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Scope of jurisdiction of Service Tribunal to modify penalty imposed by Departmental Authority

The question before the Court was: whether in the circumstances of the case the Tribunal was justified to modify the penalty of dismissal from service to that of withholding of two increments for a period of two years?

The Court observed that the Tribunal had not taken the trouble of examining, "[w]hat are the parameters of imposition of major and minor penalties, under what circumstances such penalties are to be imposed and what law governs the imposition of such penalties." The Court held, "[j]ust whimsically stating that the punishment is harsh could not be made basis by the Tribunal to modify the penalty imposed by the competent authority," and further held that "[t]he Tribunal by interfering with the penalty imposed by the department has exceeded from its jurisdiction." (Para 2, 3)

2. *Jubilee General Insurance Company v. Ravi Steel Company*

https://www.supremecourt.gov.pk/downloads_judgements/c.p._1965_2019.pdf

Present

Mr. Justice Mushir Alam and Mr. Justice Maqbool Baqar

In the context of an insurance claim, the Court was faced with the question: whether a defendant who has not raised the defence of limitation in his written statement filed in the suit can file an application under section 12(2) CPC agitating the ground of limitation, after final decision of the suit up to the apex Court?

Doctrine of constructive res judicata explained

The Court answered the question in negative while explaining the doctrine of constructive res-judicata with reference to the relevant provisions of CPC, thus: "Indeed, in adversarial proceedings a litigant has to cross the barrier of limitation, before his rights are adjudicated. Like Order II Rule (2) CPC mandates the Plaintiff to include the whole claim and seek all reliefs in a suit to which he is entitled, where a plaintiff omits to sue in respect of the portion so omitted to claim any relief to which he may be entitled, he cannot, except by leave of the Court, afterwards sue for any relief so omitted. Cumulative effect of Order VI Rule 4 CPC read with Order VIII Rule 2 and other enabling provisions, by same stroke requires that the "defendant must raise" in written statement and specifically and particularly plead "all matters, which show that the suit not to be maintainable or that the transaction is either void or voidable in point in law, and all such grounds of defence as, if not raised, would be likely to take opposite party by surprise or would raise issues of facts not arising out of the plaint as for instance fraud, limitation, release, payment, performance or facts showing illegality,"(Order VIII Rule 2 CPC) plea of misrepresentation, fraud, breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary" (Order 6 R 4 ibid). These rules of prudence require both the plaintiff and defendant to plead all facts that may constitute cause of action for any relief and for the defendant which may constitute a defence to specifically refute any claim on merits as well raising specific defense denouncing claim on the assertions of fraud, limitation, release, payment, performance or facts showing illegality. Unless such particulars are specifically pleaded in the plaint or in written statement as a defence other party may it be plaintiff or defendant would have no opportunity to controvert the same, as neither the issue could be framed nor, evidence could ordinarily be allowed to

be raised or led at trial or attended in further appeals or revisions as the case may be. Failure to raise such plea at the first opportunity (either in plaint or written statement as the case may be) to assert any right or claim any relief where such rights and relief is founded on such assertion or raising such plea as a defence to contest and or controvert any such claim may well amount and be successfully be defeated on doctrine of constructive res-judicata, in subsequent proceeding" (Para 9)

Application of doctrine of equitable estoppel to insurance matters

The Court also held the doctrine of equitable estoppel applicable to insurance matters, with the observations: "In addition to doctrine of constructive res-judicata, doctrine of equitable estoppel having received statutory recognition under Article 114 of the Qanun-e-Shahadat Order, 1984 is gainfully applied in Insurance matter where the insurer uses the tool of surveyor, assessors and or investigators to investigate into claim of loss and assessment of damages and induce the insured to believe that the claim will be paid and or settled once the survey, assessment or investigation into loss or damages is completed in due course and then belatedly, refutes the claim putting the insured at disadvantage to bring claim within limitation. In all fairness, in such circumstances the insurer may be equitably estopped from raising plea of limitation as a defense to the Insurance claim in Court of law." (Para 10)

