SHORT PARTICULARS OF CASES
APPEALS

CANBERRA

JUNE 2018

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THE QUEEN v DENNIS BAUER (A PSEUDONYM) (NO 2) (M1/2018)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2017] VSCA 176

Date of judgment: 30 June 2017

Special leave granted: 15 December 2017

In this appeal the appellant (the Crown) seeks to reinstate the jury conviction of the respondent of 18 sexual offences against the complainant ("RC"), for which he was sentenced by the trial judge to a total effective sentence of 9 years 7 months' imprisonment with a non-parole period of 7 years. The prosecution case involved a course of sexual offending committed by the respondent against RC over a period of 11 years from 1988 to 1998. During this period RC was aged between 4 and 15 years and the respondent was aged between 42 and 53 years. RC was the foster child of the respondent and his then wife. She and her younger sister had lived with the respondent and his wife since RC was 2 years old.

The respondent has been through 9 trials since 2011 and has spent more than 900 days in custody. He was twice convicted of serious charges relating to RC, both overturned after successful appeals. The respondent's first trial, in 2013, was conducted on a joint indictment alleging sexual offending against five separate complainants. On appeal, proceedings involving two of the complainants were, in effect, permanently stayed, and a retrial was ordered on charges relating to the other three complainants. In a series of 8 re-trials however, guilty verdicts were returned only with respect to the charges relating to RC.

The Court of Appeal allowed the appellant's appeal on four grounds. The first related to the trial judge's permitting the prosecution to tender a recording of the evidence of the complainant given in the original trial rather than calling her to give evidence in person at the re-trial. The prosecutor had conveyed to the trial judge that the complainant had a "strong preference" not to give evidence at the re-trial. Those instructions were not put in issue by defence counsel or the trial judge, although defence counsel objected to the reliance on the recording. The recording of RC's original evidence was rendered admissible at the re-trial by virtue of s 379 of the *Criminal Procedure Act* 2009 (Vic) (the Act) which is subject to s 381(1)(c) of that Act which sets out the governing test for the admission of a recording, including the "availability or willingness of the complainant to give further evidence". The CA concluded that "a 'preference' not to give evidence is not unwillingness to do so" and allowed the appeal on that basis.

The second ground was also allowed by the Court of Appeal on the basis that the trial judge had erred by admitting tendency evidence at the re-trial, namely that the respondent had a tendency "to have a sexual interest in his foster daughter [RC] and a willingness to act on that sexual interest …". The issue is whether tendency evidence may be said to possess significant probative value when its source is a single complainant.

As to the third and fourth grounds, the Court held that a substantial miscarriage of justice had been occasioned by the trial judge's failing to order a severance of charge 2 on the indictment, as the only evidence called in support of that charge

flowed from another witness and not from the complainant. The Court also held that a substantial miscarriage of justice had been occasioned by the trial judge admitting a previous statement of complaint (made by RC to another person) as evidence at the re-trial.

The Crown appealed to the High Court. The grounds of appeal are:

- That the Court of Appeal erred in holding the trial judge erred in permitting the previously recorded evidence of the complainant to be tendered as evidence at the re-trial;

- That the Court of Appeal erred in holding that a substantial miscarriage of justice had been occasioned by the admission of tendency evidence at the re-trial;

- That the Court of Appeal erred in holding that a substantial miscarriage of justice had been occasioned by the trial judge failing to order severance in respect of charge 2 on the indictment and by the trial judge admitting a previous statement of complaint (made by the complainant to another) as evidence at the re-trial.

The respondent has cross-appealed on the ground that, upon allowing the appeal, the Court erred in ordering a new trial, in lieu of entering judgments of acquittal.

