MINOGUE v STATE OF VICTORIA (M162/2018)

Date Special Case referred to Full Court: 5 April 2019

On 12 July 1988, in the Supreme Court of Victoria, the plaintiff was convicted of one count of murder arising from the explosion of a car bomb in the vicinity of the Russell Street Police Complex on 27 March 1986. The explosion resulted in the death of a policewoman. The plaintiff was sentenced to imprisonment for life with a non-parole period of 28 years. On 30 September 2016, his non-parole period expired and he became eligible for the grant of parole. He made an application to the Adult Parole Board ("the Board"), which made a decision to proceed to parole planning. Before the Board could complete the performance of its functions, the *Corrections Act 1986* (Vic) ("the Act") was amended to insert s 74AAA, which provides that the Board must not make a parole order in respect of a prisoner convicted and sentenced to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless it is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated.

The plaintiff brought proceedings in the original jurisdiction of the High Court contending that s 74AAA should be construed as not applying to the exercise by the Board of its power to make a parole order in respect of him. On 20 June 2018, the High Court held that s 74AAA, on its proper construction, applied to a prisoner sentenced on the basis that the prisoner knew, or was reckless as to whether, the person murdered was a police officer. The plaintiff was not sentenced on that basis. The offence committed was indiscriminate and no particular person or class of persons was targeted. Therefore, the Court concluded that s 74AAA did not apply to the plaintiff.

On 1 August 2018, the Act was amended by inserting s 74AB and substituting a new s 74AAA. Section 74AB(3) provides that, after considering an application for parole by Craig Minogue, the Board may make an order if, and only if, it is satisfied that he is in imminent danger of dying or is seriously incapacitated and, as a result, he no longer has the physical ability to do harm to any person, and that he has demonstrated that he does not pose a risk to the community.

The plaintiff contends that these provisions are inconsistent with the *Bill of Rights 1688 (1 Will & Mar ss II c II)* as applied by the *Imperial Acts Application Act 1980* (Vic) *(Bill of Rights),* and fundamental principles of the separation of the judicial power where punishment of criminal guilt is concerned, and are contrary to the rule of law. He submits that the practical effect of s 74AB(3) and (if it applies) s 74AAA(5) is to deprive him of any relevant prospect of release on parole, thereby making the burden of his sentence heavier.

With respect to the separation of powers, the plaintiff contends that the setting of a minimum non-parole period as part of a sentence is quintessentially an exercise of judicial power. The effect of s 74AB(3) and (if it applies) s 74AAA(5) is to impose on him additional punishment in respect of specific criminal conduct, which is something that may only be done by a court upon an adjudication of criminal guilt.

The plaintiff further contends that s 74AB(3) and (if it applies) s 74AAA(5) have the effect of converting his imprisonment into detention that amounts to cruel and unusual punishment within the meaning of the *Bill of Rights* by its being grossly disproportionate, or by its being arbitrary and insensitive to individual circumstances.

The plaintiff submits that s 74AB and (if it applies) s 74AAA offend the rule of law because those provisions single out the plaintiff (either by name or as a one of a small class of prisoners) and place him outside the general operation of the otherwise operative sentencing law, as it was applied by the Supreme Court in his matter without a rational and relevant basis for the discriminatory treatment and certainly not a rational and relevant basis justifying the extraordinary degree of disproportionality of that discriminatory treatment. Moreover, the provisions have been inserted into the Act some 30 years after the plaintiff began serving his sentence and are calculated to destroy the expectation on which he relied throughout that time - not that he would in fact be released on parole at the expiry of his non-parole period, but that he *might* be so released if he could demonstrate his rehabilitation to the parole authorities.

On 5 April 2019 Gordon J referred the Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. The Attorneys-General of New South Wales, Western Australia and South Australia have filed Notices of Intervention.

The questions in the Special Case are:

(a) Is s 74AB of the Act valid?

(b) Does the validity of s 74AAA arise in the circumstances of this case?

(c) If the answer to question (b) is “yes”, is s 74AAA invalid?