

SUPREME COURT OF QUEENSLAND

CITATION: *Jacob v Roberts* [2002] QCA 87

PARTIES: **LANSTON CLARK JACOB**
(applicant/applicant)
v
MELANIE BRITTANIA ROBERTS
(respondent/respondent)

FILE NO/S: Appeal No 10194 of 2001
DC No 5080 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 21 March 2002

DELIVERED AT: Brisbane

HEARING DATE: 19 February 2002

JUDGES: Davies, McPherson and Williams JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **1. Application for leave to appeal granted**
2. Appeal dismissed

CATCHWORDS: CRIMINAL LAW - JUDGMENT AND PUNISHMENT -
ORDERS FOR COMPENSATION, REPARATION,
RESTITUTION, FORFEITURE AND OTHER MATTERS
RELATING TO DISPOSAL OF PROPERTY -
COMPENSATION - QUEENSLAND - where the applicant
seeks compensation pursuant to *Criminal Offence Victims Act*
1995 - where the application was made after the expiry of the
three year limitation period contained in s 40(1)(a) of the
Criminal Offence Victims Act 1995 - where the respondent
did not appear and did not plead the expiry of the limitation
period as a defence - whether the applicant is entitled to
compensation

LIMITATION OF ACTIONS - APPLICATION OF
STATUTES OF LIMITATIONS - APPLICATION TO NEW
RIGHT CREATED BY STATUTE - where *Criminal Offence*
Victims Act 1995 contains within it a limitation period -
whether the limitation period bars the remedy or the right -
whether the limitation period is annexed by statute to a right
which it creates so as to be the essence of that right

Criminal Code (Qld), s 663B
Criminal Offence Victims Act 1995 (Qld), s 40(1)(a),
 s 40(1)(c), s 41(1), s 41(2)
Limitation of Actions Act 1974 (Qld), s 30, s 31

Australian Iron and Steel Limited v Hoogland (1962)
 108 CLR 471, applied
Byrnes v Groot Eylandt Mining Co Pty Ltd (1990)
 19 NSWLR 13, considered
Maxwell v Murphy (1957) 96 CLR 261, applied
R v Chong; ex parte Chong [2001] 2 QdR 301, distinguished

COUNSEL: A J Kimmins for the applicant
 No appearance for the respondent

SOLICITORS: Tony Bailey (Samford) for the applicant
 No appearance for the respondent

- [1] **DAVIES JA:** This is an application for leave to appeal against the dismissal of an application for compensation pursuant to the *Criminal Offence Victims Act 1995*. That leave is necessary for this application is not in doubt.¹
- [2] On 27 July 1998 the respondent was convicted of wounding the applicant on 19 September 1997. On that latter date she stabbed him twice.
- [3] The principal question is issue before the learned District Court judge and the sole question involved in this application arises from the fact that it was made on 12 October 2001, more than three years after the respondent's conviction. Section 40 of the Act provides:
- "(1) An application to a court for a compensation order against a convicted person must be made -
- (a) within 3 years after the end of the convicted person's trial; ...
- ...
- (c) with the court's order under s 41 - at any other time."
- Section 41 of the Act applies sections 30 and 31 of the *Limitation of Actions Act 1974* to permit applications and orders for extensions of the period of limitation but no such application was made and it is conceded by the applicant that no such application would succeed.
- [4] The question in issue is whether, the respondent not having appeared on this application and consequently not having taken any point about the limitation period, the limitation in s 40(1)(a) needs to be considered by the Court. The learned District Court judge was of the view that it did because s 40(1)(a) was, he thought, a command in emphatic language which cannot be overlooked by the court. The applicant submits that that is incorrect.

¹ A proceeding on an application under the Act is a civil proceeding (s 30) and the amount for which judgment was given was less than the Magistrates Court's jurisdictional limit (*District Court Act 1967*, s 118(2)(a)(ii), (3)).

