

Criminal law developments

R v Thomas [2006] VSCA 165 (18 August 2006)

Jabbour v Thomas [2006] FMCA 1286 (27 August 2006)

After his apprehension at Karachi Airport on 4 January 2003 Joseph Terrence Thomas was detained by the Pakistani authorities until 6 June 2003, when he was released and returned to Australia. Except when interviews were being conducted, Thomas was held in solitary confinement throughout this period of detention. During his detention, in a formal interview conducted by Australian Federal Police on 8 March 2003, Thomas confessed to receiving funds from a terrorist organisation and possessing a falsified Australian passport.

In *R v Thomas* [2006] VSCA 165 the Victorian Court of Appeal held that these confessions were involuntary and had been wrongly admitted into evidence in the trial of Thomas for offences, including receiving funds from a terrorist organisation and possessing a falsified Australian passport. In *Jabbour v Thomas* [2006] FMCA 1286 the Federal Magistrates' Court held that the confessions were admissible in proceedings in which the AFP sought the imposition of an interim control order on Thomas under the Commonwealth's counter-terrorism laws.



Joseph Terrence Thomas aka 'Jihad Jack' led in shackles from Melbourne Supreme Court after being denied bail. Photo: Brett Hartwig / News Image Library

The circumstances of Thomas's custody in Pakistan prior to the AFP interview were critical to the finding by the Victorian Court of Appeal that the confessions were involuntary. The majority of Thomas's account of this custody was accepted by the trial judge as truthful, including the following matters:

- ◆ on 4 January 2003, after presenting his passport and air ticket to Customs at Karachi Airport, Thomas was taken into custody by a number of men dressed in military uniforms who took him, blindfolded and hooded, to what he believed to be a military base;
- ◆ there he was questioned by two Pakistanis and two Americans, to whom, out of fear of being sent to Guantanamo Bay and detained indefinitely, he lied about travelling in Pakistan as a student;
- ◆ later that night he was twice further questioned by men, who included the Americans, and it became clear to Thomas that his account was not being accepted as truthful;
- ◆ later still, he was taken by car, blindfolded and hooded, to a house and kept for about two weeks in a cell 'that he described as 'a dog kennel about the size of a toilet', with open bars and a gate that exposed him to the elements';
- ◆ when questioned at this location Thomas was taken to a room, blindfolded and hooded, and his feet were padlocked to the floor and his hands cuffed behind his back;
- ◆ during the first interview at this location, at which Pakistanis and the Americans were present, Thomas maintained his untruthful account and was threatened with electrocution and execution by the Pakistanis present, and informed that he was not allowed water;
- ◆ he decided to change his approach to the questioning when, after a break in the interview, 'the short Pakistani officer grabbed my hood by the collar and strangled my hood so that I was suffocating and being strangled with my hood and the heat and the stress was unbearable and I felt they were not going to stop until I screamed out and they released me';
- ◆ shortly afterwards, a 'cold-frosted' bottle of water was placed in front of Thomas;
- ◆ some time after returning to his cell, when asked what he wanted, Thomas indicated that he wanted to return home to his family and informed another Pakistani of his intention to co-operate;
- ◆ soon after he was given food and his detention conditions improved;
- ◆ the next day, when interviewed, he gave a truthful and thorough account and was told by his interrogators that they were 'overjoyed' with the information provided;
- ◆ at the end of this two-week period of detention Thomas was flown to Islamabad, again blindfolded, hooded and shackled;
- ◆ on 22 January 2003 Thomas had his first contact with an Australian official, the consular officer Alastair Adams;
- ◆ Adams gave evidence that during a telephone conversation Thomas had at this time with his family, Thomas was told by a Pakistani intelligence official that 'he should not assume that he was not going to Guantanamo Bay';
- ◆ AFP officers interviewed Thomas four times between 25 January and 29 January 2003 in the presence of Pakistani and Australian officials, who emphasised to Thomas that his future was dependent upon the extent of his co-operation;
- ◆ in the second of these interviews Thomas was shown a photograph of his family and in the fourth, a letter from his family;

- ◆ after these interviews Thomas was flown from Islamabad to Lahore, where he was held for three weeks and interviewed daily by Pakistani officials and an American called 'Joe', whom he believed to be from the CIA;
- ◆ during this period Joe threatened that Thomas would be returned to Afghanistan where he would be tortured; and
- ◆ eventually Thomas broke down 'because of what [Joe] was saying, especially about my wife and sending agents to Australia to rape my wife'.

