HIGH COURT OF AUSTRALIA

10 May 2017

MICHAEL AUBREY v THE QUEEN
[2017] HCA 18

Today the High Court dismissed an appeal from a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales. A majority of the High Court held that causing a complainant to contract the human immunodeficiency virus ("HIV") was capable of constituting infliction of grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act* 1900 (NSW), as that provision stood in 2004. The Court also held that recklessness, within the now repealed definition of "maliciously" in s 5 of the *Crimes Act*, could be established by an accused's foresight of the possibility, rather than the probability, of the risk in question materialising.

The appellant engaged in unprotected sexual intercourse with the complainant between January and July 2004 in circumstances where the appellant had been diagnosed as, and therefore knew that he was, HIV positive. The appellant was charged with one count of maliciously causing the complainant to contract a grievous bodily disease with the intent of causing the complainant to contract that grievous bodily disease (Count 1) and, in the alternative, one count of maliciously inflicting grievous bodily harm upon the complainant (Count 2). In March 2012, the appellant moved for an order from the District Court of New South Wales that Count 2 be quashed. Sorby DCJ stayed the proceedings in relation to Count 2 due to uncertainty as to whether causing another person to contract a serious disease constituted the infliction of grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act*. On appeal by the Crown the Court of Criminal Appeal dissolved this stay, holding that the word "inflicts" should not be given a limited and technical meaning.

At his subsequent trial in the District Court, the appellant conceded that he had known that there was a real possibility that he could infect the complainant by having unprotected sexual intercourse with him. The appellant was acquitted of Count 1 but convicted of Count 2. He unsuccessfully appealed against his conviction to the Court of Criminal Appeal on grounds including that Count 2 disclosed no offence known to law and that the trial judge erred in directing the jury that the element of malice was satisfied.

A majority of the High Court held that the meaning of "inflicts" in s 35 of the *Crimes Act* does not require the infliction of force productive of immediate physical injury, but rather extends to the communication of disease or infection. The Court also held that recklessness in the context of s 35 does not require an accused to have foresight of the probability that certain consequences will eventuate; foresight of the possibility of such consequences is sufficient. Accordingly, the appeal was dismissed.

- *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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