HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S53 of 2022**
B E T W E E N:

PETER LEONARD STEPHENS

Appellant

- v -

THE QUEEN

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: SUITABLITY FOR INTERNET PUBLICATION

1. The Appellant certifies that this Outline of Oral Submissions is in a form suitable for publication on the internet.

PART II: OUTLINE OF THE PROPOSITIONS TO BE ADVANCED BY THE APPELLANT IN ORAL ARGUMENT

2. The statutory offence created by s. 81 of the Crimes Act, 1900 (NSW) was in force from 31 October, 1900 to 7 June, 1984. The statutory offence created by s. 78K of the Crimes Act was in force from 8 June, 1984 to 12 June, 2003. **AS [7]**

3. On 29 November, 2018 an 18-count indictment was presented and the Appellant, on his arraignment on that 18-count indictment, pleaded not guilty to each count. **CAB 5-10** The Appellant's trial had commenced no later than that arraignment on 29 November, 2018. **AS [24]**

4. It is instructive to consider Counts 7 & 8 on that 18-count indictment. Count 7 alleged an offence contrary to s. 81, its wording reflecting the fact that s. 81 was repealed with effect from 8 June, 1984. Count 8 concerned the same act as Count 7 and was alleged in the alternative to Count 7, alleging an offence contrary to s. 78K, its wording reflecting the fact that s. 78K came into force on 8 June, 1984. **CAB 7-8**

5. Had the Appellant's trial been conducted on 29 November, 2018, the Appellant could only be convicted of the act the subject of Counts 7 & 8 if the Crown could prove beyond reasonable doubt that:

   (i) the act was committed on or before 7 June, 1984, in which event the Appellant would be convicted on Count 7 of an offence contrary to s. 81; or, in the alternative,

   (ii) the act was committed on or after 8 June, 1984, in which event the Appellant would be convicted on Count 8 of an offence contrary to s. 78K. **AS [24], [25] & [30]**

6. If the Crown could prove neither beyond reasonable doubt, then the Appellant would necessarily be acquitted on both Counts 7 & 8. This is illustrated by what was decided in R v Greenaway (2000) 118 A.Crim.R. 299 with respect to the conviction on count 4 for the offence contrary to s. 81; see R v Greenaway at paras. [5] – [11]. **AS [26] & [30]**

7. In these circumstances, having been arraigned on 29 November, 2018, the Appellant had a substantive right not to be convicted of, or an immunity from conviction for, an offence contrary to s. 81 unless the Crown could prove beyond reasonable doubt that the subject act was done no later than 7 June, 1984, that is, within the period for which s. 81 was in force. **AS [3] & AR [7]**

8. On 5 February, 2019 the 18-count indictment was amended and a 14-count indictment was substituted. **CAB 18-21** On that 14-count indictment, Count 6 was substituted for Counts 7 & 8 on the 18-count indictment and alleged an offence contrary to s. 81 for a period which extended beyond 7 June, 1984, a period during which s. 81 had not previously been in force. **CAB 19**

9. With respect to Count 6 on that 14-count indictment, the Crown, in order to obtain a conviction for an offence contrary to s. 81, now only had to prove that the subject act was done within that extended period, a period which extended beyond the date upon which s. 81 had been repealed.

10. Section 80AF of the Crimes Act, 1900 had come into force on 1 December, 2018 and was the basis upon which the Crown had applied to amend the 18-count indictment. (The amendments to that indictment relevant to the convictions the subject of challenge on this Appeal are summarised in the Appellant's Submissions at paras. 10 – 14.) **CAB 15-17**

11. If the requirements of s. 80AF(1) of the Crimes Act were satisfied then, in summary, s. 80AF(2)(a) eliminated the requirement that the Crown prove that the subject act was done by the Appellant whilst s. 81 was in force, that is, on or before 7 June, 1984, so long as s. 81 was in force at some time during the period within which the subject act is alleged to have been done. **AS [9] & [27]**

12. Section 80AF of the Crimes Act thereby "altered" the offence created by s. 81 in a manner akin to creating a criminal offence for the period beyond 7 June, 1984, by retrospectively extending the operation of s. 81 beyond the date of its repeal, thereby extending the period for which criminal liability might be imposed for the doing of an act which had been prohibited by s. 81. **AS [33] & AR [6]**

13. Section 80AF of the Crimes Act thereby removed or eliminated the substantive right or immunity described in para. 7 above. **AS [30]**

14. And with respect to the insertion of s. 80AF into the Crimes Act on 1 December, 2018:

    (a) there was no transitional provision contained within the amending Act;

    (b) there was no provision which deemed s. 80AF to have been in force from some earlier date;

    (c) there was nothing within the amending Act, s. 80AF or any other statute which evidenced a legislative intention that s. 80AF applied to criminal trials which had commenced prior to 1 December, 2018, such as the Appellant's trial. **AS [35]-[37]**

15. There is a presumption of statutory interpretation that a statute which affects existing substantive rights is not intended to apply retrospectively to pending criminal proceedings unless the language of the statute expressly or by necessary implication requires such a conclusion. **AS [17]-[22], [28] & [33] & AR [8]-[9]** See, for example:

- Newell v R (1936) 55 CLR 707, at pp. 712.4, 712.8 – 713.1 & 713.5;
- Rodway v R (1990) 169 CLR 515, at pp. 518.5 & 520.3 – 521.1;
- Victrawl Pty. Ltd. v Telstra Corp. Ltd. (1995) 183 CLR 595, at pp. 615.7 – 616.6 & 621.6;
- Lodhi v R (2006) 199 FLR 303, at paras. [21] – [50], but see esp. at paras. [23], [25], [30], [35], [43], [44] – [47] & [49] – [50].

16. Section 30(1) of the Interpretation Act, 1987 (NSW) provides another route to the same conclusion; see Lodhi v R at paras. [51] – [56]. **AS [18]**

17. The reasoning of Spigelman CJ in Lodhi v R is not only most instructive, but sets out the approach to be adopted in order to determine whether s. 80AF, upon being inserted into the Crimes Act, 1900 on 1 December, 2018, applied to the Appellant's (then pending) criminal trial. **AS [20]-[22]**

18. The authorities cited in para. 15 above dictate the conclusion that s. 80AF did not apply to a criminal trial which had commenced prior to 1 December, 2018. In this regard, s. 80AF was not "merely procedural" in operation because it was not a provision which merely affected the mode or conduct of a criminal trial; it did not, for example, merely provide for the admissibility of evidence or alter the burden of proof. See the Appellant's Reply at paras. 4 – 7.

19. Moreover, the reasoning in the judgment of Simpson AJA (with whom Davies J agreed) in the Court below does not reflect the principles set out within the authorities cited in para. 15 above and is therefore erroneous. **AS [29]-[38]**

- See the Judgment below at paras. [43], [44], [45] & [58]. **CAB 310, 311 & 314**

20. In circumstances where s. 80AF did not apply to the Appellant's trial, the convictions on Counts 6, 7 & 13 must therefore be set aside, and verdicts of acquittal must be entered on those counts; see the Appellant's Reply at paras. 11 – 12; also see the Appellant's Submissions at paras. 38 – 41.

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Wednesday 15 June, 2022