30/99; [1999] VSC 442

SUPREME COURT OF VICTORIA

THORPE v KENNETT

Warren J

10 September, 15 November 1999

CRIMINAL LAW – GENOCIDE – DEATHS OF ABORIGINAL PERSONS – CHARGES LAID AGAINST FORMER PREMIER OF VICTORIA ALLEGING COMMISSION OF CRIMINAL OFFENCE OF GENOCIDE – CHARGES DISMISSED FOR WANT OF JURISDICTION – WHETHER GENOCIDE FORMS PART OF THE CRIMINAL LAW OF STATE OF VICTORIA – WHETHER GENOCIDE IS RECOGNISED AS PART OF THE DOMESTIC LAW OF VICTORIA – WHETHER ON THE MATERIALS TENDERED IN SUPPORT OF THE CHARGES AN ARGUABLE CASE WAS MADE OUT AGAINST THE DEFENDANT INSOFAR AS THE QUESTION OF INTENT WAS CONCERNED – WHETHER MAGISTRATE IN ERROR IN DISMISSING CHARGES.

T. caused the issue of three charges against K, the then Premier of the State of Victoria, alleging that he committed the "universal offence of genocide", failed to stop and prevent further and continuing genocide and incited and conspired to commit offences on the Aboriginal people. When the charges came on for hearing, the Chief Magistrate dismissed the proceedings for want of jurisdiction on the basis that the offence of genocide does not form part of domestic law. On appeal—

HELD: Appeal dismissed.

1. The criminal law in the State of Victoria does not recognise a crime of genocide. Such a crime is not recognised at common law or under the *Crimes Act* 1958 (Vic) or any other statute at this point in time. Before genocide could constitute part of the criminal law of the State of Victoria it would be necessary for the legislature to enact specific legislation such as that enacted in England by way of the *Genocide Act*. In England, the *Genocide Act* 1969 specifically creates an offence of genocide if a person commits any act falling within the definition of "genocide" in Article II of the Genocide Convention. An equivalent provision to the *Genocide Act* (UK) does not exist in the State of Victoria.

2. On the basis of the exhibits tendered in support of T's case, T. was unable to make an arguable case to show an intent on the part of K. such as to satisfy the intent contemplated by Article II of the Convention.

3. Genocide is not recognised as part of domestic law in the State of Victoria.

***Nulyarimma & Buzzacott v Thompson & Ors* [1999] FCA 1192; 96 FCR 153; (1999) 165 ALR 621; (1999) 8 BHRC 135; (1999) 3 CHRLD 205 (per Wilcox and Whitlam JJ); and**

***Sumner v United Kingdom of Great Britain & Ors* [1999] SASC 456, followed.**

WARREN J:

1. On 10 December 1998 the Registrar of the Magistrates' Court of Victoria issued a charge and summons upon the written request of Robert Alan Thorpe ("the appellant") against Mr Jeffrey G Kennett, the then Premier of the State of Victoria, that:

> 1. The defendant did at Melbourne between Thursday 1 October 1998 and Tuesday 24 November 1998 commit the universal criminal offence of genocide in that he did, with intent to destroy, cause serious mental harm to us, the Gunai under Boorun.
>
> 2. The defendant has failed to stop and prevent further and continuing genocide of our people. In particular, the defendant has refused to make "the following executive acts (Acts of State):
> (1) Declaration of Détente (end of hostilities).
> (2) Recognition of the Gunai/Kurnai under Boorun.
> (3) Express adoption of Genocide Convention."
>
> 3. The defendant has at Melbourne and elsewhere, in his position as Premier and Government Minister attempted, incited and conspired and been an accomplice in numerous acts, committed with intent to destroy the original peoples of the land, causing serious mental harm to the original peoples of the land and deliberately imposing upon the original peoples of the land conditions of life calculated to destroy each people in whole or in part.