3. *Farooq Ahmad v. State*

https://www.supremecourt.gov.pk/downloads_judgements/j.p._73_2016.pdf

Present

Mr. Justice Qazi Faez Isa and Mr. Justice Mazhar Alam Khan Miankhel

DNA testing, not a requirement of law for proving offence of rape

The question before the Court was: Is non-conducting of DNA test fatal to the prosecution case in proving the charge of rape? The Court answered it in negative with the observations: "We do not think that such DNA testing was required under the circumstances. Moreover, DNA testing is not a requirement of law. . . .It is also not desirable that we should impose additional conditions to prove a charge of rape, or of attempted rape, and to do so would be a disservice to victims, which may also have the effect of enabling predators and perpetrators. However, there may be cases where an accused's DNA is retrieved for forensic determination to establish his guilt." (Para 7)

4. *Sui Southern Gas Company v. Registrar of Trade Union*

2020 SCMR 638
https://www.supremecourt.gov.pk/downloads_judgements/c.p._449_2019.pdf

Present

Mr. Justice Maqbool Baqar and Mr. Justice Amin-ud-Din Khan

Eligibility of a workman engaged through a labour contractor, to be registered as a voter to participate in a referendum for choosing a Collective Bargaining Agent

The question involved in the case was: whether a worker/workman engaged for rendering service in an establishment through a labour contractor, is eligible to be registered/enlisted as a voter to participate in a referendum for choosing a Collective Bargaining Agent in the said Establishment? The Court answered the question in affirmative with the observations: "In terms of Section 19(4)(a) of the IRA, 2012 every employer, on being required by the Registrar, is obliged to submit a list of all the workmen employed in his establishment, except those whose period of employment is less than three months, whereas Section 19(5) of the IRA, 2012 requires the Registrar to include in the voters list the name of every workman, whose period of employment, computed in accordance with Subsection (4) is not less than three months, and is also not a member of any of the contesting trade union, copies of which list the Registrar is required to send to each of the contesting trade unions at least four days

before the date fixed for the referendum. It can thus be seen that the only requirement for the membership of a union, is being workman, and for being registered as a voter, the period of employment of such workman in the establishment should not be less than three months. Whereas the term "worker" and "workman" has been defined by Section 2(xxxiii) of the IRA, 2012, as a person not falling within the definition of employer, who is employed in an establishment, or industry for hire or reward, either directly or through a contractor. It can therefore be seen that for an employee to fall under the definition of a worker or workman, it is wholly irrelevant whether he has been employed directly or through a contractor…" (Para 3)

5. *FBR v. Wazir Ali and Co.*

2020 SCMR 959
https://www.supremecourt.gov.pk/downloads_judgements/c.a._1460_2013.pdf

Present

Mr. Justice Umar Ata Bandial, **Mr. Justice Faisal Arab** and Mr. Justice Qazi Muhammad Amin Ahmed

Mode of calculating surcharge under section 4A of the ITO, 2001 explained

In the case, the Court was concerned with the question: whether the amount of surcharge payable under Section 4A, the Income Tax Ordinance 2001 is to be computed on the proportionate amount of income tax liability of the whole financial year or on income tax liability of the specific period of three and a half months?

The Court answered the question thus: "The whole of the 2001 Ordinance envisages that the income tax liability is to be determined on the basis of taxable income that is derived or legally presumed to have been derived in a whole tax year and not any part of it. Therefore, even for the purpose of computing surcharge under Section 4A of the Ordinance, the entire income tax liability of the tax year 2011 was to be taken into consideration which was then to be proportionately allocated to the 3½ month period and on that figure of proportionate tax liability surcharge was to be calculated. This is so as no provision of the 2001 Ordinance allows splitting of a tax year into two periods for the purposes of determining two separate taxable incomes of the same tax year and then on the income of one such period tax liability is to be computed. . . . Splitting of taxable income of the same tax year would negate the very intention of the Legislature reflected from the provisions of Sections 4(1), 74, 114 and 115 of the 2001 Ordinance." (Para 5)

6. *Government of Pakistan v. Nawaz Ali Sheikh*

2020 SCMR 656
https://www.supremecourt.gov.pk/downloads_judgements/c.p._669_l_2018.pdf

Present

Mr. Justice Gulzar Ahmed, HCJ and **Mr. Justice Ijaz ul Ahsan** and Mr. Justice Sajjad Ali Shah

No Court or Tribunal has any jurisdiction except the one conferred by Constitution or by or under any law

