SUBMISSION 25th NOV 2024 – PAUL ROBERT BURTON v R
Appeal of the decisions of Harris DCJ
Trial 30/10/2024 - 13/11/2024
Conviction 13/11/2024

Appeal to the CCA
Lower Court
R v Paul Robert Burton
Decisions of Her Honour Judge S Harris DCJ
Material Date; conviction 13/11/2024
Relevant Dates; 30/10/2024, 31/10, 4/11, 5/11, 6/11, 7/11, 8/11, 11/11, 12/11, 13/11, 22/11/2024

Short List Of Authorities
John L Pty Ltd v Attorney-General (NSW [1987] HCA 42; (1987) 163 CLR 508
R v Halmi [2005] NSWCCA 2; (2005) 62 NSWLR 263
R v Darko Janceski [2005] NSWCCA 281
RUSSELL -v- THE STATE OF WESTERN AUSTRALIA [2011] WASCA 246
Doja v R [2009] NSWCCA 303
Ex parte Lovell; Re Buckley (1938) 38 SR (NSW) 153
Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) [2010] HCA 1 (3 February 2010)
Jago –v- The District Court of New South Wales and Ors 168 C.L.R. 23
Moubarak by his tutor Coorey v Holt (2019) 100 NSWLR 218
Re J [2013] EWHC 2694 (fam) (at 28 to 32)
Proudman v Dayman [1941] HCA 28; 67 CLR 536
Thomas v The King [1937] HCA 83; 59 CLR 279 at 304
R v Burgess and Saunders (2005) 152 A Crim R 100
Secretary, Department of Family and Community Services v Smith [2017] NSWSC 6
Secretary, Department of Family and Community Services v Smith [2017] NSWCA 206
Burton v R [2024] NSWCCA 213

GROUNDS

1. Her Honour Harris DCJ erred after finding the indictment was invalid (as it did not contain an essential element and so did not disclose an offence punishable by law), by then failing to dismiss the jury and discharging the defendant.

2. Her Honour Harris DCJ further erred by allowing an amendment to an invalid indictment.

3. Her Honour erred (notwithstanding the indictment was invalid) by refusing the appellant any defences and robbing him of his right to a fair jury trial by 12 peers.

4. Her Honour erred (notwithstanding the indictment was invalid) by instructing the jury that it did not matter that the accused abided by the law when the alleged breaches were properly brought to his attention.

5. Her Honour erred (notwithstanding the indictment was invalid) by failing to tell the jury that time was an essential element and that they only needed to find the posts were on or around the times charged.

6. Her Honour erred (notwithstanding the indictment was invalid) by not dismissing the matter when the evidence showed that nothing the appellant was alleged to have done had any impact on the privacy or identity of the child or caused the child stigma, that is section 105 was being used for an improper purpose.

ORDERS SOUGHT

1. Appeal Upheld
2. Conviction Quashed
3. Any other reasonable orders the court deems fit to make

NECESSARY STATEMENTS ACCORDING TO PRACTICE NOTE No. SC CCA 1 COMMENCING 1st May 2021

19. The submissions of the appellant or applicant for leave to appeal against conviction shall contain:

(a) a statement as to whether:

(i) any party to the appeal or application is serving a sentence in custody and, if so, their earliest release date;

No party to the appeal is in custody or serving a prison sentence.

(ii) any party to the appeal or application is on bail pending appeal and, if so, the terms of that bail;

No party to the appeal is on bail.

(iii) *there is any non-publication or suppression order made in the Court below that is relevant to the matters raised on appeal and, if so, the terms of that order and whether it is necessary for that order to remain in force;*

No orders were made in the Court in relation to non publication relevant to the appeal. There were previous orders that the Child not be named hence the use of "CWS".

(iv) *there is any other prohibition or restriction on publication or dissemination of any matter relevant to the appeal including the identity of any victim and, if so, the terms of the prohibition or restriction (eg Crimes Act 1900, s 578A);*

See (iii) above.

(v) *any suppression or non-publication order is sought in relation to any part of the proceedings or any judgment in the proceedings and, if so, the terms of the order sought;*

The applicant makes no requests in relation to any suppression or non-publication order in relation to any part of the proceedings or any judgment in the proceedings.

