

SHORT PARTICULARS OF CASES
APPEALS

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GOOGLE LLC v DEFTEROS (M86/2021)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2021] VSCA 167

Date of judgment: 17 June 2021

Special leave granted: 10 December 2021

In 2016, the respondent commenced a defamation proceeding against the appellant, Google LLC, in the Supreme Court of Victoria. The respondent alleged that the appellant published material (“the Web Matter”) that was defamatory to him. The respondent commenced another defamation proceeding in 2017 which was heard with the Web Matter in the Supreme Court and in the Court of Appeal, however, the 2017 proceeding is not the subject of any High Court appeal.

On 6 May 2020, the primary judge made orders giving judgment for the respondent in the sum of \$40,000 in relation to the Web Matter. The primary judge found that the Web Matter conveyed the defamatory imputation that the respondent had crossed the line from professional lawyer for, to confidant and friend of, criminal elements. A defence of statutory qualified privilege was made out in relation to a substantial proportion of the (up to 150) people to whom it was published, but it was not established in relation to a smaller number of those people. Other defences pleaded by the appellant were not made out.

The appellant sought leave to appeal to the Victorian Court of Appeal, and the respondent sought leave to cross-appeal. Leave to appeal was granted by the Court of Appeal, but the appeal was dismissed and leave to cross-appeal was refused.

The appellant sought special leave to appeal which was granted on 10 December 2021.

On 24 December 2021, the appellant filed a notice of appeal containing the ground of appeal proposed in the application for special leave. At the same time, the appellant filed an application for leave to file an amended notice of appeal containing an additional ground of appeal.

The grounds of appeal are that:

- The Court of Appeal erred in concluding that the appellant published the Web Matter.
- The Court of Appeal erred in rejecting the appellant’s common law qualified privilege defence.
- The Court of Appeal erred in rejecting the appellant’s statutory qualified privilege defence under s 30(1) of the *Defamation Act 2005* (Vic).

The additional ground of appeal in the proposed amended notice of appeal is:

- The Court of Appeal erred in rejecting the appellant’s defence of innocent dissemination at common law and innocent dissemination pursuant to s 32 of the *Defamation Act 2005* (Vic).

O'DEA v THE STATE OF WESTERN AUSTRALIA (P53/2021)

Court appealed from: Supreme Court of Western Australia Court of Appeal
[2021] WASCA 61

Date of judgment: 13 April 2021

Special leave granted: 3 December 2021

At trial in the District Court, the prosecution alleged that the appellant and a co-accused, with intent to maim, disfigure, disable, or do some grievous bodily harm, unlawfully did grievous bodily harm under s 294(1) of the *Criminal Code* (WA) (“the Code”). In giving directions to the jury, the trial judge described two “pathways” by which the jury could be satisfied beyond reasonable doubt that the appellant and his co-accused were guilty. The first pathway was that the appellant and his co-accused were both criminally responsible for the charged offence under s 7(a) of the Code. The second pathway was that the appellant or his co-accused was criminally responsible under s 7(c) of the Code in that he aided the other in committing the charged offence.

On 15 October 2019, the jury returned a verdict of guilty in respect of the appellant. The jury was unable to agree on a verdict in respect of his co-accused. [In August 2020, the appellant’s co-accused was retried. He was convicted of the alternative offence of unlawfully doing grievous bodily harm to another contrary to s 297(1) of the Code]. On 9 December 2019, the appellant was sentenced to 6 years 3 months’ imprisonment.

On 3 March 2020, the appellant filed an application for an extension of time and leave to appeal in the Court of Appeal. On 13 April 2021, the Court of Appeal dismissed the application for an extension of time and refused leave to appeal. Relevantly, the Court found that the trial judge’s explanation to the jury of “acting in concert” was adequate. In addition, the Court held that the jury could convict the appellant of the charged offence under the first pathway without being satisfied beyond reasonable doubt that the co-accused’s acts, in the context of the appellant and the co-accused “acting in concert,” were unlawful.

The grounds of appeal in the High Court are that:

- The Court of Appeal erred in law in deciding that the appellant’s guilt for the offence of doing grievous bodily harm with intent could be established pursuant to the pathway of liability designated as the “first pathway” which alleged that the appellant and the co-accused were criminally liable as joint principals under s 7(a) of the *Criminal Code* (WA) on the basis of acting in concert each doing one or more acts which constituted the offence, in circumstances where the acts of the co-accused were not proved to have been unlawful.
- The Court of Appeal erred in law in deciding that it was sufficient that the learned trial judge directed the jury that “acting in concert” for the purposes of the first pathway meant that the appellant and the co-accused “were acting together” and that the trial Judge was not required to direct the jury to the effect that acting in concert required the two accused to have reached an understanding or arrangement amounting to an agreement between them (which may be inferred from all the circumstances) to commit a crime.