The Court while dealing with the question of jurisdiction of the Service Tribunal to modify the order of departmental appellate authority observed: "No doubt, under Section 5 of the Service Tribunals Act, the Service tribunal enjoys powers to modify any Appellate order but such power is to be exercised carefully, judiciously and with great circumspection by assigning cogent, valid and legally sustainable reasons justifying such modification. We fail to understand how and from where the Service Tribunal derived the authority and jurisdiction to arbitrarily and whimsically grant the relief that it has ended up granting the Respondent." (Para 13)

The Court further observed: "All Courts and Tribunals are required to act strictly in accordance with law, and all orders and judgments passed by them must be entrenched and grounded on the Constitution, the law and the rules. No Court, Authority or Tribunal has any jurisdiction to grant any relief in favour of any person which is not based upon the

foundation of the Constitution, the law and the rules." (Para 14)

7. *Amjad Ali v. State*

PLD 2020 SC 299
https://www.supremecourt.gov.pk/downloads_judgements/crl.p._74_l_2018.pdf

Present

Mr. Justice Manzoor Ahmad Malik, Mr. Justice Sardar Tariq Masood and **Mr. Justice Syed Mansoor Ali Shah**

There were two questions before the Court: First, whether a vehicle involved in the commission of an offence under CNSA, after being seized by the Police and put up before the court as case property, can be temporarily released on superdari? And second, whether a vehicle that has been seized and is a case property in a criminal case under the Act can be transferred and registered in the name of a third party by the Authority under the Motor Vehicles Ordinance, 1965 till the conclusion of the trial and the final disposal or confiscation of the vehicle by the court?

Scope of Superdari under CNSA

As to the first question the Court observed: "Under the scheme of general criminal law, a vehicle seized by the Police and having become case property, can be released on custody (superdari), during the trial, under sections 516-A or an order be made for its disposal to the person entitled to its possession by the Magistrate under section 523 of the Cr.P.C. Things are, however, different under the CNSA which does not envisage release of a conveyance (vehicle, etc.) during the trial, except as provided in the proviso to section 32(2) and 74 of CNSA." (Para 6) The Court held: "Joint reading of sections 32 and 74 of CNSA show that an applicant can seek release of a vehicle on superdari, which has been seized under CNSA and is a case property in a criminal case; if the applicant can show that he is the lawful owner of the vehicle; that he is neither the accused nor an associate or a relative of the accused or an individual having any nexus with the accused. While the prosecution has to show that the applicant knew that the offence was being or was to be committed." (Para 11)

Transfer of ownership of a seized vehicle and its registration by MVA when vehicle is on Superdari

As to the second question the Court observed: "The Vehicle was registered in the name of the petitioner by the Motor Registration Authority under MVO when the Vehicle had already been seized by the Police and had become case property in a criminal case, hence becoming liable to confiscation under CNSA. As a result the disposal of the vehicle comes under the control of the court and the owner stands cautioned not to deal or transact with the title of the vehicle till the conclusion of the trial. In fact there is a freeze on the legal title of the owner of the vehicle till the conclusion of the trial. The rationale behind this being that any transfer or change in the title of the vehicle (case property) would undermine the safe administration of criminal justice system; as any such transfer (registration of the vehicle in the name of a third party) would amount to interference in the powers of the criminal court and in eroding the sanctity and security of the evidence in an ongoing criminal trial. Therefore, transfer of ownership of the Vehicle by the Motor Registration Authority … was not permissible and is, therefore, without lawful authority. (Para 14)

8. *Rahat and Company v. Trading Corporation of Pakistan*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._91_k_2017.pdf

Present

Mr. Justice Faisal Arab, Mr. Justice Sajjad Ali Shah and **Mr. Justice Munib Akhtar**

Examining Articles of Association and application of Doctrine of Indoor Management in order to determine competency of a suit filed by a Corporation

The question before the Court was: How an objection with regard to the competency of

a suit filed without authorization by the Board of Directors of a Corporation is to be dealt with?"