(vi) *the party requests that any judgment in the proceedings not be published on www.caselaw.nsw.gov.au for a specified period (see Matthews v R (No.2) [2013] NSWCCA 194);*

The applicant makes no requests in relation to publication on www.caselaw.nsw.gov.au

(vii) *there is any objection to a grant of third party access, including the press, to the parties' submissions and, if so, the basis for that opposition; and*

There is no objection to the access of the applicants submissions by third parties.

(viii) *the party contends that there is some matter that warrants the sitting of five judges and, if so, the basis for that contention.*

The appellant does not contend that five judges sit. However, if the respondent claims that previous decisions of the Court of Criminal Appeal should simply be overruled then 5 judges should sit to determine if they should overrule their own authorities.

(b) a brief statement in narrative form of the Crown case and of the case raised or put forward by the appellant at the trial;

The Crown case was that I (the appellant) published the name of a child "CWS" who was before the children's court and that it could be viewable by a person in NSW. The time period of the alleged offending Facebook posts was determined to be between 3 to 10 days in July 2017.

The appellant faced four charges. Dr Andrew Katelaris stood trial with the appellant on one similar charge. He was not a co-accused but stood trial as a matter of expediency.

The appellant did not deny publishing the name of CWS when he was unlawfully forcibly and violently removed from his loving family, and for some time after. The appellant's case was that FACS NSW had no legal grounds for taking the child using section 43 of the relevant Act and that the child was taken on known false grounds, was essentially kidnapped, and that the appellant despite his strong objections abided by all orders once the alleged offending posts were able to be identified amongst thousands of posts, and he was shown the matter had judicial oversight from what he considered at the time to be a competent court of law. He further stated that what he was doing was necessary to save the life of the child and to protect the child from significant risk of harm in the alleged care of the department of FACS. Further to this the appellant stated that the times of the posts, content of the posts, and place of the posts that were alleged to have been made, were also in error.

The defences of necessity, self defence and honest and reasonable mistake of fact were not allowed to go to the jury despite a substantive amount of evidence to support these defences.

OUTLINE OF ARGUMENT

GROUNDS 1 & 2

Your Honours,

The indictment was a nullity. The indictment failed to list all the essential elements of the offence and an essential element could not be implied into the indictment.

The trial judge found that the indictment was invalid for failing to list all essential elements.

The question was, could the judge order an amendment under the Criminal Procedure Act Ss20 and Ss21. S21 states,

***21 ORDERS FOR AMENDMENT OF INDICTMENT**, separate trial and postponement of trial*

"(1) If of the opinion that an indictment is defective but, having regard to the merits of the case, can be amended without injustice, the court may make such order for the amendment of the indictment as it thinks necessary to meet the circumstances of the case."

The trial judge was of the view that a defective indictment that could be amended included an invalid indictment that was a nullity and incurably bad.

It is the submission of the appellant that when the Statute spoke of an indictment it was necessarily speaking of a valid indictment and that an invalid and incurably defective indictment cannot be amended.

Her Honour posed the question of what would be the purpose of allowing a Court to amend a defective indictment if it could not amend this indictment in question.

S16 dealt with defects that would not cause an indictment to be erroneous bad or void.

In **REGINA v Darko JANCESKI [2005] NSWCCA 281** at 79 the Court stated in regards to S16

"Sections 16 and 17 of the Act, set out above, represent a list of defects which would have led to invalidity at common law but which, by longstanding statutory provision, do not do so. Although the particular defect in issue in the present case does not fall within either section, the scope of these provisions is so wide that it can support the proposition that Parliament did not intend that every other defect, however or whenever occurring, should deprive an indictment of its character as such for purposes of other sections of the Act."

Therefore clearly this Court has set out the difference between an indictment which will be defective and one which will be invalid.

Her Honour did not accept the difference between a defective indictment that could be amended and an invalid indictment that could not be amended.

As His Honour McClure P said in Russell v The State of Western Australia [2011] WASCA 246; 214 A Crim R 326 at 28 "An invalid indictment could not be the subject of amendment."

The Criminal Procedure Act S16 itself shows that essential elements are not caught in 16 as to make the indictment not void or erroneous or bad.

