HIGH COURT OF AUSTRALIA

30 May 2012

PGA v THE QUEEN

[2012] HCA 21

Today the High Court by majority dismissed an appeal from the Full Court of the Supreme Court of South Australia, which had held that a husband could be guilty of rape of his wife in 1963.

In 2010, the appellant was charged with a number of criminal offences including two counts of rape. It was alleged that in 1963 the appellant raped his then wife, with whom he lived at the time. In 1963, s 48 of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act") criminalised rape but did not define the elements of the offence. Those elements were supplied by the common law. Legislative amendments in South Australia, which removed the limitation period in respect of offences against s 48, permitted the prosecution of the appellant despite the lapse of time between 1963 and 2010.

A Judge of the District Court of South Australia stayed the trial of the appellant and reserved for determination by the Full Court the following question of law: "Was the offence of rape by one lawful spouse of another ... an offence known to the law of South Australia as at 1963?" A majority of the Full Court answered that the appellant could be guilty of rape of his wife in 1963. By special leave, the appellant appealed to the High Court seeking to set aside this answer to the reserved question of law.

In the Full Court and in the High Court, the appellant argued that until the High Court's decision in R v L (1991) 174 CLR 379, the common law with respect to rape in marriage was correctly stated by Sir Matthew Hale. In 1736, Hale wrote that a husband could not be guilty of raping his wife because, by marriage, she gave her irrevocable consent to intercourse. In 1991, the High Court in R v L held that, if it was ever a part of the common law of Australia that by marriage a wife gave irrevocable consent to sexual intercourse with her husband, this was no longer a part of the common law by 1991.

A majority of the High Court dismissed the appeal. The majority held that if the marital exemption to rape was ever a part of the common law of Australia, it had ceased to be so at least by the time of the enactment of s 48 of the CLC Act in 1935. Local statute law, including legislation about divorce, property and voting, had removed any basis for the acceptance of Hale's proposition as a part of the common law applicable in Australia in 1963. The majority emphasised that this conclusion involved no retrospective variation or modification of a settled rule of the common law of Australia.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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