2. The appellant described himself as the "designated genocide prosecutor for the Gunai under Boorun".

3. The charge and summons was heard by the Chief Magistrate on 27 January 1999. Relying upon the judgment of Crispin J of the Supreme Court of the Australian Capital Territory in *Nulyarimma & Ors v Thompson* [1998] ACTSC 136; (1998) 136 ACTR 9; (1998) 148 FLR 285, the Chief Magistrate dismissed the proceedings for want of jurisdiction on the basis that the offence of genocide does not form a part of domestic law. There was no appearance for the defendant in the Magistrates' Court.

4. The appellant sought to appeal against the decision of the Chief Magistrate on a question of law pursuant to section 92 of the *Magistrates' Court Act* 1989. The matter came before Master Wheeler on 9 April 1999. The Master in published reasons also followed the decision of Crispin J in *Nulyarimma & Ors v Thompson* and dismissed the appellant's application to appeal on the basis that the appellant had failed to make out a prima facie case for the relief sought. The application before the Master was determined pursuant to Order 58 of Chapter I of the *Rules of the Supreme Court* and heard *ex parte*.

5. By notice of appeal dated 12 April 1999 the appellant appealed against the whole of the order of Master Wheeler to a judge of the Supreme Court, pursuant to O 77.05 of the Rules.

6. The appeal against the Master proceeds before me pursuant to Order 77.05(7) as a hearing *de novo*. In the hearing before me, Mr Kennett, as respondent, did not appear although I was informed by the appellant that notice had been given to the respondent of the hearing in accordance with Order 77.05(5) of the Rules. The appellant appeared in person but was partly assisted by Mr Lindon of counsel who appeared as *amicus curiae* with respect to any procedural matters about which the appellant required assistance.

7. Section 92 of the *Magistrates' Court Act* provides for an appeal on a question of law only. Hearing the matter *de novo* as I do I must be satisfied that the appellant has made out a *prima facie* or arguable case that the offence of genocide forms a part of domestic law in the State of Victoria. If so satisfied I would state questions of law in accordance with Order 58.09(1) of the Rules and refer the matter for hearing and determination by a judge.

8. In the affidavit filed in support of the appeal the appellant deposed that in support of the offences brought against the former Premier it was alleged that the respondent had refused to recognise the Gunai under Boorun as a sovereign people and had enacted the *Land Titles Validation (Amendment*) Act 1998 thereby further diminishing the rights of the Gunai and occupation of their land. It was further alleged in the affidavit that the non-recognition of the Gunai and the enactment of the *Land Titles Validation (Amendment) Act* constituted conduct that in turn constituted the act of genocide. It was further deposed by the appellant in his affidavit that the former Premier during his term of office had engaged in other acts of genocide with respect to matters of cultural heritage, education, health and housing. However, no particulars of those acts of genocide were before the learned Chief Magistrate below.

9. The appellant exhibited to his affidavit five volumes of materials said to constitute the particulars in support of the charges he wished to pursue against the former Premier. The materials encompassed copies of documents filed by the appellant in other proceedings in the High Court, copies of judgments in other jurisdictions, articles in relation to customary and international law, copies of correspondence between the appellant and the Registrar of the Magistrates' Court, copies of matters laid before the Parliament of the State of Victoria, various maps said to represent the location of the original indigenous people of the area constituted by the State of Victoria, a "massacre" map and the location of various Aboriginal reserves and missions in the State of Victoria together with, various articles in relation to the rights of indigenous persons.

10. The pivotal question of law of whether or not the offence of genocide is recognised as part of domestic law was considered at first instance by Crispin J in *Nulyarimma & Ors v Thompson*, *supra* and which authority formed the basis of the orders of the learned Chief Magistrate and the Master. In *Nulyarimma* an application was made to the Registrar of the Magistrates' Court of the Australian Capital Territory to issue warrants for the arrest of the Prime Minister and others on

the allegation that they had committed the criminal offence of genocide in connection with the formulation of a document devised by the Commonwealth Government entitled "Ten Point Plan" to enact the *Native Title Amendment Act* 1998 (Cth). The Registrar refused to issue the warrants and Crispin J of the Supreme Court of the Australian Capital Territory rejected an application for mandamus against the Registrar. The appellants appealed to the Full Court of the Federal Court.