HFM043 v THE REPUBLIC OF NAURU (M146/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 76

Date of judgment: 22 September 2017

The appellant was born in Myanmar in 1980. She is a Sunni Muslim of Rohingya ethnicity, who left Myanmar for reasons of asylum when she was 11 years old. She did not hold citizenship in Myanmar. She thereafter lived in Thailand where she married a Rohingya man and they had four children. After living in Thailand for 6 years she moved to Malaysia where she worked. She did not take the children with her, although she visited them. Her husband died when her eldest child was about 10 years old and she never went back to Thailand. She kept in contact with her children but lost touch by early 2015. The appellant decided to save some money so that she could go to Australia. She left Malaysia for Indonesia in December 2012 and arrived in Australia in September 2013 and was later transferred to Nauru.

In January 2014 the appellant made an application for refugee status determination under the *Refugees Convention Act* 2012 (Nr) ("the Act").

The Secretary of the Nauru Department of Justice and Border Control refused the application in September 2014. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal. In March 2015 the Tribunal found that the appellant was a Rohingya born in Myanmar but was "stateless". The Tribunal found that Thailand and Malaysia were countries of "former habitual residence" and that her claim should be assessed against both countries. Having done so, the Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

The appellant then appealed to the Supreme Court of Nauru in April 2015. The hearing took place before Judge Khan in March 2016 and the decision was reserved. In April 2016 the appellant married Mr B, who had been recognised as a refugee under Part 2 of the Act. In August 2016 the appellant was granted derivative status pursuant to s 5 of the Act, by way of a "Refugee Determination Record". On 23 December 2016, the *Refugees Convention (Derivative Status and other measures) Amendment Act 2017* (Nr) came into effect, including the introduction of s 31(5) which was deemed to operate retrospectively from 21 May 2014. That section provides: "*An application made by a person under section 31(1)(a) that has not been determined at the time the person is given a Refugee Determination Record, is taken to have been validly determined at that time*."

Judge Khan delivered judgment in the appeal in June 2017. The appeal succeeded on the second of the three grounds of appeal, namely that the Tribunal had failed to take into account the appellant's mental health problem. In its decision the Tribunal had noted that during the information session, which the Tribunal conducted before the [appellant's] hearing, she was unable to participate as she cried uncontrollably throughout and that her affect at the hearing was "very depressed". In the decision the Tribunal further noted "*Although no formal evidence was provided to the Tribunal, it accepts that the applicant has mental health issues and has taken this into account when assessing her claim*." Judge Khan held that given that the matter of her mental health was raised by the

appellant in her Statutory Declaration made for the purposes of her claim for refugee status and in light of the Tribunal's own observations of the appellant "*it should have adjourned the hearing and asked the appellant to obtain a full medical report so that it could adequately deal with the review process. The Tribunal failed to do so and therefore it fell into error*."

Judge Khan accordingly adjourned the hearing of the appeal and ordered both parties to file further submissions as to the orders he should make. In its submissions the respondent submitted that the matter should not be remitted to the Tribunal (on the issue of the mental health issues being properly investigated and taken into account) when the appellant had been separately granted derivative status. The appellant submitted that it would be valuable for her to gain independent, individual refugee status and not simply be reliant on the derivative status gained from her husband's status, the legal treatment of which could be subject to change. Judgment was delivered in September 2017 dismissing the appeal on the basis that the Tribunal would now be unable to reconsider the matter and therefore that an order remitting the matter to the Tribunal would be futile.

The appellant appealed to the High Court, invoking its jurisdiction to hear and determine appeals from the Supreme Court of Nauru by virtue of s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) and Article 1A(b)(i) of the Agreement between the Governments of Australia and Nauru Relating to Appeals to the High Court of Australia.
The grounds of appeal, should the appellant be granted leave to amend them as she has sought, will be:

- That the Supreme Court of Nauru erred by exercising its discretion not to remit the matter to the Refugee Status Review Tribunal in circumstances where it found jurisdictional error, on the basis that remittal would be futile because the same Tribunal would be unable to consider the matter by the operation of s 31(5) of the *Refugees Convention Act* 2012 (Nr) as amended;

- That the Supreme Court of Nauru erred by failing to find that the Refugee Status Review Tribunal failed to act according to the principles of natural justice. In circumstances where the Secretary of the Department of Justice and Border Control found that Burma (Myanmar) was the appellant's 'place of originand country of reference', natural justice required the Tribunal to inform the appellant that the question of whether Burma (Myanmar) was one of the appellant's countries of former habitual residence was an issue in relation to the review.