**TU'UTA KATO A v MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL AFFAIRS & ANOR
(S135/2021)**

Date proceeding commenced: 17 September 2021

Date referred to Full Court: 9 December 2021

Mr Tu'uta Katoa is a citizen of New Zealand and was the holder of a Special Category (subclass 444) visa under the *Migration Act 1958* (Cth) ("the Act"). On 2 September 2019, the Minister cancelled his visa pursuant to s 501(3)(b) of the Act on the basis that the Minister reasonably suspected Mr Tu'uta Katoa did not pass the character test and the cancellation was in the national interest.

On 1 November 2019, Mr Tu'uta Katoa filed an application in the Federal Court of Australia for an extension of time to seek review of the Minister's decision under s 477A(1) of the Act, the deadline for filing such an application having been 25 days prior on 7 October 2019.

On 24 August 2019, Justice Nicholas refused to grant the extension of time. His Honour, having heard argument on the substantive application for review concurrently with the application for an extension of time, held that the extension of time should be refused because Mr Tu'uta Katoa's proposed ground of review lacked sufficient merit to warrant the grant of an extension of time.

Mr Tu'uta Katoa then commenced proceedings in the original jurisdiction of this Court, seeking a writ of certiorari to quash the decision of Justice Nicholas and a writ of mandamus to require the Federal Court to make the decision according to law. On 9 December 2021, Justice Gageler granted Mr Tu'uta Katoa leave to amend his application and referred the application, so amended, for hearing by the Full Court.

The sole ground of the amended application is:

- The Second Defendant erred in law in failing to assess whether, in respect of the Plaintiff's second ground of review of the decision of the First Defendant, the Plaintiff's claim had reasonable prospects of success so as to justify the grant of an extension of time pursuant to s 477A(2) of the Act.

HORE v THE QUEEN (A5/2022); WICHEN v THE QUEEN (A6/2022)

Court appealed from: Supreme Court of South Australia Court of Appeal
[2021] SASCA 29; [2021] SASCA 30

Date of judgment: 7 May 2021

Special leave granted: 21 February 2022

The appellant in the first of these appeals, Mr Hore, has had a history of sexual offending. On 19 February 2018, while in prison for his most recent sexual offence, an order was made pursuant to s 23 of the *Criminal Law (Sentencing) Act 1988* (SA) (“the 1988 Act”) that Mr Hore be detained following the completion of his sentence on the ground that he was “incapable of controlling or unwilling to control his sexual instincts.”

The appellant in the second appeal, Mr Wichen, has also had a history of sexual offending, and during his most recent sentence, an order was also made pursuant to s 23 of the 1988 Act that he be detained until further order.

At the time the orders pursuant to s 23 were made in relation to each appellant, the provisions governing discharge of such orders or release on licence did not include a requirement that the person prove that they were capable of controlling or willing to control their sexual instincts. That requirement was first introduced by a legislative amendment that took effect in 2018.

On 6 November 2017, Mr Wichen made an application for release on licence pursuant to s 24(1) of the 1988 Act. Before the application was determined, legislative amendments came into force in 2018 and the pending application was then to be determined in accordance with s 59 of the *Sentencing Act 2017* (SA) (“the 2017 Act”). On 26 August 2020, Kourakis CJ refused the application because he was not satisfied that the Mr Wichen was “willing” to control his sexual instincts within the particular statutory meaning of “willing” in s 59 of the 2017 Act.

On 1 March 2018, Mr Hore applied for release on licence pursuant to s 24(1) of the 1988 Act which was replaced by s 59 of the 2017 Act. On 12 October 2020, Hughes J refused the application because she was not satisfied that he was willing and capable of controlling his sexual instincts. She held that the word “willing” in s 59(1a) of the 2017 Act meant the converse of the word “unwilling” as defined in s 57 of the 2017 Act.

Both appellants appealed to the Court of Appeal. The appeals were heard on the same day and the appellants relied on the same arguments. The Court of Appeal dismissed both appeals and held that the word “wiling” in s 59(1a) of the 2017 Act has a meaning that is opposite to the defined term “unwilling” in s 57 of the 2017 Act.

Both appellants applied to the High Court for special leave to appeal, which was granted on 21 February 2022.

The grounds of appeal are that:

- The Court of Appeal erred in holding that:

- a. The meaning of the undefined word "willing" in s 59(1a) of the *Sentencing Act 2017* (SA) (the Act) is the converse of the word "unwilling" as defined in s 57 of the Act, so that a person in the position of the appellant can be regarded as "willing" to control their sexual instincts only if they can establish that there is not "a significant risk that [they] would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of [their] sexual instincts" and;
 - b. That this was "a necessary conclusion" because ss 57, 58, and 59 of the Act "can only provide a coherent regime" if the word "willing" in s 59(1a) is so construed.
- The Court of Appeal erred in holding that, in considering whether a person is "willing" to control their sexual instincts for the purpose of s 59(1a) of the Act, the hypothetical risk of the person failing to exercise appropriate control of their sexual instincts if "given an opportunity to commit a relevant offence" is to be considered without regard to the likely circumstances of the person if released on license or the effect of any conditions that might be imposed on that release.