11. In *Buzzacott v Minister for the Environment & Ors* [1999] ICHRL 122 a representative of the Arabunna People instituted a proceeding in the Federal Court against two Commonwealth Ministers alleging that the respondents had committed genocide in failing to apply to the UNESCO World Heritage Committee for inclusion of certain lands of the Arabunna People on the World Heritage List maintained under the World Heritage Convention. The applicant claimed that the failure constituted genocide and sought civil remedies, including damages and a mandatory injunction compelling the respondents to proceed with the World Heritage application. The respondents moved to strike out the proceeding and the motion was referred to a Full Court of the Federal Court. Both matters of *Nulyarimma* and *Buzzacott* were heard together before the Full Court of the Federal Court constituted by Wilcox, Whitlam and Merkel JJ [1999] FCA 1192; 96 FCR 153; (1999) 165 ALR 621; (1999) 8 BHRC 135; (1999) 3 CHRLD 205 and the judgment of the court was delivered on 1 September 1999, that is, after the orders were made by the Master but before the matter came on for hearing before me. As I hear the matter *de novo* I consider the relevant authorities that may have been handed down since the orders made by the learned Chief Magistrate.

12. The Full Court upheld the decision of Crispin J and dismissed the appeals. Wilcox and Whitlam JJ reached their view on the basis that the international crime of genocide does not form part of the domestic law of Australia. Merkel J, after giving much consideration to the offence of genocide as an offence under customary international law, concluded that genocide was a part of the common law of Australia. However he too dismissed the appeal on the basis that the appellants failed to show that the respondents committed acts which constituted genocide.

The issues before the Full Court of the Federal Court in *Nulyarimma* and *Buzzacott*

13. The appellants in both matters claimed that the criminal offence of genocide exists under Australian law on the basis that:

> 1. The prohibition against genocide is a customary norm of international law;
>
> 2. Australian municipal law incorporates customary norms of international law without the need for legislation;
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> 3. The universal crime of genocide, as a customary norm of international law, has been incorporated into the common law of Australia.

The arguments were founded upon customary international law, as opposed to conventional international law, that is, the law of treaties.

14. The Respondents contended that regardless of whether the offence was one of customary or conventional international law, only a law that has been enacted by an Australian Parliament is able to give rise to criminal liability. Since the crime of genocide has not been enacted by the Australian Parliament, there is no criminal liability that can exist.

15. It was common ground between the parties that genocide has been recognised as a crime under customary international law since at least 1948, and is defined in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention"). The Convention was ratified by the *Genocide Convention Act* 1949 (Cth), but that ratification did not have the effect of incorporating the Act as part of Australian law or for that matter as part of Victorian Law.

16. Wilcox J discussed the definition of "genocide" in his judgment. Article II of the Genocide Convention requires that the acts be committed "with intent to destroy, in whole or in part, a national, ethical, racial or religious group". Wilcox J held, therefore, in considering the term "genocide" thought must also be given to "intent". The learned judge concluded that the plight of aboriginal Australians was not due to a sustained or official intention to destroy Aboriginal people. The learned judged ultimately held that genocide is a crime under international customary law,

but concluded that it is not cognisable in an Australian Court.

17. Wilcox J held that the prohibition of genocide is a peremptory norm of customary international law that gives rise to a non-derogatable obligation on each nation State towards the entire international community. The learned judge considered that the obligation existed before and independent of the Genocide Convention. He considered that the obligation imposed by customary law on each nation State is to extradite or prosecute any person found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention.

