

MALONEY v. THE QUEEN (B57/2012)

Court appealed from: Court of Appeal of the Supreme Court of Queensland
[2012] QCA 105

Date of judgment: 20 April 2012

Date of grant of special leave: 5 October 2012

The appellant, Joan Maloney, is an Aboriginal woman who resides on Palm Island. On 31 May 2008 the appellant was charged with an offence under s 168B(1) of the *Liquor Act 1992* (Qld) (“the Liquor Act”), namely, having in her possession a 1125 ml bottle of Jim Beam bourbon and a 1125 ml bottle of Bundaberg rum (three-quarters full) in a public place on Palm Island within a restricted area declared under s 173H of the Liquor Act. As at 31 May 2008 section 168B(1) of the Liquor Act provided: “(1) A person must not, in a public place in a restricted area to which this section applies because of a declaration under section 173H, have in possession more than the prescribed quantity of a type of liquor for the area, other than under the authority of a restricted area permit.” Section 168B(1) in combination with ss 37A and 37B of the *Liquor Regulation 2002* (Qld) and schedule 1R thereof (“the Liquor Regulation”) prohibit the possession of more than a certain quantity of liquor by any person while in a public place or the canteen on Palm Island.

The appellant was convicted and she appealed her conviction to the Townsville District Court. She contended that the relevant Queensland legislation was not applicable because it was invalid pursuant to the operation of s 10 of the *Racial Discrimination Act 1975* (Cth) (“the RDA”) and s 109 of the *Constitution*. Section 10(1) of the RDA relevantly provides:

“If, by reason of, or of a provision of, a law ... of a State ..., persons of a particular race, ... do not enjoy a right that is enjoyed by persons of another race, ... or enjoy a right to a more limited extent than persons of another race, ... then, notwithstanding anything in that law, persons of the first-mentioned race, ... shall, by force of this section, enjoy that right to the same extent as persons of that other race...”

The District Court dismissed her appeal with costs.

The Court of Appeal held by majority (Chesterman JA and Daubney J) that s 10 of the RDA was not engaged. McMurdo P, dissenting, held that the appellant’s enjoyment of rights to equal treatment before the law and of access to a service intended for use by the general public, namely the Palm Island licensed canteen were compromised by the provisions of the Liquor Act and Liquor Regulation. The Court held unanimously that the impugned provisions of the Liquor Act and Liquor Regulation were a special measure within the meaning of s 8 of the RDA even if under s 10 of the RDA they were racially discriminatory.

The grounds of appeal include:

- The Court erred in failing to find that Schedule 1R of the Liquor Regulation was inconsistent with s10 of the RDA and therefore invalid by reason of s 109 of the Constitution.
- A majority of the Court (Chesterman JA and Daubney J) erred in failing to find that the Liquor Restrictions contravened the appellant's rights under Articles 5(a) and 5(f) of the United Nations *Convention on the Elimination of All Forms of Racial Discrimination* namely:
 - The right to equality before the tribunals and organs administering justice (Article 5(a));
 - The right to access to goods and services (Article 5(f)),

and, by reason of such contraventions, offended s 10 of the RDA and were invalid unless they were "*special measures*" within the meaning of s 10 of the RDA.

The respondent seeks to rely on a notice of contention. The respondent contends that the decision of the Court below should be affirmed on the ground that: "The Court of Appeal should have concluded that schedule 1R of the Liquor Regulation was not a law to which s 10 of the RDA applies because it did not, by its operation in conjunction with s 168B(1) of the Liquor Act have the effect that persons of a particular race, colour or national of [*sic*] ethnic origin did not enjoy a right that is enjoyed by persons of another race colour or national of [*sic*] ethnic origin, nor have the effect that any such persons enjoy any such rights to lesser extent than the said persons."

The appellant has issued notices pursuant to section 78B of the *Judiciary Act* and the Attorney-General of the Commonwealth of Australia and the Attorneys-General for the States of South Australia and Western Australia are intervening. The Australian Human Rights Commission and the National Congress of Australia's First Peoples Limited are seeking leave to intervene.