed of certain factual matters, the Australian Taxation Office *did* lose something of value – or even that the rulings *did* put the revenue of the Commonwealth at risk.' The majority said this might lead to confusion of the jury. The safer course was for the trial judge to define the issue, set out the arguments of both parties on it and invite the jury, if satisfied that the Crown had established that issue, to move on to the next issue. Mason P differed from the majority in this respect, stating (at paragraph 134) that:

> It would be open to the trial judge to inform himself of the state of tax law as it stood when the rulings were issued. If that state of law permitted the commissioner genuinely to advance a tax outcome … otherwise than in the taxpayer-favoured rulings promoted by the respondent, then the judge could so direct the jury. The jury would then be directed that, if the factual elements of the Crown case were established, it would be open for them to find the necessary imperilment of the revenue of the Commonwealth.

R v Studenikin (2004) 147 A Crim R 1; 182 FLR 324

R v Bezan (2004) 147 A Crim R 430

The effect of the repeal of s16G of the *Crimes Act 1914* (Cth) has recently been considered in two decision of the New South Wales Court of Criminal Appeal. Section 16G required a court sentencing a commonwealth offender in a state or territory where sentences were not subject to remission or reduction to take that fact into account and adjust the sentence accordingly. The intent of the provision was to achieve parity between the sentences imposed on commonwealth offenders for like offences where one sentence was subject to remissions and the other was not. Prior to its repeal on 6 January 2003, s16G was interpreted as requiring the courts in New South Wales to provide commonwealth offenders with a discount for the absence of remissions in this state, which, typically, amounted to a one third reduction in sentence: *DPP (Cth) v El Karhani* (1990) 51 A Crim R 123.

In *R v Studenikin* (2004) 147 A Crim R 1 the New South Wales Court of Criminal Appeal considered whether the repeal of s16G should affect the current sentencing range for narcotics offenders. The court held that the repeal of s16G has the effect that the courts of New South Wales, when sentencing commonwealth offenders, can no longer reduce sentences because of the absence of remissions now that the statutory authority in s16G to do so has been withdrawn. Howie J, with whom Newman AJ agreed, stated (at paragraph 62) that:

> it is wrong, in my view, to approach this matter on the basis that it involves a question of whether the courts in this state should increase sentences as a result of the repeal of s16G. The issue is rather whether the courts in this state have the power to continue to apply the discount authorised by s16G after the repeal of that provision. If this issue is stated in this way, the answer is obvious. In the absence of a statutory warrant to do so, a court has no power to reduce a sentence that has been determined by a proper application of the sentencing principles laid down by the statue of the common law to the facts and circumstances of the particular case. It seems to me, with respect, to be a matter of common sense and simple logic, that, if the courts of this state have been reducing the sentences imposed upon federal offenders by reason only of the operation of a specific statutory provision, the courts can no longer reduce sentences in that way once the statutory authority to do so has been withdrawn.

Later in his judgment, Howie J noted (at paragraph 67) that:

> any increase in sentences consequent upon the repeal of s16G is not a result of the courts voluntarily exercising a choice to increase sentences, but rather a result of the fact that the courts no longer have the power or authority to continue discounting them. The resulting increase in the sentences for federal offender[s] that must, in my view, inevitably follow the repeal of s16G is not a result of an intention on the part of the courts or the government to make the punishment for federal offences more effective. It is the result of a different objective being pursued by the government.

In *R v Bezan* (2004) 147 A Crim R 430 the New South Wales Court of Criminal Appeal considered *R v Studenikin* and a number of later decisions that considered the effect of the repeal. Wood CJ at CL, with whom Buddin and Shaw JJ agreed, held that while the repeal of s16G would be likely to result in an increase in the sentencing range compared to that which pertained prior to the repeal, it would be inappropriate merely to adjust the pre-repeal range upwards by a bare mathematical formula. Given that the 'rule of thumb' reduction prior to the repeal was a reduction of the sentence by one third, a bare mathematical increase would be 50 per cent. The court held in *R v Bezan* that an automatic adjustment in the order of a 50 per cent increase would be an inappropriate resort to a 'mathematical approach'.

The court held (at page 434) that the proper approach is 'to set a sentence that meets the requirements of s16A(1) of the Crimes Act [which sets out the substantive matters relevant to sentence, apart from general deterrence], and the relevant objectives of sentencing, without giving a s16G discount.'.

By Christopher O'Donnell

Baker v The Queen (2004) 78 ALJR 1483

In *Baker*, the High Court considered provisions of the *Sentencing Act 1989 (NSW)* that allowed for certain prisoners to apply to the Supreme Court for a re-determination of their life sentences. It is also the most recent case with comment on the expression 'special reasons.'

Baker and his co-accused had been sentenced in the early 1970s to a number of life sentences for horrific crimes committed in the NSW country and southern Queensland. The facts of the cases are notorious and do not bear repeating here.

The appellant was unsuccessful in his application to the New South Wales Supreme Court and on appeal in the Court of Criminal Appeal. The appellant's case had foundered on being unable to demonstrate 'special reasons' for a determination to be made by the court. This provision has been introduced by an amendment to the Sentencing Act which had been directed at the appellant and other indeterminate life sentence prisoners and had been accompanied by the widely reported 'never again be free' comments in parliament.

The court held in *R v Bezan* that an automatic adjustment in the order of a 50 per cent increase would be an inappropriate resort to a 'mathematical approach'.

