



HIGH COURT OF AUSTRALIA

13 November 2019

HT v THE QUEEN & ANOR
[2019] HCA 40

Today the High Court unanimously allowed an appeal from the New South Wales Court of Criminal Appeal ("the CCA") concerning circumstances in which, in a Crown appeal against sentence under s 5D(1) of the *Criminal Appeal Act 1912* (NSW), the CCA denied the appellant and her legal representatives access to confidential evidence which it had taken into account when deciding to allow the appeal and exercise its discretion under s 5D(1) to re-sentence the appellant.

The appellant pleaded guilty in the District Court of New South Wales to 11 counts comprising fraud offences which each carried a maximum penalty of either five years' or ten years' imprisonment. A factor of significance to the appellant on sentencing was the assistance that she had provided, and was anticipated to provide, to a law enforcement authority as a registered police informer. The sentencing judge was required by statute to take such assistance into account. An affidavit outlining the appellant's assistance was admitted into evidence in the sentencing proceedings and marked "Exhibit C". It included criminal intelligence of a highly sensitive nature. The Crown had seen Exhibit C, but the appellant and her counsel had not seen, and did not see, its contents. The appellant's counsel had agreed to this course in circumstances in which the only alternative that had been presented by the Crown Solicitor was to receive, and have provided to the Court, a highly redacted version of Exhibit C. The sentencing judge specified a combined discount of 35 per cent for the assistance and guilty pleas and sentenced the appellant to an aggregate sentence of three years and six months' imprisonment, with a non-parole period of 18 months.

The Crown appealed to the CCA on the ground that the sentence was manifestly inadequate. The CCA allowed the appeal. On appeal, the appellant's counsel sought access to Exhibit C. The Commissioner of Police (NSW), supported by the Crown, opposed access on the basis of public interest immunity ("PII"). The CCA upheld the PII claim, holding that the information came within a particular class of documents to which PII attaches, but allowed disclosure of one sentence from Exhibit C to the appellant's counsel. The CCA proceeded to determine for itself the appropriate discount for the appellant's assistance. It increased the combined discount for her assistance and guilty pleas to 40 per cent, but also increased the aggregate sentence to six years and six months' imprisonment, with a non-parole period of three years and six months.

By grant of special leave, the appellant appealed to the High Court. The Court unanimously held that the appellant was denied procedural fairness in the CCA. Having been denied access to Exhibit C, the appellant was denied a reasonable opportunity of being heard, including testing and responding to evidence which was relevant to whether the sentence was manifestly inadequate and, if so, whether the CCA should exercise its discretion to re-sentence the appellant. The Court did not consider the denial of procedural fairness to be justified by PII, holding that the doctrine of PII does not extend to permitting material to be admitted in evidence in proceedings, but kept confidential from one party to those proceedings. Nor was the withholding of Exhibit C permitted by an alternative source of power. In the circumstances of this case, the Court held that the proper exercise of its discretion should have led the CCA to dismiss the Crown's appeal against sentence and that the denial of procedural fairness was, alone, a reason for doing so.

- *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.*