AUBREY (MA) v THE QUEEN (S274/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 323

Date of judgment: 18 December 2015

Special leave granted: 16 November 2016

In April 2002 the appellant tested positive for Human Immunodeficiency Virus ("HIV"). Doctors subsequently warned him of a need to adopt safe sexual practices, including wearing a condom, to avoid transmission of HIV to others.

In January 2004 the appellant commenced a sexual relationship with GB, who had regularly tested negative for HIV. The appellant told GB that he did not have HIV. In the ensuing months the appellant performed anal sex on GB on many occasions, without wearing a condom. In August 2004 GB tested positive for HIV. As a consequence of having HIV he has experienced serious ill health, suffering strokes, pulmonary embolism, cataracts, prostate damage, metabolic disorders, cognitive impairment, anxiety and depression.

The appellant later faced criminal charges, on an indictment containing two counts. Count 1, laid under s 36 of the *Crimes Act* 1900 (NSW) ("the Act") (as it stood in 2004), was that the appellant maliciously caused GB to contract a grievous bodily disease. Count 2, laid under s 35(1)(b) of the Act, was that the appellant maliciously inflicted grievous bodily harm upon GB. After pleading not guilty to Count 1, the appellant applied for Count 2 to be quashed. This was on the basis that the law in respect of the Count 2 offence required an injury that had an immediate connection with an act of unlawful violence, whereas the Crown case against the appellant did not allege a violent act, nor could any HIV-related injury suffered by GB have the requisite immediate connection.

On 8 March 2012 Judge Sorby stayed the proceedings on Count 2, upon holding that at the time of the charged offences there was uncertainty in the law as to whether the infecting of a person with a serious disease could constitute an infliction of grievous bodily harm.

An appeal by the Crown was unanimously allowed by the Court of Criminal Appeal ("the CCA") (Macfarlan JA, Johnson & Davies JJ) on 29 November 2012. Their Honours held that the meaning of the word "inflicts" in s 35(1)(b) of the Act (as s 35 stood in 2004) was not confined to an application of force. By 2004, the law in respect of the infliction of grievous bodily harm no longer required even an indirect application of force, nor did it require an immediate connection between an offender's act and consequent injury to the victim. The CCA then set aside Judge Sorby's order staying proceedings on Count 2.

An application by the appellant for special leave to appeal from the CCA's orders was dismissed by this Court on 10 May 2013.

When the appellant subsequently stood trial, a jury found him guilty on Count 2 (after finding him not guilty on Count 1). Judge Marien then sentenced the appellant to imprisonment for five years with a non-parole period of two years.

The appellant appealed, on grounds which included that Judge Marien had erred by directing the jury that the element of malice in Count 2 was satisfied (on the basis of recklessness, under s 5 of the Act) if the appellant had foreseen the *possibility* of harm being inflicted on GB, rather than the *probability* of harm.

The CCA (Gleeson JA, Button & Fagan JJ) unanimously dismissed the appellant's appeal. Their Honours held that Judge Marien had not misdirected the jury, as the chance of harm to GB foreseen by the appellant did not need to be so high as to be "probable" as opposed to "possible". Nor was any direction required so as to distinguish between a "merely theoretical possibility" and a "possibility as a matter of reality". The CCA also held that its earlier decision, on the Crown appeal in respect of the staying of proceedings on Count 2, was not wrong.

The grounds of appeal are:

- The Court of Criminal Appeal of New South Wales erred in holding that the offence of which the appellant was convicted was available in law, notwithstanding the decision in *R v Clarence* (1888) 22 QBD 23 and the subsequent New South Wales legislative amendments, in that the Court held that the offence of maliciously inflicting grievous bodily harm, as required by s 35(1)(b) *Crimes Act* 1900 (NSW) (as it stood in 2004), did not require an act by the accused that directly resulted in force being applied violently to the body of the victim.

- The Court of Criminal Appeal erred in finding that the mental state of recklessness, provided for by s 5 *Crimes Act* 1900 (NSW), did not require a foresight of the probability of harm in accordance with this Court's holding in *The Queen v Crabbe* (1985) 156 CLR 464, but instead was satisfied by the mere foresight of the possibility of harm.