The Court held: "[I]f any objection of the nature as encapsulated in the issue under consideration is taken at any stage (i.e., whether in a written statement at the trial stage or in para wise comments or reply filed at the appellate or other similar stage), the court should refrain from straightaway framing an issue or recording an objection in this regard. Experience shows that such objections are, more often than not, frivolous and an abuse of the process of the court, intended only to delay, derail or frustrate consideration of the dispute on the merits. The court should, if at all it considers this necessary, require the Articles of Association to be produced. If an examination of the same, and an application of the doctrine of indoor management as explicated in Australasia Bank (PLD 1966 SC 685) satisfy the Court that the suit/appeal etc. has been properly instituted then any objection taken in this regard should be regarded as concluded in favor of the company. It is only if, after such examination and consideration, the court is of the view, for reasons to be recorded, that the matter still remains unresolved that an issue should at all be framed (or the objection otherwise entertained for further consideration at the appellate etc. stage) and evidence led or the record summoned (as the case may be) and the parties heard accordingly."

9. *Ali Gohar v. Pervaiz Ahmed*

https://www.supremecourt.gov.pk/downloads_judgements/crl.p._230_2019.pdf

Present

Mr. Justice Mushir Alam, Mr. Justice Mazhar Alam Khan Miankhel and **Mr. Justice Yahya Afridi**

The Court dealt with the questions: (i) what is meant by the words "cognizance of the case" as employed in Section 23 of the Anti-Terrorism Act, 1997; and (ii) whether remedy of revision before the High Court is available to an aggrieved party against the order of ATC passed under Section 23 of the Act, transferring the case to an ordinary criminal court?

Meaning and Scope of the words "cognizance of the case" employed in section 23 of the Anti-Terrorism Act, 1997

As to the first question, the Court held: "ATC would be said to take "cognizance of the case" when on the receipt of the challan along with the material placed therewith by the prosecution, it takes judicial notice thereon by the conscious application of mind and takes positive steps to indicate that the trial of the case is to follow. These steps need not necessarily be recorded as judicial orders. What is essential is that the orders so passed or steps taken reflect that ATC is to proceed with the trial." (Para 32)

Availability of remedy of revision before the High Court against the order of ATC passed under section 23 of the Anti-Terrorism Act, 1997

The Court answered the second question in affirmative with the observations: "ATC being a judicially "inferior criminal court" to the High Court and that the order of transfer of the case…was passed during the "proceedings" of the case before the ATC. Accordingly, the two condition precedents for invoking the revisional jurisdiction of the High Court under section 435 was satisfied, and thus the grievance of the present respondent…. was maintainable under the revisional jurisdiction of the High Court under section 435 Cr.P.C." (Para 24)

10. *Anjuman-e-Khuddam-ul-Qur'an v. Najam Hameed*

https://www.supremecourt.gov.pk/downloads_judgements/c.a._154_l_2018.pdf

Present

Mr. Justice Ijaz ul Ahsan and **Mr. Justice Amin-ud-Din Khan**

Attestation by witnesses under Article 17, QSO, not required for a Waqfnama

The question that arose for determination, before the Court was: whether a waqfnama is required to be attested by two men or one

man and two women, as per provisions of Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984?
The Court answered the question in negative with the observations: "Since the waqfnama is not a document pertaining to financial or future obligations, therefore, to prove this document, the conditions of Article 17 of the Order of 1984 were not applicable."

Foreign Superior Courts

US SUPREME COURT

1. *Bostock v. Clayton County*

2020 U.S. LEXIS 3252
https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

Coram
Roberts CJ, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh JJ

Discrimination based on homosexuality or transgender status entails discrimination based on sex

Homosexuality and transgender status are distinct concepts from sex. But, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.

An employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

SUPREME COURT OF COLORADO, USA

2. *State of Colorado v. Andre Demetrius Willi Jones*

2020 CO 45
https://cases.justia.com/colorado/supreme-court/2020-18sc445.pdf?ts=1591027275

Coram
Coats, CJ. Márquez, Boatright, Hood, Gabriel, Hart, Samour, AJJ.