- [5] In the event that he was wrong in this respect, his Honour assessed the amount of compensation at \$4,500. There is no issue as to the appropriateness of that amount.
- [6] In support of his argument, counsel for the applicant relied on the decision of this Court in *R v Chong; ex parte Chong*,² a case decided on the provisions for criminal compensation which preceded the *Criminal Offence Victims Act*. These were, in substance, s 663AA to s 663BA, since repealed, of the *Criminal Code*. Section 663B, which was the operative section, provided relevantly:
 "(1) Where a person is convicted on indictment of any indictable offence relating to the person of any person or of more than 1 indictable offence relating to the person of any person (whether in respect of 1 indictment or more than 1 indictment) arising out of the one course of conduct or closely related courses of conduct of that person so convicted, the court, on the application by or on behalf of the person aggrieved by the offence or offences, may, in addition to any other sentence or order it may make, order the person to pay for the person aggrieved a sum not exceeding the prescribed amount by way of compensation for injury suffered by the person by reason of the offence or offences of which the offender is convicted."
- [7] These provisions contained within them no time limitation within which an application under s 663B(1) must be made. However in *Chong* this Court characterized such an application as "an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture" within the meaning of s 5 (definition of "action") and s 10(1)(d) of the *Limitation of Actions Act* 1974. Consequently it held that, in terms of that section, such an application "shall not be brought after the expiration of six years from the date on which the cause of action arose".³
- [8] The phrase "an action (or actions) shall not be brought after the expiration of" a specified period, used in all of the limitation sections of the *Limitation of Actions Act*, has a long history in limitation provisions. It is sufficient to say that they have been held to bar the remedy and not the right and operate only if distinctly relied upon.⁴
- [9] As the learned primary judge noted, however, s 40 of the *Criminal Offence Victims Act* has departed from the familiar wording of limitation provisions. Instead of "an action shall not be brought" or "no action shall be brought" after the expiration of a specified period, s 40 provides that "an application to a court ... must be made ... within three years after the end of the convicted person's trial". It is, however, unnecessary in my opinion to consider whether this departure in language would alone be sufficient to require a materially different result namely that the right to bring the application is conditional upon it being made within the limitation period.

² [2001] 2 QdR 301.

³ See at [9], [35].

⁴ See *Chong* at [10]; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 473 - 474; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534. The history of this construction is more closely analysed by Fullagar J in *Maxwell v Murphy* (1957) 96 CLR 261 at 287 and following.

There are other factors which, together with this difference in wording, in my opinion require that result.

- [10] The first of these is that the *Criminal Offence Victims Act*, unlike the *Code* provisions which it replaces, contains within it a limitation period. It both creates a right in a victim of a personal offence to apply for compensation for the injury suffered because of the offence and provides a time limit within which such an application must be made. In some such cases a limitation has been held to be "annexed by statute to a right which it creates so as to be of the essence of that right".⁵
- [11] It must be acknowledged that it does not necessarily follow from the fact that a limitation period is contained in a statute which creates the right to which the limitation period attaches, that the limitation must be held to be a condition of that right. The question is one of construction of the provision in the context of the Act as a whole. And in cases in which the limitation has been so held there have often been differences of opinion on that question⁶ for it is often a finely balanced one. It is sufficient to say that the fact that a statute both creates a right and provides for a time limitation upon that right or its exercise is some indication of an intention to make the limitation a condition of the existence of the right or its exercise.
- [12] The statement of this principle and of its difficulties in application which is most commonly cited is that of Windeyer J in *Australian Iron and Steel Limited v Hoogland*.⁷ There his Honour said:

"It may be that there is a distinction between Statutes of Limitation, properly so called, which operate to prevent the enforcement of rights of action independently existing, and limitation provisions annexed by a statute to a right newly created by it. In the latter case the limitation does not bar an existing cause of action. It imposes a condition which is of the essence of a new right. The distinction was adverted to in *The Crown v McNeil*; and in *Maxwell v Murphy*; and see *Gregory v Torquay Corporation* and *Erskine v Adeane*. It seems that, under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the Statute of Limitations as a defence to an action on a common law cause of action, as if he does not it is assumed that he intends to waive it: see *Chapple v Durston*. However, when issue is joined on a plea of the Statute, the burden of proving that the action is within time is on the plaintiff: see cases referred to by Dixon J, as he then was, in *Cohen v Cohen*. And, even when a time limit is imposed by the statute that creates a new cause of action or right, it may be so expressed that it

⁵ *Commonwealth v Mewett* supra at 534 - 535.

