



## HIGH COURT OF AUSTRALIA

11 March 2015

### CMB v ATTORNEY GENERAL FOR NEW SOUTH WALES

[2015] HCA 9

Today the High Court unanimously allowed an appeal against a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales ("the CCA") that imposed a sentence of imprisonment on the appellant, and remitted the matter to be re-determined by the CCA.

In 2011, following disclosures by the victim, the appellant was charged with sexual offences against his daughter, who was under the age of 16 at the time of the incidents. In accordance with the provisions of a regulation made under the *Pre-Trial Diversion of Offenders Act 1985* (NSW), the appellant was referred to a treatment program administered by the Department of Health known as the Cedar Cottage Program ("the Program").

As part of his assessment for entry into the Program, the appellant was encouraged to make additional disclosures as a sign of a positive commitment to change. The appellant admitted to further sexual offences against his daughter, committed over the same period as the earlier charges, but of which his daughter had no memory. The repeal of the relevant regulation before these disclosures meant that these further offences could not be dealt with as part of the Program.

The appellant was charged and, following his guilty plea, was sentenced in relation to these further offences. The District Court of New South Wales deferred sentence upon the appellant entering good behaviour bonds conditioned on completion of the Program. The Director of Public Prosecutions supported the imposition of non-custodial sentences in the unusual circumstances.

The Director of Public Prosecutions publicly announced his decision not to appeal against the sentences in light of the "unique history" of the matter. Subsequently, the Attorney General for New South Wales appealed to the CCA against the inadequacy of the sentences. The CCA allowed the appeal and re-sentenced the appellant to an aggregate sentence of five years and six months' imprisonment with a non-parole period of three years.

By grant of special leave, the appellant then appealed to the High Court. The appeal was limited to two grounds: first, that the CCA erred by placing the onus on the appellant to demonstrate that the prosecution appeal should be dismissed; second, that the CCA erred in its application of the law concerning the leniency that may be extended in the case of a guilty plea resulting from an offender's voluntary disclosure of otherwise unknown guilt of an offence.

In relation to the first ground, the High Court unanimously allowed the appellant's appeal. The Court held that before the CCA can allow an appeal by the prosecution against sentence, the prosecution must demonstrate both an appellable error in the sentencing judge's discretionary decision and negate any reason why the residual discretion of the CCA not to interfere should be exercised. The High Court allowed the appeal on the second ground by majority, holding that the CCA failed to consider whether it had been open to the District Court to determine that non-custodial sentences were not *unreasonably* disproportionate to the nature and circumstances of the offences.

- *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.*