"Born Alive" doctrine is not applicable in criminal law

Jones broke into his estranged wife's apartment while she was not home. He then lay in wait until she returned. As she attempted to unlock her front door, he fired a gun through the door, shooting her in the abdomen. She died shortly after reaching the hospital. At the time, she was about thirty weeks pregnant. As a result of the mother's blood loss, the fetus was deprived of oxygen for an extended period of time. Although the baby survived, she was born with—and continues to endure—severe neurological deficits. The baby suffered a brain injury, which caused lack of muscle control. She is unable to breathe or swallow on her own. Therefore, she has a surgically implanted tube that allows her to eat, though its use requires frequent hospital visits. She also has vision and hearing loss.
The question before the Court was, "Whether under the Colorado State Law, an accused could not be retried for child abuse because an unborn fetus, even if later born alive, is not a "person" under the child abuse statute?"
Majority ruled that "Born Alive" doctrine is not applicable in criminal law and accused cannot be charged for the offence of causing pre-birth injury to a child. Since, the legislature has not provided a definition of person in the child abuse statute, and because we have been unable to discern the legislature's intent using various aids of statutory construction, we resort to the rule

of lenity. The rule of lenity provides that, when we cannot discern the legislature's intent, "ambiguity in the meaning of a criminal statute must be interpreted in favour of the accused".

Justice Boatright (dissenting):

An accused can be charged with and convicted of child abuse resulting in serious bodily injury when the accused causes injuries to a fetus in uterus that is later born alive.

Supreme Court of Michigan, USA

3. *People v. Barber*

942 N.W.2d 348 *; 2020 Mich. LEXIS 900

Coram

Bridget M. McCormack, Chief Justice. David F. Viviano, Chief Justice Pro Tem. Stephen J. Markman, Brian K. Zahra, Richard H. Bernstein, Elizabeth T. Clement, Megan K. Cavanagh, Justices.

Taking reasonable steps to protect the public is more important than strict adherence to normal operating procedures during the state of emergency

Trial courts, under administrative order, should be mindful that taking reasonable steps to protect the public is more important than strict adherence to normal operating procedures during the state of emergency. The trial court, in this case, abused its discretion in its consideration of the existing statutory factors along with the public health factors arising out of the present state of emergency. It did not address the first factor under MCL 770.9a(2)(a), and it is not obvious from the record that the defendant poses a danger to others. While the trial court considered MCL 770.9a(2)(b), its conclusory determination that the defendant's appeal does not raise a substantial question of law or fact failed to consider the timing of the defendant's emergency motion and that the plain language of the statute does not require a showing of success on appeal. Finally, the trial court clearly erred in its factual determinations regarding the public health emergency. Contrary to the trial court's statements, there are many indications that incarcerated individuals are at a greater risk of COVID-19 infection. Moreover, the trial court clearly erred by failing to adequately consider the defendant's documented health conditions. Accordingly, order of the Antrim Circuit Court denying the defendant's emergency motion for bond pending appeal is vacated and the case is remanded for reconsideration of the defendant's motion in light of this order and the defendant's current medical condition.

SUPREME COURT OF CANADA

4. *R. v. Zora*

2020 SCC 14
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18391/index.do

Coram

Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Mens rea to breach the conditions of bail is necessary for cancellation of bail

Z was charged with drug offences and was granted bail with conditions, including a curfew and a requirement that he present himself at the door of his residence within five minutes of a peace officer or bail supervisor attending to confirm his compliance with his curfew. The question before the Court was, "Whether mens rea for offence of failure to comply with conditions of undertaking or recognizance is to be assessed on subjective or objective standard?"
The Court held that the breach of bail conditions would require Subjective Fault standard (mens rea and it can be satisfied where the Crown proves:-

1. The accused had knowledge of the conditions of their bail order, or they were wilfully blind to those conditions; and

2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were wilfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or
   The accused recklessly failed to act according to their bail conditions, meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

Law relating to grant/refusal of bail discussed in the Constitutional perspective - - application of the restraint and the Ladder Principle

For imposing conditions of bail the court would observe restraint and the Ladder Principle in the following manners:

- If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?
- Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?
- Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?
- Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release?
- What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?

5. R. v. Ahmad

2020 SCC 11
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18383/index.do

Coram
Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

Police need more than an unverified tip to avoid drug-case entrapment

In each appeal, the police received an unsubstantiated tip that a phone number was associated with a suspected dial a dope operation. In these operations, drug traffickers use cell phones to connect with their customers and sell them illicit drugs. Officers called the numbers and, in brief conversations with the men who answered, requested drugs and arranged meetings to complete the transactions. Ahmad and Williams were subsequently arrested and charged with drug-related offences. At trial, each accused claimed that the proceedings should be stayed on the basis of entrapment. The trial judge convicted Ahmad but stayed the charges against Williams. The Court of Appeal held that entrapment was not made out for either Ahmad or Williams. The issue before the Supreme Court was whether it was entrapment to call those two numbers and offer cash for drugs. Was it possible that the police had goaded the two men on the other end of the phone line to commit a

crime that they might not otherwise have committed?