18. As a consequence of this obligation, Wilcox J found that it is within the constitutional power of the Commonwealth to enact legislation for trial within Australia of persons accused of genocide, pursuant to the external affairs power: *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501; (1991) 101 ALR 545; 65 ALJR 521; 91 ILR 1. However, the learned judge held that the fact that ratification of the Convention had occurred did not have the effect of directly affecting Australian domestic law in the absence of enacting legislation: *Minister for Immigration & Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 39 ALD 206; [1995] EOC 92-696; [1996] 1 CHRLD 67; (1995) 7 Leg Rep 18. Wilcox J proceeded to observe that if genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits such an outcome. In the absence of legislation, the Court must turn to the common law. If the domestic courts are faced with a policy issue in deciding whether to recognise and enforce a rule of international law it "should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm" (at 630). For these reasons Wilcox J held that both appeals should be dismissed.

19. Whitlam J held that under customary international law, there is an international crime of genocide. At 637 the learned judge referred to s1.1 of the *Criminal Code (Cth)* which abolishes common law offences under Commonwealth law. His Honour concluded that as from the date of the enactment of s1.1 (being 1 January 1997) genocide cannot be recognised as a common law offence under Commonwealth law. Whitlam J observed that the statute law of the Australian Capital Territory does not make express provision for an offence of genocide. Whitlam J concluded that genocide is not an offence under the common law. Accordingly, Whitlam J held that both appeals should be dismissed.

20. Merkel J formulated the issue as "whether the crime of genocide, which attracts universal jurisdiction under international law, can become part of Australian law without a legislative act creating genocide as an offence" (at 642). He held that such determination involved "consideration of the circumstances in which customary international civil and criminal law can become part of the municipal law of Australia". Merkel J considered a number of English authorities beginning with *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529; [1976] 3 All ER 437; (1976) 1 WLR 868, in which Lord Denning espoused two theories as to the manner in which rules of international customary law are capable of becoming part of English law. The theories being 'incorporation' and 'transformation'.

21. Essentially the doctrine of incorporation states that the rules of international law are incorporated into English law automatically and are considered to be part of English law unless they are in conflict with an Act of Parliament. The doctrine of transformation states that the rules of international law are not considered part of English law except as already adopted and made part of English law by the decisions of judges ('common law adoption'), by Act of Parliament ('legislative adoption'), or long established custom. Under the first doctrine, English law would alter as the rules of international law change. Under the second doctrine, English law would not change, and would remain bound by precedent.

22. Merkel J distinguished between 'incorporation' and 'common law adoption'. The practical difference being that by common law adoption a rule of international law is adopted "upon a court determining that the rule is not inconsistent with existing legislation, the common law, or public policy" (at 643). Upon an analysis of the English authorities, his Honour concluded that the preferred view appears to be, as a result of *Trendtex Trading*, that of the doctrine of incorporation.

23. In considering the role of international customary law in Australia Merkel J referred to the judgment of the High Court in *Chow Hung Ching v The King* [1948] HCA 37; (1948) 77 CLR 449; [1949] ALR 298; 15 ILR 147. In particular His Honour referred, at 652, to the judgment of Dixon J who noted that in regard to the status of international customary law in England "that international law is not a part, but is one of the sources, of English law", such that what follows is an analysis of whether the law should be received into and in so doing become a source of English Law.

24. Merkel J (at 653) concluded that there is no clearly established principle as to when a rule of international law becomes domestic law. However, he did note that the common law adoption approach seems to be favoured in Australia over the incorporation or legislative adoption approaches.

25. His Honour (at 653) went on to formulate the approach as follows:

> 1. The rule of international law must become generally accepted by or have received the assent of the community of nations.
>
> 2. The court must then consider whether the rule 'is to be treated as having been adopted or received into, and so become a source' of domestic law.
>
> 3. Adoption of the rule will take place if the law to be adopted is 'not inconsistent with rules enacted by statutes or finally declared by the courts'. With respect to inconsistency with the common law, a strict test of inconsistency should be applied. Inconsistency with the common law meaning 'inconsistency with the general policies of [the] law, or lack of logical congruence with its principles'.
>
> 4. A rule of international law will therefore be adopted unless there exists such inconsistency. Where inconsistency does exist, no effect can be given to it without legislative enactment.
>
> 5. Once adopted, the customary international law has the 'force of law' in the sense that it will modify the common law and be a declaration as to the common law applicable to both civil and criminal proceedings in a domestic court.
>
> 6. In certain circumstances, the adoption will only be as from the date the particular rule of customary law has been established.

