



Précis Paper

Trial date delays in criminal matters

Gabriel Wendler and Stephen Odgers SC discuss *Cheih-Wei Lin v R* [2015] NSWCCA 264 in which the Court of Criminal Appeal held that a trial judge was wrong to postpone the trial as requested by the Crown.

Discussion Includes

- The facts of *Cheih-Wei Lin v R* [2015] NSWCCA 264
- Notice of motion – District Court
- Section 5F of the *Criminal Appeal Act 1912* (NSW) – appeal against interlocutory judgment of an order
- Interlocutory application – Court of Criminal Appeal
- Remedies to reduce trial date delays in criminal matters

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1. In this edition of BenchTV, In this edition of BTV, Gabriel Wendler (Barrister) and Stephen Odgers SC (Barrister) present on the NSW Court of Criminal Appeal (Hoeben CJ at CL; R A Hulme & Bellew JJ) decision in *Cheih-Wei Lin v R* [2015] NSWCCA 264 which considered a motion to vacate trial dates in the District Court. Mr Wendler acted for the successful applicant-accused, Ms Lin, in the Court of Appeal and in the court below. He is interviewed by Stephen Odgers SC, Chair of the Criminal Law Committee of the NSW Bar Association and an experienced criminal, appellate advocate.
2. On 11 February 2014, Ms Lin and 3 co-accused were charged with the importation of 180 kg of methamphetamine (a crime for which a life sentence is available) concealed within canoes. The importation was alleged to have occurred in 2 lots in December 2013 and January 2014. Ms Lin is a Taiwanese national on a temporary working visa and was refused bail. In April 2015, a joint-trial of the 4 co-accused was listed for 19 October 2015 with the expectation that it would require 3-4 weeks in the District Court. However, in September 2015, the Commonwealth Director of Public Prosecutions (DPP) filed a notice of motion seeking to have the trial dates vacated. Mr Wendler recounts that a new DPP had assumed carriage of the matter and considered that the expected length of the trial was underestimated and that counsel for the Crown was not adequately prepared with evidence still needing to be finalised and served.
3. Mr Wendler opposed the application to vacate the trial dates primarily out of a concern that the trial would be relisted for hearings in June or July in 2016 – a 20 month delay from charge to hearing would become a 2.5 year delay. It was contended that such a period of pre-trial custody was "a scandal". Furthermore, the accused's family and a witness had already purchased non-refundable plane tickets from Taiwan for the 19 October trial date and they would find it difficult to organize funds for subsequent travel. These concerns appear quite overwhelming particularly with Mr Wendler characterizing the DPP's reasons as largely unsatisfactory. Notwithstanding these concerns, Townsden DCJ agreed with the DPP that the trial estimate should reasonably have been 6 weeks and as an indulgence to the DPP the trial would be relisted.
4. Mr Wendler received additional funding from Legal Aid to seek an interlocutory appeal of this decision to vacate the dates in the Court of Criminal Appeal under s 5F of the *Criminal Appeal Act 1912* (NSW). The relevant question for the court was whether the court below had made an error in exercising the discretion to vacate under the principles in *House v R* [1936] HCA 40; (1936) 55 CLR 499. The Court found Townsden DCJ had indeed fallen into error in vacating the dates on several bases. The court agreed with Mr Wendler's contention that Ms

Lin's interest in having the matter proceed expeditiously subjugated the conveniences of the DPP in circumstances where she was presumed innocent and had already served a considerable duration of pre-trial custody. This balancing test was resolved very much as a question of weighing public policy considerations with the presenters noting that such delays affect not only the accused but also any victims, families etc.

5. In relation to public policy, the court noted that such delays are becoming longer and longer in the District Court with the implication that the Executive and Legislative governments should perhaps consider such delays in the District Court as a priority for reform and/or further resources.
6. In addition to balancing these interests, the court also found that the primary judge entirely failed to take into account the matter of the pecuniary concerns of the witness and the family – a relevant consideration that was not satisfactorily considered. Finally, the primary judge's contention that the District Court had "no capacity" to accommodate a 6 week trial was found to be unsubstantiated, with a complete lack of evidence on the issue making it legally impermissible for the judge to rely on this as a factor in exercising the discretion. The court noted that the primary judge could not have taken this contention on judicial notice and when the matter was relisted, the registrar of the District Court was indeed able to accommodate a 6 week trial.
7. The eventual trial did not commence on 19 October as the 3 co-accused reversed their pleas to guilty. However, the trial had begun and was ongoing at the time of this interview in early November 2015.

BIOGRAPHY

Gabriel Wendler

Seven Windeyer Chambers, Sydney

Gabriel Wendler was called to the Bar in SA in 1982 and the NSW Bar in 1988. He is admitted to the Bars of Victoria, Queensland, Tasmania, ACT and the NT. Internationally he has appeared in major criminal trials before the High Courts of New Zealand and Fiji. He is an appointed member of the NSW Legal Aid complex criminal trial and appellate panels and for the past three years has been a member of the NSW Bar Association's Criminal Law Committee. Mr Wendler has an Australia wide criminal law trial and appellate practice. He has been counsel before the High Court of Australia in numerous past cases some of which have had a constitutional law dimension: He was counsel in the land mark case of *X7 v Australian Crime Commission* (2013) 248 CLR 92.

Stephen Odgers SC

Forbes Chambers, Sydney

Stephen Odgers SC was appointed Senior Counsel in 2000. He is chair of the NSW Bar Association Criminal Law Committee. He is the general editor of the Criminal Law Journal and author of *Australian Criminal Justice* (5th edition 2014) with Mark Findlay and Stanley Yeo, *Principles of Federal Criminal law* (3rd edition 2015) and *Uniform Evidence Law* (11th edition 2014).

BIBLIOGRAPHY

Focus Case

Cheih-Wei Lin v R [2015] NSWCCA 264

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_02-10-2015_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/560872abe4b0517a97280f0f>

Cases

House v R [1936] HCA 40; (1936) 55 CLR 499

Legislation

Criminal Appeal Act 1912 (NSW)