The Section itself when it speaks of TIME is clear that this is only in respect of when TIME is not an essential element.

> *"16 (g) except where time is an essential ingredient, for omitting to state the time at which an offence was committed, for stating the time wrongly or for stating the time imperfectly,*

In this Learned Criminal Court of Appeal in **Doja v R [2009] NSWCCA 303** at 3 it was stated,

"It is important to state at the outset that it is a fundamental principle of the criminal law that an indictment must, to adopt the terminology of Hunt CJ at CL in R v Mai (1991) 26 NSWLR 371 at 377, "disclose an offence punishable by law". This is a longstanding principle. (See, eg, Broome v Chenoweth (1946) 73 CLR 583 at 594-595, 600-601; Johnson v Miller (1937) 59 CLR 467 at 486; Ex parte Price (1899) 20 LR (NSW) 343; Ex parte Thomas; Re Otzen (1947) 47 SR (NSW) 261; Traveland Pty Ltd v Doherty (1982) 6 A Crim R 181 at 188.) Accordingly, statutory provisions which permit defects to be overlooked have not been interpreted to "enable a magistrate to convict of an offence upon an information which discloses no offence". (Ex parte Lovell; Re Buckley (1938) 38 SR (NSW) 153 at 173.)

The legislation in S16 was doing no more than following the Common Law that when an essential element is missing the offence charged will not be known to the law and hence invalid and unable to be overlooked or amended.

At 4 this Learned Criminal Court of Appeal continued,

"To give one, directly relevant, example, the failure to plead the mental element of the offence was one of the defects identified in the indictment considered by this court in Lodhi v The Queen [2006] NSWCCA 121; (2006) 199 FLR 303 at [91]. The normal result of a defect of this character is a finding that there has been no trial. It is convenient to describe such a trial as a nullity."

Therefore it is clear that when an essential element is missing the indictment is invalid and any trial held on that indictment will be a nullity.

At 50 and 51 Janceski stated:

"John L Pty Ltd v Attorney General (NSW) (1987) 163 CLR 508, although directed to the particular defect involved in that case, at 520:

"If an information is invalid for the reason that it fails sufficiently to identify the ingredients of the actual offence, it will be inadequate to satisfy a statutory requirement … that proceedings be commenced by information since, as a matter or ordinary construction, such a requirement can only be satisfied by a valid information."

51 A similar conclusion is appropriate with respect to the use of the word "indictment" in ss8, 126, 129 and 130."

Therefore clearly when a Statute speaks of an indictment it is speaking of a valid indictment. An invalid indictment will not convey jurisdiction.

The power to amend cannot be in regards to an invalid indictment because there is no jurisdiction conveyed unless the Statute specifically overrides the Common Law and allows jurisdiction to be conveyed by an invalid indictment.

The indictment could not be amended because there was nothing to amend, the indictment being a nullity and there was no power to order the amendment.

This Court was clear in Janceski that S16 is wide and does not list all the defects that do not lead to invalidity, however it is also clear that a missing essential element will lead to invalidity. Further the Parliament itself is clear that a missing essential element is not a defect that can be cured by the wording of S16.

As a result of the missing essential element leading to invalidity of the indictment the trial was a nullity.

Unless the Court intends to overrule the High Court and it's own longstanding decisions the following grounds 3 to 6 are not necessary to answer given that the indictment is invalid.

GROUND 3

Your Honours, notwithstanding the indictment is invalid, the evidence before the jury clearly showed that the accused honestly believed that the child was kidnapped. It was the circumstances perceived by the accused that were relevant.

There were grounds for the accused to perceive those circumstances and the evidence to support those grounds was ALL un-contradicted and un-rebutted.

By way of one very small but important example, evidence was presented to the jury, amongst many other things, to show a close temporal connection between an actual harm or threat of harm to the child in question and a defensive response by the accused concerning the child in question. The accused was present during the removal, nobody identified themselves, he was violently pepper sprayed and assaulted during the removal, the child then simply disappeared from the hospital, the child's medical treatment was abruptly and violently terminated, he was unnecessarily separated from all of his close ties and the accused continued to express his significant concerns in the weeks that followed and made repeated efforts and enquiries including to the courts themselves with extreme concern for the child's welfare, he was and is also the child and families Pastor. All of this simply appeared to be ignored.