26. Merkel J then went on to consider whether the principles regarding the adoption of customary international law relate only to international civil law to the exclusion of criminal law. His Honour noted (at 655) that there was nothing in the authorities to say that the principles are restricted only to civil law. In respect of universal crimes, provided extraterritoriality and *jus cogens* are present, there is no need to enact legislation to incorporate the offence into municipal law. The situation differs where the offence is not universal, and is specific to particular countries who may be signatories to a particular treaty and in which case legislation would be necessary.

27. Merkel J held in relation to the first principle, genocide, as a universal crime, has been recognised and acted upon by Australia as a consequence of ratification of the Genocide Convention by the Commonwealth Parliament with the enactment of the *Genocide Convention Act* 1988 (Cth). He held that it has not been incorporated domestically. Given that legislation is not necessary under the doctrine of common law adoption, it fell to be considered whether the adoption would be inconsistent with common law policy.

28. The respondents contended that adoption would be inconsistent with the common law policy that it is no longer the function of the courts to create a new offence. His Honour concluded that "[g]enocide, as a crime, is clearly defined under international law, may be prosecuted in a superior court of record in any State (and probably any Territory) in Australia and would be punishable by that court in accordance with the policies and principles of the common law in relation to common law offences" (at 663). He further held that the court would not be creating a new crime, but adopting an existing law which is a universal crime and consequently the same policy considerations do not apply (at 664). Adoption would not usurp the proper role of Parliament, in fact adoption would re-enforce the recognition that the legislature has already accorded to genocide as an international crime. It would not introduce uncertainty, given that genocide is already defined and no value judgment is involved as the "established criteria for adoption of

customary international into municipal law have been satisfied rather than because it is 'desirable' to do so" (at 666). It was also contended that adoption would be inconsistent with the *Criminal Code* 1995 (Cth) the purpose of which was to codify Commonwealth offences. Merkel J concluded (at 663) that the legislation does not constitute a statutory prohibition or impediment' and that the adoption thereby is not inconsistent with the rules enacted by statute. Merkel J concluded, (at 668) that the law will be better served by incorporating universal crimes against humanity as part of the common law in Australia. It satisfies the criteria of experience, common sense, legal principle and public policy; and (at 668) held that the offence of genocide is an offence under the common law of Australia.

29. The main contention of the appellants in *Nulyarimma* was that the "Ten Point plan" and the *Native Title Amendment Act* 1998 (Cth) would result in the unjustifiable extinguishment of native title in certain circumstances, and that, effectively, this extinguishment gave rise to the crime of genocide. At 670 Merkel J noted the views of Crispin J that the formulation of the legislative policy and the presentation of the bill for enactment were part of the conduct of parliamentary business. The relevant public policy considerations would be defeated "if the protection given to members of parliament by the law could be circumvented by prosecuting them for antecedent formulation of the policies reflected in legislation". At 670 his Honour considered that the conduct complained of as constituting genocide was clearly within the scope of "opinions and arguments concerning government and political matters that affect the people of Australia" and which has been held to fall within the implied freedom of political communication under the Commonwealth Constitution: *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 571; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2. Further, there had been no challenge to the constitutional validity of the *Native Title Amendment Act* 1998 (Cth), such that the role of the members of parliament "in supporting and voting for a valid law could not possibly constitute criminal conduct in Australia". The conduct complained of, which was more in the nature of 'cultural genocide' is dealt with elsewhere, in other protocols and conventions.