The Court of Criminal Appeal was of the view that for reasons to be 'special' they '… must be out of the ordinary, unusual and not to be expected.' Rehabilitation simpliciter would not ordinarily be regarded as 'special'.

The High Court dismissed Baker's appeal by majority on a number of grounds. In the main, the expression 'special reasons' was not dealt with at length. However, the chief justice was of the view that there was nothing unusual about a court being required to find special reasons or circumstances. He said at page 1487:

> This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

Re: Attorney-General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 3 of 2002) (2004) 147 A Crim R 456

This case dealt with an application by the attorney general for a guideline judgment with reference to the driving offence known generally as high range prescribed concentration of alcohol ('HRPCA').

The New South Wales Court of Criminal Appeal convened a five-member bench with the chief justice presiding. The judgment details were delivered by Howie J.

The judgment deals at length with the history and legislation governing the offence and the need for a guideline judgment. It would be trite to attempt to summarise such important and socially relevant considerations in passing.

Suffice to say that the court was of the view that this offence was prevalent and extremely serious with a high social and economic impact on the community. It remains a commonly occurring offence despite an extensive media campaign over the years to stress its seriousness and the consequences that flow from it. It also continues to be committed regularly despite the introduction of random breath testing in 1982.

It is also difficult to summarise the details of the guidelines briefly. The following are some of the salient points. At paragraph 146 of the report the court listed the criteria for what can be described as an ordinary case of HRPCA, e.g. the offender was detected a by random breath test, had prior good character, plea of guilty, or little risk of re-offending.

In such a case the court indicated that it will rarely be appropriate for no conviction to be recorded and that a conviction cannot be avoided only because the offender is involved in a driver education course. Further, the automatic disqualification period is appropriate unless there is good reason to reduce it. A good reason may include employment, absence of viable alternative transport or sickness of the offender or another person.

The guideline judgment also dealt with a second or subsequent HRPCA offence and the factors increasing the 'moral culpability' of a HRPCA offender e.g. the degree of intoxication above 0.15, collision with another object.

A combination of repeat offending and an increase in moral culpability required a term of imprisonment of some kind leading to full-time custody.

Subramanian v The Queen (2004) 79 ALJR 116; 211ALR 1

The High Court in *Subramanian* dealt with the procedure at a so-called 'fitness hearing' under the *Mental Health (Criminal Procedure) Act 1990* (NSW).

After a lengthy court history, in November 2001 the NSW attorney general directed that a special hearing be conducted of charges against the appellant under s19 of the Act. For that purpose a special hearing commenced in 2002 before a judge and jury in the District Court.

The High Court in its judgment found that the special hearing had not been conducted in compliance with the Act, in particular s21(4). Those requirements the court said were mandatory and the Act required them to be not just touched upon but explained. Section 21(4) of the Act is in the following terms:

> At the commencement of a special hearing, the court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts.

At page 124 of the report the court has set out a draft direction to be followed by a trial judge allowing for adaptation to the facts of a particular case.

Interestingly enough at p125 of the judgment the court indicated that it was unable to immediately see the purpose behind such a detailed explanation to the jury of the purpose of a special hearing but suggested it may be to reassure the jury regarding the future conduct of the case following their verdict.

By Keith Chapple SC

Recent commercial cases

Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 79 ALJR 129; 214 ALR 644

This case, decided by the High Court on 11 November 2004, was an appeal from the NSW Court of Appeal (Sheller JA, Young CJ in Eq, Bryson J) raising two issues:

(a) first, whether an exclusion clause and/or an indemnity clause contained within the terms and conditions on the back of a signed application for credit formed part of a contract of carriage made between the appellant ('Finemores') and the third respondent ('Thomson'); and

(b) secondly, if so, whether the exclusion clause bound the first respondent ('Alphapharm') on the footing that Thomson entered into the contract of carriage as Alphapharm's agent.

The first of these is referred to as the 'terms of contract issue', the second as the 'agency issue'.

The material facts were as follows. Under a sub-distribution agreement with the second respondent ('Ebos'), Alphapharm was the exclusive distributor of an influenza vaccine ('Fluvirin') in Australia. Ebos arranged for Thomson to look after collection, storage and regulatory approval for the Fluvirin sent to Australia. Thomson proposed to Alphapharm that Alphapharm use Finemores, which Thomson was using to transport the Flurivin from Sydney airport to Finemores' Sydney warehouse, to transport the Fluvirin from the Sydney warehouse to Alphapharm's customers. Alphapharm agreed and left it to Thomson to enter such contractual arrangement with Finemores as was necessary for this.

Having been informed by Thomson of the transport and storage requirements for Fluvirin, on 12 February 1999 Finemores faxed a quotation to Thomson. The covering letter invited Thomson, if it accepted the quotation, to complete Finemores' credit application and sign its freight rate schedule. On 15 February 1999, Thomson informed Alphapharm of its decision to engage Finemores. On 17 February 1999, at Finemores' premises, Thomson's operations manager completed and signed Finemores' credit application and signed the freight rate schedule. Immediately above the place for signing on the credit application appeared the statement 'Please read 'conditions of contract' (overleaf) prior to signing'. Those conditions of contract contained the exclusion and indemnity clauses in question. They were not read by Thomson's operations manager before he signed the credit application.

The relevant clauses of the conditions of contract were clauses 5, 6 and 8. Clause 5 provided:

> 5. The customer warrants that in entering into this contract it does so on its own account as agent for the customer's associates.