Andrew Yuile's High Court Judgments

Andrew Yuile is a Victorian barrister, telephone (03) 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at *www.austlii.edu.au*.

OCTOBER

CRIMINAL LAW

Trafficking drugs – admissibility of evidence – probative value – tendency

R v Falzon [2018] HCA 29 (orders 19 April 2018; reasons 8 August 2018) concerned the admissibility of evidence on grounds of relevance and tendency. The respondent was charged with cultivating a commercial quantity of narcotics and trafficking. In executing search warrants on several properties, the police found drugs, drug paraphernalia and $120 800 in cash. The Crown alleged that the trafficking was constituted by the possession of drugs at the properties for the purpose of sale. The respondent argued that the cash should not be admitted as evidence, because it had no probative value or its prejudicial effect outweighed any probative value. The trial judge ruled the cash admissible and it was led as showing that the respondent was running a business in cultivating drugs for sale. The Court of Appeal allowed an appeal, finding that the Crown case was that the drugs were for future business or sales, not that the respondent was running a business. The cash was relevant only to the business aspect. The majority also found that the evidence was inadmissible propensity or tendency evidence. The High Court said that where a person is charged with possession of drugs with intent to sell those drugs, proof that the person was engaged in a business of selling drugs at the time of possession is logically probative of the fact that the accused possessed the drugs to sell them. It is circumstantial evidence that, with the possession and other evidence, could found an inference that the accused had a prior and ongoing drug business, and that the drugs found were for the purpose of sale through that business. The cash was not rendered inadmissible because it tended to show past offences of trafficking. The cash also had high probative value and the trial judge was correct to hold that that value outweighed any prejudicial effect. The Court lastly criticised the majority in the Court of Appeal for failing to follow, and wrongly distinguishing, a number of intermediate appellate authorities supporting the trial judge's decision. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

Re-sentencing – procedural fairness – departure from facts found

DL v The Queen [2018] HCA 32 (8 August 2018) concerned procedural fairness owed by a Court conducting resentencing on appeal. DL was convicted of the murder of TB. TB had suffered 48 stab wounds, including to her head, face, chest and back. She was 15 and DL was 16 at the time of the offence. DL declined to be interviewed by police, but in interviews with psychiatrists, he denied involvement or claimed not to remember. At trial, no defence of mental illness or impairment by abnormality of mind was run. At sentencing, both the prosecution and the defence adduced psychiatric evidence. The primary judge found that it was probable the appellant was acting "under the influence of some psychosis" at the time of the offence. His Honour found that the evidence did not establish premeditation or intention to kill. DL was sentenced to 22 years' imprisonment with a non-parole period of 17 years. On appeal, DL argued and the Crown conceded that the primary judge had erred by giving primary significance to the standard non-parole period in determining the appropriate sentence (so-called *Muldrock* error). That enlivened the Court of Appeal's power to re-sentence DL. At the hearing of the appeal, neither party challenged the factual findings of the primary judge. However, taking into account evidence of the period since sentencing, a majority of the Court of Appeal rejected the primary judge's findings on mental state and found that there was intention to kill or some degree of premeditation. On that basis, there was no reason to depart from the primary judge's sentence. The High Court noted that the Court of Appeal had power to exercise an independent sentencing discretion, based on material before the sentencing judge, unchallenged factual findings, and evidence of relevant post-sentencing conduct. The High Court held that where the prosecutor makes a concession – here that the primary judge's factual findings were not challenged – and the sentencing judge (or Court of Appeal) is minded not to accept that concession, the failure to put the offender on notice of that and to allow them to respond by evidence or submissions will ordinarily amount to a miscarriage of justice. In this case, it could not be said that the failure to put the offender on notice would not have made any difference. It followed that there had been a miscarriage of justice and the matter had to be remitted for reconsideration by the Court of Appeal. Bell, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Criminal Appeal (NSW) allowed.

