BECKETT v THE STATE OF NEW SOUTH WALES (S144/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 114

Date of judgment: 2 May 2012

Referred into Full Court: 5 October 2012

In September 1991 a jury found the Applicant guilty of having committed various offences, on eight of the nine counts indicted. She was then sentenced to a lengthy period of imprisonment. After an unsuccessful appeal, the Applicant petitioned the Governor for a review of her convictions in 2001. The Attorney General then referred the matter to the Court of Criminal Appeal pursuant to s 474C(1)(b) of the *Crimes Act* 1900 (NSW). In August 2005 the Court of Criminal Appeal acquitted the Applicant on one count, but quashed her convictions and ordered a new trial on five of the other counts. On 22 September 2005 however the Director of Public Prosecutions ("the Director") directed that no further proceedings be taken against the Applicant on the outstanding charges. In August 2008 the Applicant instituted proceedings for malicious prosecution.

In those proceedings, the Respondent sought the separate determination of two questions. The first was in regard to the counts which were quashed, while the second was in regard to the count for which the Applicant was acquitted. Each question queried whether the Applicant was required to prove her innocence on each count to succeed on the malicious prosecution claim.

On 5 August 2011 Justice Davies found for the Respondent on the first question and for the Applicant on the second. The Applicant then appealed on the first question and the Respondent cross-appealed on the second.

On 2 May 2012 the Court of Appeal (Beazley & McColl JJA, Tobias AJA) unanimously dismissed both the appeal and the cross-appeal. Their Honours held that, upon the quashing of the Applicant's convictions (and the ordering of a new trial) on five counts, the indictment containing those counts remained on foot. It was therefore open to the Director to direct that no new trial take place. Their Honours held that they were bound by the High Court's decision in *Davis v Gell* (1924) 35 CLR 275 (*"Davis v Gell"*). It was therefore necessary, despite the Director's decision, for the Applicant to prove her innocence in order to succeed in her action for malicious prosecution. The Court of Appeal also held that, as a consequence of the High Court's decision in *Commonwealth Life Assurance Society Ltd v Smith* (1938) 59 CLR 527, the effect of the decision in *Davis v Gell* did not extend to the Applicant's acquittal on one count. She did not therefore have to prove her innocence in relation to that count.

On 5 October 2012 Justices Gummow, Hayne and Heydon referred this matter into an enlarged bench so that the application for special leave to appeal could be argued as if it were on appeal.

The questions of law said to justify the grant of special leave to appeal include:

- Whether the decision in this Court in *Davis v Gell* is correct in holding that the plaintiff in a malicious prosecution case must prove her innocence when the relevant prosecution was terminated by the filing of a nolle prosequi?
- What are the elements of the tort of malicious prosecution and, in particular, when (if at all) must a plaintiff affirmatively prove innocence?