The respondent has sought leave to file a Notice of Contention that the judgement of the Supreme Court at first instance should be upheld on an additional or different ground to that held below, including on the ground that:

- The Supreme Court erred in concluding that the failure of the Tribunal to adjourn its hearing and ask the appellant to obtain a full medical report, so that it could adequately deal with the review process, was an error of law.

ETA067 v THE REPUBLIC OF NAURU (M167/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 99

Date of judgment: 13 November 2017

The appellant is a citizen of Bangladesh. He is 31 years old and unmarried. His ethnicity is Bengali and his religion is Islam. He arrived in Australia in December 2013 as an unauthorised maritime arrival and then transferred to Nauru.

In March 2014 the appellant applied for refugee status determination under the *Refugees Convention Act 2012* (Nr), claiming that he had a well-founded fear of persecution upon return to Bangladesh for reason of an imputed political opinion. The Secretary of the Nauru Department of Justice and Border Control refused the application in March 2015. The appellant made an application for merits review of that decision to the Refugee Status Review Tribunal.

The appellant's evidence before the Tribunal was that he joined the Bangladesh Nationalist Party ("BNP") in 2004 and became one of its local Publications Secretaries. He was thereafter physically harmed in the many violent clashes which occurred between the BNP and the opposing Awami League ("AL") when those political parties had organised public meetings on the same day and place. He said he ended his involvement with the BNP in 2008 and from then on, was pressured by the AL to join them, they believing he was an influential former member of the BNP. The appellant was afraid that he would be harmed if he continued to refuse to join the AL. He claimed that in 2010 he saw the AWL beat his friend R, whom they had been trying to recruit for a long time but who continually refused to join them. The beating occurred on the street, before a crowd of people. He described the pressure from the AL upon him gradually increasing, particularly in the lead up to the 2014 elections. He claimed he fled the country before the escalation reached the stage he knew would be violent physical assault and possible death.

In September 2015 the Tribunal affirmed the decision of the Secretary that the appellant was not recognised as a refugee and was not owed complementary protection under the Act.

The Tribunal found the appellant had not suffered harm in the past amounting to persecution for reasons of his imputed political opinion, nor did it accept that there was a real possibility that the appellant would face harm in the reasonably foreseeable future. Even if some harm might befall the appellant, any risk of that harm was confined to the locality of the appellant's own suburb of Dhaka, from which the appellant could safely relocate. This was because the Tribunal reasoned that the appellant had no profile within the BNP (he being "merely" a supporter and not ever a formal member of the BNP) and therefore could safely relocate to another part of Dhaka.

The appellant unsuccessfully appealed to the Supreme Court of Nauru in November 2017. Judge Khan dismissed the first ground of the appeal that the Tribunal erred by failing to deal with the evidence of beatings of people for their resistance to joining the AL, particularly the appellant's friend R. Judge Khan found it unnecessary to consider the second ground (that the Tribunal had failed to accord the appellant natural justice by not giving him the opportunity to be

heard on the issues it found relevant to the question relocation) given his dismissal of the first ground of appeal. The respondent had submitted, and the appellant had conceded, that to succeed in the appeal the appellant had to succeed on both grounds.

The appellant appealed to the High Court, invoking its jurisdiction to hear and determine appeals from the Supreme Court of Nauru by virtue of s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) and Article 1A(b)(i) of the Agreement between the Governments of Australia and Nauru Relating to Appeals to the High Court of Australia.