All nine justices dismissed Ahmad's appeal where police had a reasonable suspicion that the man on the other end of the phone was, in fact, selling drugs. William's appeal, in a 5-4 split, was allowed for police evidence was shaky. "The offer of an opportunity to commit a crime must always be based upon a reasonable suspicion of particular criminal activity, whether by a person, in a place defined with sufficient precision, or a combination of both.", the majority found. "Reasonable suspicion is also individualized, in the sense that it picks an individual target - whether a person, an intersection or a phone number - out of a group of persons or places." The majority ruled that the suspects' own language was of considerable importance when it came to the officers' invitation. It was also noted that "state surveillance over virtual spaces is of an entirely different qualitative order than surveillance over a public space. Technology and remote communication significantly increase the number of people to whom police investigators can provide opportunities, thereby heightening the risk that innocent people will be targeted."

Given the technological reality, the minority argued, parsing the conversations between undercover officers and their targets for evidence of entrapment is "unprincipled and impractical." Instead, a stay of proceedings should only be entered due to entrapment where "police go beyond providing an individual with the opportunity to commit an offence and instead induce the commission of the offence."

HIGH COURT OF AUSTRALIA

6. *Josiah Binsaris v. Northern Territory of Australia*

[2020] HCA 22
http://eresources.hcourt.gov.au/downloadPdf/2020/HCA/22

Before

Kiefel CJ, Gageler, Keane, Gordon, Edelman JJ

Detainees at Youth Detention Centre are entitled to damages in respect of the claims for battery arising out of the unlawful use of CS gas against them

The detainees, Josiah Binsaris, Kieran Webster, Leroy O'Shea and Ethan Austral, were held in the Behavioural Management Unit of Don Dale Youth Detention Centre. When another detainee, Jake Roper, had begun damaging property in and outside of his cell, Binsaris and Austral caused some damage to the inside of their cell, while Webster and O'Shea remained inside their cell playing cards. The Superintendent of the Detention Centre contacted the Director of Correctional Services and asked him to mobilise members of the Immediate Action Team from Berrimah Correctional Centre. The Action Team arrived at the Detention Centre, and in attempt to subdue Roper, used CS gas (a form of tear gas) using a CS Fogger. In doing so, they exposed Webster, O'Shea, Binsaris and Austral to CS gas.

The issue before the court was whether the use of a CS fogger to disperse CS gas was lawful.

The High Court decided that the four detainees had a claim for damages. Justices Gordon and Edelman found that the use of a CS fogger was not lawful as it was a prohibited weapon under the *Weapons Control Act* (NT) unless an exemption applied. An exemption could in some circumstances be granted to a prison officer in a prison, however, a detention centre was not a prison and the detainees were not prisoners. Therefore, the use of the CS fogger was prohibited. Chief Justice Kiefel and Justice Keane agreed with Justices Gordon and Edelman and added that a prison officer may only use a weapon to 'maintain the security and good order of a prisoner or a prison and only in a prison or police prison'. It was not part of the role of the prison officers from the Immediate

Action Team to use a weapon in a youth detention centre. Justice Gageler disagreed with other Justices, finding that the use of the CS fogger was within the power of the prison officers in an emergency situation. However, this exemption to the *Weapons Control Act* (NT), did not provide a defence against a bystander suffering collateral harm in the use of force.

CONSTITUTIONAL COURT OF SOUTH AFRICA

7. *New Nation Movement NPC v. President of the Republic of South Africa*

[2020] ZACC 11
http://www.saflii.org/za/cases/ZACC/2020/11.html

Coram

Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

Choosing to dissociate is also an exercise of right to freedom of association

In this case the question before the court was, whether an independent candidate (without joining a political party) can contest Election under the Constitution?

The court ruled: "[C]hoosing to associate is an exercise of the right to freedom of association. Choosing to dissociate from that which you earlier associated with is also an exercise of that right. Choosing not to associate at all too is an exercise of the right. A restraint on any of these choices is a negation of the right."

