



HIGH COURT OF AUSTRALIA

8 November 2018

TONY STRICKLAND (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS; DONALD GALLOWAY (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS; EDMUND HODGES (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS; RICK TUCKER (A PSEUDONYM) v COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS
[2018] HCA 53

Today, the High Court, by majority, allowed appeals from a decision of the Court of Appeal of the Supreme Court of Victoria and ordered that prosecutions of the appellants for offences against the *Criminal Code* (Cth) and the *Crimes Act 1958* (Vic) be permanently stayed.

Pursuant to the *Australian Crime Commission Act 2002* (Cth) ("the ACC Act"), the Australian Crime Commission ("the ACC") may conduct a special investigation into matters relating to federally relevant criminal activity and an examiner may conduct an examination of a witness for the purposes of that investigation. A person appearing as a witness at such an examination is prohibited from refusing to answer a question that the examiner requires the person to answer.

In December 2008, the ACC received information concerning allegations that a company, XYZ Limited (a pseudonym), was involved in criminal activity. The ACC did not undertake any investigation of its own but instead referred the allegations to the Australian Federal Police ("the AFP") and offered to allow the AFP to utilise for the AFP's own purposes the ACC's coercive powers to examine witnesses. In 2010, the ACC compulsorily examined the appellants. Prior to their examinations, each appellant had declined to participate in a cautioned record of interview with the AFP. Several AFP officers watched each examination from a nearby room and their presence was not disclosed to the appellant under examination. Following each examination, the examiner appointed under the ACC Act made orders permitting the dissemination of examination material to the AFP and the Commonwealth Director of Public Prosecutions ("the CDPP"). The ACC then provided audio recordings of the examinations to both the AFP and the CDPP. The appellants were later charged with Commonwealth and Victorian offences.

On the pre-trial applications of each appellant to the Supreme Court of Victoria, the primary judge ordered that the proceedings on each indictment be permanently stayed as an abuse of process. The primary judge found that the ACC had been conducting a special investigation but that the entire examination process had been driven by the AFP for the purposes of its own investigation into the allegations. Her Honour found that information obtained from the examinations was used to compile the prosecution brief and obtain evidence against the appellants in circumstances where the prosecution would not have been able to do so if the examiner had exercised his powers appropriately. The prosecution had therefore gained an unfair forensic advantage. In addition, the practical effect of each examination had been to constrain the appellants' legitimate forensic choices in the conduct of their trials, because of the answers that three appellants were compelled to give during those examinations, and because all appellants had been deprived of the ability to test the basis upon which the documents in the prosecution brief had been selected. Finally, her Honour held that the examiner had been "reckless" as to the discharge of his statutory responsibilities and that, if he had exercised his powers independently and with appropriate

diligence, those responsible for investigating the alleged offences and for preparing the prosecution brief would never have received the information which they received.

On appeal, the Court of Appeal set aside the orders of the primary judge and concluded that the stay applications should be refused. The Court of Appeal held that the decisions to conduct the appellants' examinations and permit the disclosure of examination material to the AFP and CDPP were unlawful, because the examinations had not been conducted for the purposes of a special investigation by the ACC but rather, for the improper purpose of assisting an AFP investigation. The Court of Appeal held, however, that it had not been open to the primary judge to conclude that the examiner had acted recklessly. The Court of Appeal also held that the primary judge had erred in holding that the prosecution had been unfairly advantaged by the examinations and in holding that the appellants had suffered an unfair disadvantage which could not be sufficiently ameliorated by trial directions.

By grants of special leave, the appellants appealed to the High Court. The Court held, unanimously, that the ACC had acted unlawfully: the ACC had not conducted a special investigation into the matters the subject of the AFP investigation or matters otherwise relevant to the examination of the appellants but had acted at all times simply as a facility for the AFP to cross-examine the appellants under oath for the AFP's own purposes. A majority of the Court held, consequently, that the appellants' prosecutions ought to be stayed, as, in the circumstances of the case, to allow the prosecutions to proceed would bring the administration of justice into disrepute. A plurality of the Court held that this conclusion was further supported by the fact that the prosecution had derived a forensic advantage, which the examinations were expressly calculated to achieve, of compelling the appellants to answer questions that they had lawfully declined to answer and thereby locking them into a version of events from which they could not credibly depart at trial. For the same reason, at least three of the appellants had suffered a forensic disadvantage as a result of the examinations. The plurality held that given the wide dissemination of the examination product within the AFP and the Office of the CDPP, the forensic disadvantage and consequent prejudice to the fair trials of the appellants were incurable.

- *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.*