After the Lahore period, Thomas was returned to Islamabad and twice interviewed by AFP officers and ASIO agents. The Victorian Court of Appeal summarised the relevant admissions he made during the formal AFP interview conducted on 8 March 2003 as follows:

In the interview, the applicant admitted that he had altered his passport in order to conceal the amount of time he had spent in Pakistan. He was concerned that questions might be asked about his associations and activities whilst absent from Australia, which included his contact with members of the al Qaeda terrorist organisation and his having been in Afghanistan (more specifically, at the al Faruq camp at which al Qaeda training was conducted). He also stated that the ticket and money had been provided to him by a man named Khaled bin Attash, who was an associate of Osama Bin Laden and a high ranking al Qaeda operative.

It was accepted by the court that the AFP agents who conducted this interview wished to comply with the admissibility requirements set out in Part 1C of the *Crimes Act 1914* (Cth), including the requirement set out in section 23G that Thomas be given access to a legal practitioner. However, the Pakistani authorities refused to allow Thomas such access. Thomas gave evidence on the voir dire in the trial that at the time of this interview he believed it was a 'test' the failure of which would result in his 'indefinite detention'.

The Victorian Court of Appeal, following the well-known decision of Dixon CJ in *McDermott v R* (1948) 76 CLR 501, held that the events leading up to the interview led to Thomas's will being overcome during the interview by the 'hope of advantage' held out to him by both the Australian and Pakistani authorities in the following sense:

The Pakistani officials put explicitly to the applicant the possibility, on the one hand, of returning to his family and, on the other, a very different fate. They made clear that the Australian authorities would only be able to assist him if he could be seen to have co-operated fully. The Australians present did nothing to distance themselves from the position attributed to them. Acquiescence alone would have been sufficient confirmation in the circumstances but the Australian officials went further and, by their remarks, impliedly endorsed what the Pakistanis had said.

For this reason the court held that the admissions made during the interview were not made voluntarily and were inadmissible.

Although the common law rule that confessions must be voluntary has not applied in New South Wales since the introduction of the *Evidence Act 1995*, it is probable that the admissions Thomas made would be inadmissible in this state due to the operation of s84 of

the Evidence Act. This provision prevents confessions from being admitted unless the court is satisfied that they were not influenced by violent, oppressive, inhuman or degrading conduct, or threats of such conduct.

Shortly after the decision of the Victorian Court of Appeal was handed down and he was acquitted, the AFP sought the imposition of an interim control order on Thomas under section 104.4 of the Commonwealth Criminal Code. Mowbray FM held that the AFP interview of Thomas on 8 March 2003, despite being held to be inadmissible against Thomas in the criminal proceedings referred to above, was admissible in the control order proceedings because those proceedings were interlocutory civil proceedings.

Mowbray FM was satisfied of the following matters on the balance of probabilities:

- ◆ an AFP member holding the rank of superintendent or above requested the control order in accordance with sub-section 104.3 of the Criminal Code;
- ◆ the court had received and considered the information put before the court by the AFP;
- ◆ making the order would substantially assist in preventing a terrorist act;
- ◆ Thomas had received training from a listed terrorist organisation; and
- ◆ each of the obligations, prohibitions and restrictions to be imposed on Thomas by the order was reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

The admissions Thomas made during the 8 March 2003 interview were crucial to the decision of Mowbray FM to grant the interim order. During the interview Thomas admitted to receiving training from al Qaeda in 2001. This, it was held, made him an available resource to that organisation, and gave him a capacity to carry out terrorist acts. Mowbray FM found Thomas to be vulnerable, and therefore potentially susceptible to exploitation by extremists. He also found that the training Thomas had received might make him attractive to aspirant extremists, who might seek assistance or guidance from Thomas to achieve their objectives.

The conditions of the order included: a residential condition with a midnight to 5am curfew; thrice-weekly reporting to the Victorian Police; and the provision of fingerprints. They also included prohibitions on:

- ◆ overseas travel;
- ◆ possessing weapons, firearms, ammunition or explosives;
- ◆ engaging in combat activities; and
- ◆ contacting a number of nominated individuals or members of nominated terrorist organisations.

Thomas was also prohibited from using any non-approved telecommunications facilities, including public telephones, except in the case of an emergency.