ADMINISTRATIVE LAW – APPELLATE REVIEW

Migration – unreasonableness – proper standard of review on appeal

In *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (8 August 2018) the High Court considered unreasonableness in a Tribunal's decision to dismiss a case for non-appearance and considered the role of a court on appeal from the decision of a lower court. The respondent and his wife had applied for protection visas, which were refused by a delegate of the Minister. The respondents sought review before the Refugee Review Tribunal (RRT). The respondents were invited to a hearing before the RRT, but did not appear. Section 426A(1) of the *Migration Act 1958* (Cth) allowed the RRT to adjourn the hearing or to make a decision on the review without waiting if the applicant failed to attend. The RRT affirmed the decision under review. On judicial review, the Federal Circuit Court held that the RRT's decision to proceed was legally unreasonable because it was not necessarily clear that the respondents were aware of the hearing and there were other steps the RRT could have taken to alert them to the hearing before proceeding. The Full Federal Court upheld this decision. Importantly, the Full Court held that the Minister was required to demonstrate appealable error of fact or law akin to that required in appeals from discretionary judgments (that is, on the principles from *House v The King* (1936) 55 CLR 499). The Full Court held this had not been done. The High Court unanimously allowed the Minister's appeal. An appeal from the Federal Circuit Court to the Federal Court is an appeal by way of rehearing (as opposed to an appeal in the strict sense). In such an appeal concerning whether an administrative decision by the RRT was legally unreasonable, principles from *House v The King* had no application. The Full Court was required to examine the administrative decision of the RRT and to determine for itself whether the primary judge was correct to conclude that the decision was unreasonable. In this case, the Act contemplated that the RRT could take the course that it did. The Act deemed that the respondents had received the invitation to the hearing. The respondents had not attended an earlier interview with the delegate, and there was no explanation for the failure to appear before the RRT. There was nothing to suggest taking further steps would have made any difference. The RRT was entitled to proceed, and there was no indication of unreasonableness from the reasons given by the RRT for proceeding to its decision. Nettle and Gordon JJ; Kiefel CJ, Gageler J and Edelman J each separately concurring. Appeal from the Full Federal Court allowed.

→

ADMINISTRATIVE LAW

Migration – jurisdictional error – multiple bases for decision – materiality

In *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 (15 August 2018) the High Court held that there was no jurisdictional error in a decision of the Administrative Appeals Tribunal (AAT) notwithstanding that the AAT had erred considering one visa criterion, because the AAT had correctly found that the appellant did not meet another, independent visa criterion. The appellant applied for a Partner visa. To be granted the visa, the appellant had to show, relevantly, that the application had been made within 28 of his ceasing to hold another visa "unless the Minister was satisfied exceptional circumstances existed". He also had to show that he did not have a debt to the Commonwealth. The AAT was not satisfied either criterion had been met. In the Federal Circuit Court, the Minister conceded that the AAT had erred by considering the exceptional circumstances criterion as at the date of the visa application, not the date of the AAT decision. However, the Minister contended that the decision should not be set aside because the finding as to the debt to the Commonwealth was correct. The Court rejected that argument, finding that the error in respect of exceptional circumstances was jurisdictional and the AAT's decision was therefore invalid. The Full Federal Court on appeal held that the error was jurisdictional, but that the AAT still retained authority to make the decision on the other criterion. The High Court held that to describe an error as jurisdictional refers not only to the existence of error, but also to the gravity of that error. The extent of non-compliance required to make out jurisdictional error will turn on the construction of the statute. The question is whether, on the proper construction, the error is of a magnitude that takes the decision outside the jurisdiction conferred. Statutes are "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance". That threshold "would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made". In this case, the AAT's error could have made no difference, because the AAT was correctly satisfied that the second, independent criterion, about the debt to the Commonwealth, was not met. The error was therefore not material and not jurisdictional. Kiefel CJ, Gageler and Keane JJ jointly; Nettle J and Edelman J separately concurring. Appeal from the Full Federal Court dismissed.

Migration – jurisdictional error – multiple bases for decision – materiality

Shrestha v Minister for Immigration and Border Protection; Ghimire v Minister for Immigration and Border Protection; Acharya v Minister for Immigration and Border Protection [2018] HCA 35 (15 August 2018) was heard concurrently with Hossain (above) and concerned similar legal principles about jurisdictional error and materiality. In these cases, the appellants had been granted student visas. A requirement of the visa grant was that the students were "eligible higher degree students", which in turn required that the visa applicants be enrolled in a relevant preliminary course of study. The appellants' visas were cancelled because a circumstance necessary to the grant of the visa was no longer met. Although the appellants had been enrolled in the required preliminary courses of study when granted the visas, they were no longer so enrolled. The AAT affirmed the decisions to cancel the visas in each case. The Full Federal Court held that the word "circumstance" referred to a factual state of affairs, rather than a legal characterisation of a state of affairs. The AAT had erred by focussing on whether the appellants satisfied the definition of "eligible higher degree students", rather than on whether the prerequisite of enrolment in the relevant course was satisfied. However, the Full Court refused to set aside the AAT's decision because the error could have made no difference. The High Court dismissed the appeal because, following the principles from *Hossain*, even if the AAT had made the error alleged, that error could have no impact on the decisions. At most, the error meant that the AAT asked a superfluous question. The AAT's factual findings, reasoning and exercise of discretion were not impacted. Any error was not material and not jurisdictional. Kiefel CJ, Gageler and Keane JJ jointly; Nettle and Edelman JJ separately concurring and holding that there was no error in the AAT's approach. Appeal from the Full Federal Court dismissed.