30. On the basis of these findings Merkel J dismissed the appeal in the *Nulyarimma* matter.

31. In *Buzzacott v Hill & Ors*, Merkel J considered the *World Heritage Properties Conservation Act* 1983 (Cth) which gave effect to the World Heritage Convention. The purpose of the Act is to ensure the protection and conservation of property defined within the Act in s3A. Merkel J concluded (at 674) that the subject lands did not fall within the categories of "identified property". It was therefore necessary to look at the conduct of the Executive government under the World Heritage Convention instead of the Act. At 674, his Honour noted that the purpose of the Convention was to impose a duty on each State who is a party to the Convention to identify and delineate cultural heritage properties situated within its territory suitable and appropriate for protection and conservation in accordance with the Convention. Article II of the Convention places an obligation on the States to nominate property for inclusion on the World Heritage List. Merkel J observed that it is for the Executive to decide what property will be nominated based upon a "calculus of factors, including factors which are cultural, economic and political" (*Richardson v Forestry Commission* [1988] HCA 10; (1988) 164 CLR 261, at 296; 73 ALR 589; 61 ALJR 528; 90 ILR 58 and *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, at 278-279 and 306-308; (1987) 75 ALR 218).

32. In *Peko-Wallsend*, the Full Federal Court held that such decisions are not justiciable because of the complexity of policy considerations involved. Also, such decisions are concerned with Australia's international relations rather than the personal circumstances of any individual. As such, the decision of the Executive as to whether certain property should be nominated for inclusion in the List is not justiciable. Consequently, at 676 Merkel J noted that the Convention is not a part of municipal law and therefore cannot confer justiciable rights upon individuals. The obligation is on signatory States to comply with the requirements of the Convention in accordance with international law. As a consequence, a breach of obligations under the Convention is not a matter justiciable at the suit of a private citizen: *Tasmanian Wilderness Society Inc v Fraser* [1982] HCA 37; (1982) 153 CLR 270; (1982) 42 ALR 51; (1982) 56 ALJR 763; (1982) 48 LGRA 300.

33. On the basis of these findings Merkel J dismissed the appeal in the *Buzzacott* matter.

Sumner v United Kingdom of Great Britain & Ors

34. The judgment of the Full Court of the Federal Court was subsequently considered by the Supreme Court of South Australia in the unreported judgement of Nyland J in *Sumner v United Kingdom of Great Britain & Ors* [1999] SASC 456, delivered on 27 October 1999.

35. In that case, the plaintiff instituted proceedings against the defendants as a result of the intention of the Government of South Australia to proceed with the building of the Hindmarsh Bridge. An injunction was sought by the plaintiff to restrain works in the area. The proceedings arose out of concerns arising from possible desecration to the site and culture of the Ngarrindjeri people should further development of the area take place. The plaintiff sought to rely upon the *Genocide Act (UK)* 1969, to support the application for the injunction. The plaintiff submitted that in the absence of Australian or South Australian legislation there is sufficient connection between the Ngarrindjeri People and the United Kingdom given the history of the colonisation of Australia and the issue of genocide to attract the protection of the English Act.

36. Nyland J formed the view that there was no basis upon which the Court could rely to exercise jurisdiction under the *Genocide Act,* particularly where it contained a provision that limited its operation extra territorially.

37. In respect of the matters concerning the issue of genocide, her Honour referred to the decision of the Full Court of the Federal Court in *Nulyarimma v Thompson* and adopted the decision of the majority in that case. Her Honour referred in particular to paragraphs 199 and 202 of the decision of Merkel J. These paragraphs emphasise that, in Australia's history, it is undoubted that injustices have been perpetrated on the indigenous peoples of Australia as well as other groups, but that these harms in the community resulting from government conduct is not genocide. The Convention requires intention, which is not present. And, further, that no one person could be said to have engaged in conduct that would constitute the crime of genocide under international and [or] domestic law.

38. Her Honour reiterated that the decision of the Federal Court in *Nulyarimma v Thompson* represents the current state of the law in Australia concerning the issue of genocide. The plaintiff appealed to the Full Court.

39. The judgment of Nyland J in *Sumner* was considered on appeal by the Full Court of the Supreme Court of South Australia constituted by Doyle CJ, Debelle and Lander JJ [1999] SASC 462. The Full Court in a unanimous judgment, dismissed the appeal concluding that the appellant had failed to establish that there was a serious question to be tried.

