HIGH COURT OF AUSTRALIA

13 September 2017

MARCO CHIRO v THE QUEEN
[2017] HCA 37

Today a majority of the High Court allowed an appeal from a decision of the Court of Criminal Appeal of the Supreme Court of South Australia concerning the proper basis on which to sentence the appellant for an offence of "[p]ersistent sexual exploitation of a child" contrary to s 50(1) of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA").

Section 50(1) of the CLCA provides that it is an offence for an adult to commit "over a period of not less than 3 days ... more than 1 act of sexual exploitation of a particular child under the prescribed age". Section 50(2) defines an "act of sexual exploitation" to mean an act that "could, if it were able to be properly particularised, be the subject of a charge of a sexual offence". The prosecution alleged that, between 1 July 2008 and 19 November 2011, the appellant committed more than one act of sexual exploitation of the complainant contrary to s 50(1). The complainant had been a student in a class taught by the appellant. The alleged acts of sexual exploitation ranged from kissing the complainant in circumstances of indecency to inserting the appellant's penis into the complainant's mouth.

At trial, the judge directed the jury that it would be sufficient to prove the offence if they were satisfied beyond reasonable doubt that the appellant had kissed the complainant on more than one occasion in circumstances of indecency, or had committed any two or more of the other acts of sexual exploitation alleged by the prosecution. The judge also directed the jury that it was necessary that they be unanimous (or agreed by statutory majority) as to the commission of at least the same two acts of sexual exploitation. The jury returned a majority verdict of guilty. The judge sentenced the appellant on the basis that he had committed all of the alleged acts of sexual exploitation.

The appellant appealed to the Court of Criminal Appeal against conviction and sentence on grounds including that the judge erred in not taking a special verdict or asking questions of the jury after receiving the general verdict in order to ascertain which of the alleged acts of sexual exploitation the jury agreed were proved beyond reasonable doubt. The appeal was dismissed.

By grant of special leave, the appellant appealed to the High Court. The Court held that, notwithstanding that it was not known which of the alleged acts of sexual exploitation had been proved, the appellant's conviction was not uncertain. A majority of the Court held, however, that the judge should have exercised her discretion to ask the jury, after the general verdict of guilty was returned, to specify which of the alleged acts of sexual exploitation they agreed had been proved. The majority held that, on the proper construction of s 50(1), each act of sexual exploitation is part of the actus reus of the offence and it is for the jury alone to find the actus reus of the offence proved. In circumstances where the judge did not know which of the acts of sexual exploitation the jury agreed had been proved, the appellant should have been sentenced on the view of the facts most favourable to him, namely, that he had committed the offence by kissing the complainant on more than one occasion in circumstances of indecency. On that basis, a majority of the Court allowed the appeal against sentence and remitted the matter to the Court of Criminal Appeal for the appellant to be resentenced.

- *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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