Froneman J (dissenting):

"The differentiation in consequence flowing from the choice to associate with a political party (the ability to stand for and hold electoral office) from that flowing from the choice not to associate with a political party (to exercise one's political rights through other democratic means provided in the Constitution) can thus not be said to limit some general right, free-floating outside the Constitution. But even if that can somehow conceptually be envisaged, the constitutionally sanctioned differentiation will also immediately show why the so-called limitation will then be reasonable."

FEDERAL CONSTITUTIONAL COURT OF GERMANY

8. *In the Proceedings about the Constitutional Complaint of der Reporters sans frontiers*

1 BvR 2835/17
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1bvr283517.html

Coram

Vice President Harbarth, Masing, Paul, Bear, Britz, Ott, Christian, Radtke

International surveillance must be in accordance with the Municipal Law

A coalition of media and activist organizations filed a constitutional complaint against a 2017 amendment in the law that allowed the German Federal Intelligence Service (BND) to spy *en masse* and without cause on foreign citizens abroad including sensitive groups such as journalists. The key legal question was whether foreign nationals in other countries were covered by Germany's constitution, known as the Basic Law, which safeguards human rights - including Article 10, the privacy of correspondence, posts and telecommunications.

The Court held that the current practice of monitoring telecommunications of foreign citizens at will violated constitutionally-enshrined press freedoms and the privacy of communications. "The fundamental rights of the Basic Law bind the Federal Intelligence Service and the legislature regulating its powers regardless of whether the service is active in Germany or abroad." The ruling said that non-Germans were also protected by Germany's constitutional rights, and that the current law lacked special protection for the work of lawyers and journalists. This applied both to the

collection and processing of data as well as passing on that data to other intelligence agencies.

The Constitutional Court said the legislature had until the end of 2021 to come up with a new law regulating secret services. "The challenged provisions can only be justified as authorizations to encroach on telecommunications secrecy and freedom of the press if they comply with the principle of proportionality." According to the Constitutional Court's interpretation of the Basic Law, monitoring communications abroad without cause is only permissible in very limited circumstances. In addition, vulnerable groups of people such as journalists must be given special protection. The targeted surveillance of individuals must be subject to stricter limitations. The Court also noted that the BND's surveillance practices should be monitored by financially independent counsels.

SUPREME COURT OF NORWAY

9. A v. The Public Prosecution Authority

HR-2020-972-U
https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2020-972-u.pdf

Coram
Kallerud, Thyness and Steinsvik

Right of accused to appear physically before the Court in the light of Corona Regulations

A person charged with attempted homicide or contribution to the same was remanded in custody in the District Court, which conducted a remote hearing in accordance with section 2 of Temporary Regulations to mitigate the effects of the Covid-19 outbreak (the Corona Regulations). The person charged and his defence counsel had opposed a remote hearing. His appeal to the Court of Appeal was dismissed.

The question was whether the District Court – in connection with an initial remand in custody – could decide on a remote hearing with a legal basis in section 2 of the Corona Regulations when the person charged opposed it and wished to be brought physically before the judge.

The Supreme Court's Appeal Selection Committee stated, "The right to be brought before a court in connection with arrest and remand in custody is a basic due process guarantee." Section 2 of the Corona Regulations must thus be interpreted within the scope of Article 5 (3) of the European Convention on Human Rights and Article 94 (2) of the Constitution. "The Regulations do not give an extended possibility to derogate from the right to be brought before the court in connection with a remand in custody, to the extent it is protected in the Constitution or the Convention."

The Committee did not further discuss the possibility to derogate from the right to be brought before a court in Article 5 (3) of the Convention, but mentioned that a condition would be that the court assessed in each case of whether it was inappropriate for infection control reasons to conduct a remand hearing by other means than video conferencing. However, the necessity assessment of the District Court and the Court of Appeal was based on general infection control considerations. No individual assessment had been made. Thus, the Appeals Selection Committee did not have an adequate basis for examining whether the interpretation of Article 5 (3) of the Convention was correct. The orders of the Court of Appeal and the District Court were set aside. The District Court was urged to consider whether it was inappropriate for infection control reasons to conduct a physical hearing in this case.

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please read the original judgments before referring them to for any purpose.