40. The Full Court referred to the judgment of the Full Court of the Federal Court in *Nulyarimma v Thompson*, and concluded that genocide is not an offence under Australian law. The Court noted that the appellant sought to rely on the *Genocide Act* 1969 (UK), contending that it should apply in the circumstances. The Court noted that the submission was 'doomed to failure'. Accordingly the appeal was dismissed.

Summary

41. Each of the *Nulyarimma* and *Buzzacott* and *Sumner* judgments were concerned with establishing that genocide was recognised as part of the domestic law for the purposes of seeking relief in civil proceedings. In *Nulyarimma* and *Buzzacott* the ultimate relief sought lay in the nature of one of the prerogative writs, mandamus and also sought damages arising from alleged breaches of fiduciary duty and duty of care. In *Sumner* the principal claim lay in contract, tort and breach of fiduciary duty with interlocutory relief sought by way of injunction. In the present proceeding the appellant does not seek to establish that genocide is recognised as part of civil domestic law, rather, that it forms part of the criminal law in this State.

42. At common law the unlawful killing of a person is recognised as homicide (see Archbold, *Criminal Pleading Evidence and Practice* Ch19 (1999) ed.). The crime of murder has stood as the primary offence under which charges of unlawful killing of a person is brought. It is the charge of murder under which specific forms of homicide are brought. For example matricide or patricide and sometimes infanticide. The approach of the common law with respect to unlawful killing has been to treat such acts as falling under the general rubric of murder. Hence, insofar

as the appellant alleges that the respondent engaged in acts or conduct that led to the deaths of Aboriginal persons then such matters would fall under the law relating to homicide be it murder, manslaughter or otherwise.

43. However, insofar as a crime of genocide is said to exist in this State I have strong reservations upon accepting the approach followed by Merkel J in *Nulyarimma* and *Buzzacott* to the effect that by the signing of an international treaty or convention the provisions of such document are immediately incorporated into the law of the jurisdiction. In my view the consequences of such incorporation lead me to be very wary of such approach. In any event, in the present matter the appellant seeks to invoke the Genocide Convention in order to assert that genocide constitutes a criminal offence in this State. For the reasons expressed by Wilcox J in *Nulyarimma* and *Buzzacott* (at 630) and in light of the fact that the appellant seeks to lay criminal charges against the respondent I decline to regard genocide as incorporated as a criminal offence in this State. In my view, before genocide could constitute part of the criminal law of the State of Victoria it would be necessary for the legislature to enact specific legislation such as that enacted in England by way of the *Genocide Act*.

44. In summary, the criminal law in this State does not recognise a crime of genocide. Such a crime is not recognised at common law or under the *Crimes Act* 1958 (Vic) or any other statute at this point in time. In England genocide constitutes a crime under specific legislation, namely, the *Genocide Act* 1969. The English legislation specifically creates an offence of genocide if a person commits any act falling within the definition of "genocide" in Article II of the Genocide Convention. Under Article II genocide is defined as meaning specific acts committed with the intent to destroy a national, ethical, racial or religious group by one of the following acts:

> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.

45. An equivalent provision to the *Genocide Act* (UK) does not exist in the State of Victoria. In my view, therefore, genocide is not recognised at this time as part of criminal law in this State. Even so, having considered the exhibits in support of the appellant's case I do not consider he is able to make an arguable case on the material of an intent on the part of the respondent such as to satisfy the intent contemplated by Article II of the Convention. The materials, in part, tell of a tragic time in the history of this State but of itself such materials cannot demonstrate on the necessary basis an intent of the respondent.

46. Insofar as it is necessary for me to do so I consider that genocide is not recognised as part of domestic law in any event in this State. In so finding I rely upon and adopt the principles expressed by Wilcox and Whitlam JJ in *Nulyarimma* and *Buzzacott* and Nyland J in *Sumner*. It follows that I consider that the appellant has failed to make out a prima facie case and accordingly the appeal from the Master is dismissed.

APPEARANCES: The plaintiff appeared in person. No appearance for the defendant. Mr L Lindon, counsel as *amicus curiae*.