TAXATION LAW

Franked distributions – franking credits – Supreme Court directions to Trustee

Federal Commissioner of Taxation v Martin Thomas; Federal Commissioner of Taxation v Martin Andrew Pty Ltd; Federal Commissioner of Taxation v Martin Nominees Pty Ltd; Federal Commissioner of Taxation v Martin Thomas [2018] HCA 31 (8 August 2018) concerned the extent to which directions given by the Supreme Court of Queensland could determine conclusively the application of Div 207 of Part 3-6 of the *Income Tax Assessment Act 1997* (Cth). The Trustee of the Thomas Investment Trust received franked distributions within the meaning of Div 207. The Trustee passed two resolutions, which sought to distribute, or stream, the franking credits between beneficiaries of the Trust separately from, and in different proportions to, the income comprising the franked distributions. The assumption underpinning the resolutions was that franking credits and income from franked distributions could be distributed in this way – the "Bifurcation Assumption". Income tax returns were prepared and lodged on the basis that the Bifurcation Assumption was legally valid. The Trustee later sought and received from the Supreme Court of Queensland a direction under *Trusts Act 197*3 (Qld) that the resolutions could give, and had given, effect to the Bifurcation Assumption. The Commissioner conducted an audit and issued Amended Notices of Assessment. Appeals from those assessments were lodged on the basis that the direction conclusively determined the rights between the parties, even if it was wrong in law. The primary judge dismissed the appeals, holding that the Bifurcation Assumption was flawed in law and that the directions did not conclusively determine the parties' rights. On appeal, the Full Court held that the Bifurcation Assumption was flawed, but held that the directions "conclusively determined the beneficiaries' respective shares of the Trust's net income". The Full Court's conclusion depended on High Court's decision in *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxes* (SA) (1939) 62 CLR 545. Before the High Court, it was conceded that the Bifurcation Assumption was legally ineffective. The High Court unanimously held that the Full Court was wrong to follow Executor Trustee and to find that the direction was conclusive. The High Court also rejected alternative arguments raised in Notices of Contention by the respondents. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring. Two appeals from the Full Federal Court allowed, one in part; two appeals dismissed.

PROBATE

Interest in a will – procedural fairness – new trial

In *Nobarani v Mariconte* [2018] HCA 36 (15 August 2018) the High Court held that the appellant had an interest in a will under contest and had been denied procedural fairness because of the circumstances surrounding the hearing of a claim for probate. The appellant, who was unrepresented, claimed an interest in challenging a handwritten will. He filed two caveats against a grant of probate without notice to him. The respondent brought proceedings for the caveats to cease. The respondent also sought probate of the will and filed a statement of claim. The appellant was not named as a party in the probate proceedings. The probate claim was listed for hearing on 20 and 21 May 2015. At a directions hearing on 23 April 2015, the appellant was told by a judge that the trial would be limited to the caveat issue. Until that point, he had not been the subject of any orders to file evidence or take steps towards a trial of the probate claim. On 14 May 2015, the trial judge held a directions hearing at which he told the appellant that the trial would be of the claim for probate, and also instructed the appellant to file a defence and any evidence on which he wished to rely for the probate claim by 18 May 2015. The trial judge was not told, at that time, that the appellant was not a party to the proceedings or that his evidence to that point was limited to the caveat issue. On 20 May 2015, the appellant was joined. His applications for adjournments were refused. On 22 May 2015 the trial judge gave judgment orally, granting probate and ordering the appellant to pay the respondent's costs. A majority of the Court of Appeal dismissed an appeal. Ward JA held that, although there had been a denial of procedural fairness, there was no possibility that the outcome would have been any different. Emmett AJA held that the appellant did not have an interest in challenging the 2013 Will. The appellant sought to have the Court of Appeal's decision overturned and a new trial ordered. A new trial could only be ordered if there had been a denial of procedural fairness and "some substantial wrong or miscarriage" had resulted. The High Court held that a denial of procedural fairness would cause a substantial wrong if it "deprived the affected person of the possibility of a successful outcome". The High Court held that the appellant had an interest in challenging the will, and that he had been denied the possibility of a successful outcome by a denial of procedural fairness. That followed from the consequences, and effect on the appellant, of altering the hearing, at short notice, from a hearing of the caveat motion to a trial of the claim for probate. The High Court ordered a new trial. Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (NSW) allowed.

→