The grounds of appeal are:

- That the Supreme Court of Nauru erred in failing to find the Refugee Status Review Tribunal breached s 22(b) of the *Refugees Convention Act 2012* (Nr) in that it ignored and failed to assess relevant evidence provided by the appellant;

- That the Supreme Court of Nauru erred in failing to find the Refugee Status Review Tribunal breached s 22(b) and s 40(1) of the Act in not acting according to the principles of natural justice.

WET 052 v THE REPUBLIC OF NAURU (S267/2017)

Court appealed from: Supreme Court of Nauru
[2017] NRSC 96

Date of judgment: 6 November 2017

The appellant is a citizen of Iran who fled from that country in June 2013. He travelled to Indonesia on a tourist visa and then (without an Australian visa) to Christmas Island, from where he was transferred to Nauru.

The appellant first gave information about his reasons for leaving Iran during an interview conducted by a Nauruan officer in February 2014 ("the transfer interview").

In May 2014 the appellant applied for a determination that he was a refugee, claiming that he feared persecution, assault and death in Iran. Those fears were on account of both his father and the Iranian authorities. The appellant gave further details of his claim for refugee status when interviewed in July 2014 as part of the assessment process ("the RSD interview"). The appellant claimed that his father had for many years physically abused him and had forced him to transport drugs in quantities that would see him face the death penalty if he were caught. In 2013 his father attacked him with a knife and threatened to kill him. The appellant also feared that he may be viewed in Iran as having contravened Sharia Law and as being politically opposed to the government, the latter partly on account of his having applied for asylum in a Western country. On 28 September 2015 the Secretary of the Nauruan Department of Justice and Border Control ("the Secretary") determined that the appellant was not recognised as a refugee under the *Refugees Convention Act* 2012 (Nauru), nor was he owed complementary protection by Nauru under the Refugees Convention.

The appellant applied for a review of the decision of the Secretary by the Refugee Status Review Tribunal ("the Tribunal"). Before the Tribunal, the appellant made the additional claim that he feared being jailed or even executed in Iran on account of his Christian faith, he having converted to Christianity from Shia Islam while in Nauru. On 1 February 2016 the Tribunal affirmed the Secretary's decision. The Tribunal did not accept the appellant's claims in relation to his father being a drug dealer who had forced him to transport drugs. In addition to discrepancies in certain statements made by the appellant during the RSD interview and at the Tribunal hearing, the Tribunal found it adverse to the appellant's credibility that he did not mention his father's drug dealing during the transfer interview. The Tribunal also found that the appellant's conversion to Christianity was not genuine and that it was likely done to bolster his claim for refugee status. The Tribunal was not satisfied that the appellant would face persecution in Iran due to his having sought asylum in the West, nor was it satisfied that the appellant would be at risk of harm from his father.

An appeal by the appellant to the Supreme Court of Nauru was dismissed by Judge Khan. His Honour held that the Tribunal had not acted unreasonably in rejecting the appellant's claims in relation to either his Christianity or his father. Judge Khan held that the Tribunal had properly considered relevant considerations and that it had given the appellant procedural fairness in relation to both his claimed conversion to Christianity and his credibility in general.

On 20 November 2017 the appellant appealed to the High Court, invoking its jurisdiction to hear and determine appeals from the Supreme Court of Nauru by virtue of s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) and Article 1A(b)(i) of an agreement between the governments of Australia and Nauru relating to such appeals that was signed on 6 September 1976.

The grounds of appeal, should the appellant be granted leave to amend them as he has sought, will be:

- The Tribunal's adverse and determinative credibility finding, that certain claims for protection concerning drug trafficking were untrue because they had not been mentioned at the transfer interview, was without logical and probative foundation or was legally unreasonable;

- The Tribunal erred by failing to consider an integer of the appellant's claims to protection and/or to consider his claims cumulatively, namely,

    a) that he had a political profile which would lead him to be at particular risk as a failed asylum seeker from the West; or

    b) that he was at risk as a failed asylum seeker per se.