⁶ See for example *Maxwell v Murphy* (1957) 96 CLR 261 where the majority views of Dixon CJ at 268, Williams J at 275 - 276 and Kitto and Taylor JJ at 292 may be contrasted with the dissenting view of Fullagar J at 290 - 291; and *Byrnes v Groot Eylandt Mining Co Pty Ltd* (1990) 19 NSWLR 13 where the views of Kirby P at 25 - 26 and Hope AJA at 36 - 37 may be contrasted with that of Mahoney JA at 27 - 28.

⁷ (1962) 108 CLR 471 at 488 - 489; see also *Pedersen v Young* (1964) 110 CLR 162 at 169.

is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right; and in such cases it can, it seems, be waived, either expressly or in some cases by estoppel: *Wright v John Bagnall & Sons Ltd*; *Lubovsky v Snelling*.⁸

- [13] The second additional factor which leads me to the conclusion that the limitation here is of the essence of the right, that is that the right conferred by the Act is conditional upon compliance with the limitation, is that the right conferred by the Act is not a right to compensation for injury but a right to apply to the court for such compensation⁹ and it is that right, the right to apply which is, by s 40, made subject to the limitation therein contained. That is an important distinction, one which appears to have persuaded Sir Owen Dixon in *Maxwell v Murphy*¹⁰ to conclude that the limitation contained in the *Compensation to Relatives Act* (NSW) was a condition of the right granted by that Act.
- [14] The presence in an Act such as the *Criminal Offence Victims Act* of a provision applying s 30 and s 31 of the *Limitation of Actions Act* might be thought to lead to a contrary conclusion. However it is important to observe the terms of s 41 which relevantly applies those provisions. It provides:
- "(1) The *Limitation of Actions Act* 1974, sections 30 and 31 apply to applications mentioned in section 40(1) ... with the intention that, on application -
- (a) a court may order that the period of limitation under section 40(1) for an application to which the subsection applies be extended under the *Limitation of Actions Act* 1974, section 31(2); ...
- ... "
- [15] It is plain from those terms that what may be extended pursuant to s 41 is not a limitation period such as that contained in the *Limitation of Actions Act* but the period of limitation contained in s 40. As s 41(2) makes clear, those provisions of the *Limitation Act* are applied with such changes as are necessary to adapt them to an extension of a period of limitation of the kind provided for in s 40. Thus s 41, and consequently the provisions of the *Limitation of Actions Act*, cannot be used in any way to determine the character of the limitation contained in s 40.
- [16] For the reasons I have given I conclude that the limitation contained in s 40 is a condition of the right to apply for compensation granted by s 24. Because this question is plainly one of importance I would grant leave to appeal. However it follows from what I have said that the applicant, not having complied with that condition, now has no right to apply for compensation and consequently that this appeal must be dismissed.

Orders

1. Application for leave to appeal granted.
2. Appeal dismissed.

⁸ This passage was cited with approval in *The Commonwealth v Verwayen* supra at 497, in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 43 and in *The Commonwealth v Mewett* supra at 535.

⁹ Section 24(2).

¹⁰ At 268.

- [17] **McPHERSON JA:** I have read and agree with the reasons of Davies JA. I also agree that leave to appeal should be granted and the appeal dismissed.
- [18] **WILLIAMS JA:** I agree with the reasons for judgment of Davies JA and with the orders proposed.