By way of further examples as seen in [2024] NSWCCA 213 Her Honour had already attempted to limit the appellant's honest and reasonable beliefs. In the trial that followed that CCA decision above Her Honour simply removed the remaining already severely limited appellant's defence of honest and reasonable mistake of fact that the child may either be deceased and/or that the Secretary had clearly given permission for people to speak about the child.

Her Honour simply chose to ignore whatever evidence did not support the outcome she had already decided (no defences) and that supported the appellants position (necessity, self defence and honest and reasonable mistake of fact), irrespective of the evidence in the trial.

It was as though Her Honour had decided that as the offence was one of strict liability that the accused could have no defences. It is well established that with a strict liability offence the prosecution does not have to prove "mens rea" but this does not mean that the appellant can have no defences, this is a strict liability offence, not absolute liability, and the fact that the statute permits the election of a jury shows that the appellant clearly has a right to run defences.

It was clear to the appellant from the outset of the trial that her Honour had already decided to remove all defences and albeit the appellant had elected a jury as is his right, the trial was merely

an exercise contrary to the dictum of Lord Hewart which now appears to have become *"justice must be seen to be done because it is not done"*. This is further supported in [2024] NSWCCA 213 whereby the appellant had already sought leave to the Criminal Court of Appeal as Her Honour had already foreshadowed that she intended to remove the appellant's defences. Although the appellant had a jury of 12 peers he certainly did not have a fair trial as the Judge was the sole arbiter of fact and directed the jury in such a way as to ensure there was no other choice but for them to find a guilty verdict.

Many of the public that witnessed these proceedings, around 30 in the gallery and about 50 online agreed with the appellant that the courts are clearly no place for justice, that the government can do whatever it wishes and that the courts have no power over the government. They appear in effect to have become nothing more than the judicial arm of the government (the then department of FACS), and will do whatever is required to protect the department even if that appears to entail hiding criminality.

As the appellant has stated on many occasions, including in his last submission to this very court, he considers the position of each of you as Judges as one of, if not the most important positions in our society, as it is you who stands impartially and without bias between the government and the people. It is in you whom we trust to serve the public, maintain the separation of powers doctrine and to ensure the proper conduct of our representative democracy and the rule of law.

In regards to this same point in [2024] NSWCCA 213 at 71, to clarify, apprehended bias was raised by the appellant in that matter in reference to Her Honour working for the Office of the Director of Public Prosecutions for over 23 years.

The appellant was raising to the court the question as to how could a reasonable person properly informed not at the very least perceive apprehended bias with a Judge who had spent a considerable part of their working life employed by the prosecution.

In the circumstances in regards to ground 3, notwithstanding the indictment is invalid, the defences of self defence, necessity and honest and reasonable mistake of fact ought to have been left to the jury not removed by a Judge.

Where there is evidence capable of supporting the defences they must at law be left to the jury and the failure to do so meant the judge had become the sole arbiter of fact and robbed the accused of his right to a fair jury trial by 12 peers and an acquittal.

GROUND 4

Your Honours, notwithstanding the indictment is invalid, evidence was shown to the jury that the accused removed the posts when they were properly identified to him and that they were all removed as requested before the accused was even summoned into Equity. Evidence from the prosecution showed this to be true.

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The accused was first summoned to the Court of Equity on the 13th of July 2017 and had already either removed, edited or concealed all of the alleged offending posts. The evidence in the court of Equity was identical in ALL respects to the criminal matter and the accused should never have been criminally charged.

The accused was denied a chance of acquittal because the jury asked if it was still a crime if the posts were removed once they were properly brought to the appellants attention and Her Honour instructed that it was. At common law this is not the case if a person abides by the law once it is properly shown to them, and I was instructed to remove the posts and I did remove the posts as

20 instructed, I should not have even been charged let alone convicted.

The common law shows that people are often given warnings before being charged for offences and if they abide by those warnings, and do as instructed, they are not charged.

GROUND 5

Your Honours, notwithstanding the indictment is invalid, time is an essential element of the charges and the Judge erred by failing to tell the jury it was an essential element and then instructing them that they only needed to find that the posts were on “or around” the time charged contrary to the particulars in the indictment.