By Chris O'Donnell

XYZ v Commonwealth (2006) 80 ALJR 1036

The issue raised in this case was whether a law which applies to conduct outside Australia by Australian citizens or residents is within the legislative competence of the Australian Parliament because it is a law for the peace, order and good government of Australia with respect to external affairs.

Section 50BA and s50BC of the *Crimes Act 1914* (Cth) make it an offence for an Australian citizen or a resident, while outside Australia to engage in sexual intercourse with a person under 16 or to commit an act of indecency on a person under 16.

The plaintiff was due to stand trial in the County Court of Victoria on charges under the legislation alleging sexual activity with children in Thailand that had occurred in 2001. Before being arraigned the plaintiff instituted proceedings in the original jurisdiction of the High Court seeking a declaration that ss50BA and 50BC of the *Crimes Act 1914* were not valid laws of the Commonwealth. Under s18 of the *Judiciary Act 1903* a justice stated a case to the full court.

By majority, the High Court found that both sections of the Crimes Act were valid.

The chief justice was of the view that the Australian legislature had the right to regulate the conduct outside Australia of Australian citizens or residents. In this regard he saw the fact that the Australian legislature had confined the relevant Crimes Act provisions to the conduct of Australian citizens and residents as a desire on the part of the Australian Parliament to conform to international expectations and not an attempt to invade the domestic concerns of the country where the alleged conduct occurred. On that point the chief justice referred to Professor Brownlie's comments in *Principles of Public International Law*:

Extra-territorial acts can only lawfully be the object of jurisdiction if certain general principles are observed:

- i. that there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
- ii. that the principles of non-intervention in the domestic or territorial jurisdiction of other states should be observed;
- iii. that the principle based on elements of accommodation, mutuality, and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence.

The chief justice also referred to the plaintiff's argument that the external affairs power only allowed parliament to make laws with respect to relations between Australia and other countries. Finding for the plaintiff would require the High Court to depart from the decision in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501. Such a course was never going to be followed. The chief justice said on that point:

Polyukhovich held that the external affairs power covers, but is not limited to, the matter of Australia's relations with other countries. It also includes a power to make laws with respect to places, persons, matters or things outside the geographical limits of, that is, external to, Australia. That conclusion represents the current doctrine of

the Court on the external affairs power, and should be maintained because it is correct.

In a joint judgment Gummow, Hayne and Crennan JJ were of the view that the Commonwealth correctly submitted that legislative enactments such as ss50BA and s50BC of the *Crimes Act 1914* proscribing activities of the type alleged in this case are supported by the external affairs power.

Kirby J was also part of the majority who found the laws were valid. His Honour considered the arguments by the plaintiff relating to *Polyukhovich* at some length. One of these was that in *Polyukhovich* for the first time a majority of the High Court had endorsed the geographical externality principle and it had been accepted without criticism in other cases. The submission to the court in XYZ was described by his Honour in these terms:

Now, so it was suggested, was the time to pause and reconsider the 'modern doctrine' with the benefit of critical analysis, which the court needed in order to sharpen its federal jurisprudence and to correct a dangerous wrong turning.

The invitation was not accepted by the court.

By Keith Chapple SC

Litigation funding

Campbell's Cash & Carry v Fostif (2006) 229 ALR 58

The High Court's decision in *Campbell's Cash & Carry v Fostif* (Fostif) has made the position of a litigation funder at least a little clearer. It has made some kinds of representative proceedings in the Supreme Court a little less clear.

Litigation funding and abuse of process

Firmstone & Feil (Firmstones) attempted to arrange and fund representative proceedings on behalf of several thousand tobacco retailers who appeared to have a claim against tobacco wholesalers. The claim was for money had and received for a licence fee that was later held unconstitutional.

The defendants argued that this was an abuse of process. They complained that Firmstones:

- ◆ sought out potential plaintiffs;
- ◆ insisted on a high level of control over the proceedings; and
- ◆ hoped and expected to make a substantial profit from the litigation (being one third of any amount recovered on the principal claims plus any costs award).

Gummow, Hayne and Crennan JJ disagreed, albeit *obiter*: 'none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.' Gleeson CJ agreed with their Honours, and Kirby J published separate reasons coming to the same conclusion. (Gleeson CJ and Kirby J were in the minority on the outcome of the case.)

Their Honours did not say that litigation funding poses no risk to the court's process. Rather, in their view, any risks are adequately addressed through the court's general control over its process and