HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M16/2024
File Title:	Director of Public Prosecutions v. Smith
Registry:	Melbourne
Document filed:	Form 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	18 Apr 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **DIRECTOR OF PUBLIC PROSECUTIONS**
Appellant

and

DAVID JOHN SMITH
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The questions reserved for determination

2. The questions reserved for determination by the Court of Appeal in this case were informed by the reasons in *Alec (a pseudonym) v The King* [2023] VSCA 208: see facts of the case stated at [22]-[27] (**CAB 27-28**).

   2.1. Question 1 asked the Court of Appeal to determine whether the introductory meeting in this case infringed any rule derived from the principle of open justice.

   2.2. Question 2 asked the Court of Appeal to determine whether the introductory meeting in this case gave rise to a reasonable apprehension of bias.

   2.3. Questions 3 and 4 asked the Court of Appeal to determine the consequences of an affirmative answer to Question 1 and/or 2.

The source of power to hold the meeting

3. Section 389E(1) of the *Criminal Procedure Act 2009* (Vic) (**CPA**) conferred upon the County Court an express power to make or vary any direction for the fair and efficient conduct of the proceeding.

4. The facts of the case stated establish that the introductory meeting took place pursuant to directions made under s 389E(1): at [10]-[11], [14]-[17] (**CAB 25-26**).

5. Having regard to the statutory scheme within which s 389E(1) sits, fairness in s 389E(1) includes fairness to a vulnerable witness, which is in the interests of the administration of justice: **AS [58]**; **RS [52]**; **Court of Appeal [9] (CAB 32)**.

6. The Court of Appeal's reasoning evinces five errors.

First error: the principle of open justice was not infringed by the meeting

7. It is necessary to distinguish between the principle of open justice in a broad sense, and the rule(s) derived from the principle: **AS [37], [42]-[46]**.

8. A general rule derived from the principle of open justice is that a court ordinarily conducts its hearings in open court: **AS [38]-[39]**.

9. This rule applies to hearings, and not every step in a civil or criminal proceeding: **AS [39]; Reply [4]-[5]**.

- *Scott v Scott* [1913] AC 417 at 439 (**JBA Vol 5 Tab 32**); *Russell v Russell* (1976) 134 CLR 495 at 532 (**JBA Vol 3 Tab 19**); *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [40].
- *Open Courts Act 2013* (Vic) s 28 (**JBA Vol 2 Tab 11**); *Charter of Human Rights and Responsibilities 2006* (Vic) s 24(1) (**JBA Vol 2 Tab 6**).

10. The introductory meeting in this case was not a hearing. It was not a step in the proceeding that was required to be open to the public: **AS [48]-[51]; Reply [6]-[9]**.

10.1. No decision was made at the meeting, and no evidence was taken from the complainant. The meeting was for the purpose of a quick "hello" and the judge did not exercise any judicial power: *contra* **RS [19]**.

Second error: if the principle of open justice was engaged, the meeting was authorised by s 389E

11. Even if, contrary to the appellant's submission, the principle of open justice was engaged by the introductory meeting, its application was excluded by the statutory scheme created by Parts 8.2 and 8.2A of the CPA: **AS [56]-[62]**.

12. The broad power in s 389E(1) supports a statutory regime intended to enable the evidence of vulnerable complainants to be taken in a private and protective environment, so that those complainants are able to give their best evidence and are not dissuaded from making complaints and giving evidence: see CPA s 338; **AS [58], [60]**.

13. Consistent with this purpose, s 372(1)(c) of the CPA expressly excludes the public from a special hearing at which a vulnerable complainant gives evidence. It would be incongruous to require the introductory meeting to be held in open court: **AS [60]; Reply [12]**.

Third error: the accused was not required to be present

14. There is no authority for the proposition that the common law requirement that an accused be present for his or her trial extends to steps not part of the trial and sentence: **AS [65]**. *Caulfield (a pseudonym) v The Queen* [2023] VSCA 76 (**JBA Vol 5 Tab 24**) does not establish such a rule: **Reply [14]**.

15. Section 246 of the CPA did not apply, because: (i) the introductory meeting was not a hearing; and (ii) even if it was a hearing, it was not a hearing "conducted under" Chapter 5 of the CPA: **AS [64]; Reply [15]**.

Fourth error: if the principle of open justice was infringed, there was no fundamental irregularity

16. There is no suggestion that the introductory meeting affected the evidence given by the complainant in the special hearing, or that the admission of the evidence would give rise to any unfairness: **AS [69]**. Consequently, even if the principle of open justice was infringed by the introductory meeting, that could not give rise to a fundamental irregularity in the trial: **AS [71]-[73]**.

Fifth error: there was no reasonable apprehension of bias

17. The Court of Appeal did not answer Question 2. It should have answered: "no".

18. No reasonable apprehension of bias could arise in circumstances where the fair-minded lay observer would have in mind that both the prosecutor and defence counsel were present at the introductory meeting, that the purpose of the meeting was just to "say hello", the statutory context in which the meeting took place, and that the respondent did not object to the meeting taking place: compare *LAL v The Queen* [2011] VSCA 111 (**JBA Vol 5 Tab 27**).

Dated: 17 April 2024

Liam Brown **Stephanie Clancy** **Julia Wang**