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Indeed in one instance the charge in relation to broadcasting on the 4th of July 2017 referred to a historic video that was published some number of weeks before and that was not even available to the public as it had been password protected for some considerable time.

Publishing the name of a child who is before the children's court or reasonably likely to be before the children's court is not an offence until it becomes reasonably likely or actually occurs. Therefore time is essential and as such must be stated accurately. The prosecution chose a number of dates for each alleged offence and needed to prove those dates.

Also as S105 states that the prohibition does not apply if the child reaches the age of 25 it is another reason why time is essential and must be stated accurately.

S16 of the Criminal Procedure Act states that except where time is an essential element a misstating or omission of time will not void the indictment. Therefore when time is an essential element it must be stated precisely and proved.

The misstating of the element to the jury denied a chance of acquittal because the jury asked if they needed to be satisfied the posts were on those exact dates showing that they had a doubt.

GROUNDS 6

Your Honours, notwithstanding the indictment is invalid, Her Honour erred by not dismissing the matter when the following evidence became available to the court.

The purpose of section 105 as determined by the courts is to protect the privacy and identity of a child and to protect a child from stigma however in this case none of these things occurred. No action by the appellant impacted either the privacy or identity of the child or caused the child stigma. The mother of the child gave evidence that no actions by the appellant concerning the 4 alleged facebook posts over a period of 3 to 10 days in 2017 did any of these things, nor in the circumstances could they do any of these things owing to the massive amount of publicity already in the public domain permitted by The Secretary and that the child, owing to his complex health conditions, could not engender any stigma.

Further to this any actions by the appellant were clearly coming from a space of love and genuine concern for the welfare of the child and to protect the child from the perceived significant risk of harm. An action born from love, care and concern cannot engender stigma even if it could be perceived by the child, which in this case it could not.

As no action by the appellant could fulfil the purpose of section 105 there was in effect no crime and in this case no victim. If there is no crime and no victim and no alleged act could fulfil the purpose of section 105, then section 105 must have been being used for an improper purpose and the matter should have been dismissed.

Further to this Her Honour did not give adequate weight to the evidence available to her that in a period of over 7 ½ years with actions taken against the appellant in two jurisdictions on identical evidence in all respects, and that the appellant had done everything in his power to seek lawful legal remedy and that the process had in effect become the punishment and that the appellant had more than paid for a crime that did not exist and that in this case had no victim. Further to this, despite his objections to the child's unlawful removal, the appellant abided with all requests by the courts when properly shown lawful judicial oversight and he could find the alleged offending posts amongst thousands of such posts, and he had, since first being charged, been served an invalid indictment, missing an essential element, that was not known to the law, and that could not convey jurisdiction to the court from the outset.

The appellant has often quoted the powerful authority from Sir James Munby in *Re J [2013] EWHC 2694 (fam) (at 28 to 32)*

28. I have said this many times in the past but it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. When a family judge makes a placement order or an adoption order in relation to a twenty-year old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years. We must be vigilant to guard against the risks.

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32. This takes me on to the next point. It is vital that public confidence in the family justice system is maintained or, if eroded, restored. There is a clear and obvious public interest in maintaining the confidence of the public at large in the courts. It is vitally important, if the administration of justice is to be promoted and public confidence in the courts maintained, that justice be administered in public – or at least in a manner which enables its workings to be properly scrutinised – so that the judges and other participants in the process remain visible and amenable to comment and criticism. This principle, as the Strasbourg court has repeatedly reiterated, is protected by both Article 6 and Article 10 of the Convention. It is a principle of particular importance in the context of care and other public law cases.

For all the above reasons the appellant respectfully asks that this learned Court of Criminal Appeal uphold this appeal and quash the conviction.

Kindest Regards & God Bless

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"Atmano mokshartham jagat hitaya cha"

For One's own welfare and the welfare of all. - Swami Vivekananda

"Speak out on behalf of the voiceless, and for the rights of all who are vulnerable."- Prov 31:8

"There is nothing concealed that will not be disclosed, or hidden that will not be made known"- Luke 12:2

"Not by power nor by might, but by spirit sayeth The Lord" - Book of Zechariah 4:6