

SHORT PARTICULARS OF CASES
APPEALS

CANBERRA

JUNE 2007

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ROACH v ELECTORAL COMMISSIONER & ANOR (M19/2007)

Date special case referred to full court: 2 May 2007

This matter concerns the constitutional validity of s93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) (the Act).

The plaintiff is an Australian citizen of indigenous descent. She is over 18 years of age and currently enrolled to vote. She is also currently serving a full time sentence of imprisonment for breach of State law, having been convicted in 2004. She will not be eligible for parole until August 2008. The earliest possible date for the next federal election is 4 August 2007 and the latest possible date is 19 January 2008. Thus the plaintiff will be serving her sentence whenever the next general election takes place.

Amendments made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) to the Act, came into operation in June 2006. Section 93(8AA) of the Act now provides that any person serving a sentence of imprisonment at the date of the election is not entitled to vote. (Prior to the amendments, the position was that any person serving a sentence of three years or more was disqualified from voting). By reason of s93(8AA) and s208(2)(c) of the Act, the plaintiff will not be entitled to vote at the next election.

The plaintiff commenced proceedings in this Court by way of an application for an order to show cause, seeking constitutional writs and a declaration that s93(8AA) and s208(2)(c) of the Act are invalid. The plaintiff maintains that the criterion for disenfranchisement is arbitrary and consequently not consistent with representative democracy. Further she maintains that it is contrary to the freedom of political communication and the freedom of political participation.

The Attorneys-General for New South Wales and Western Australia are intervening.

The issues raised by the special case are:

- are ss93(8AA) and 208(2)(c) of the Act invalid because they are contrary to ss7 and 24 of the Commonwealth Constitution?
- are ss93(8AA) and 208(2)(c) of the Act invalid because they are beyond the legislative power of the Commonwealth conferred by ss51(xxxvi) and 30 of the Constitution or any other head of legislative power?
- are ss93(8AA) and 208(2)(c) of the Act invalid because they are contrary to:
 - (i) the freedom of political communication implied in the Constitution; or
 - (ii) a freedom of participation, association and communication in relation to federal elections implied in the Constitution?

PM v THE QUEEN (S217/2007)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 13 September 2006

Date of grant of special leave: 24 April 2007

This appeal involves the interpretation of section 31 of the *Children (Criminal Proceedings) Act 1987* (NSW) and the question whether the Director of Public Prosecutions ("DPP") can present an ex officio indictment in the District Court against a child for an offence which is not a "serious children's indictable offence" and which has not been the subject of an order for committal by the Children's Court.

The prosecution alleges that on 17 September 2004 the appellant then aged 16 had non consensual intercourse with the complainant then aged 14. Initially there were two charges of aggravated sexual assault laid against the appellant in the Children's Court with two different circumstances of aggravation. The first was that the alleged victim was under the age of 16 years and the second was that at the time of the offence he "did occasion actual bodily harm" to the alleged victim which appeared to be intended to identify the circumstances in s 61J(2)(a) of the *Crimes Act 1900* (NSW). The second charge alleged a "serious children's indictable offence" under section 31 of the *Children (Criminal Proceedings) Act 1987* (NSW). The first charge was withdrawn and the appellant committed for trial on the second charge.

In the District Court a first indictment alleging "actual bodily harm" was followed by a second indictment containing three charges each of which were capable of summary disposition if he had been charged before the Children's Court. One alleged as a circumstance of aggravation that the alleged victim was under 16 years.

After the appellant was arraigned on the second indictment and the trial commenced, McGuire DCJ discharged the jury and remitted the matter to the Children's Court on the basis that the record indictment failed for want of jurisdiction.

The DPP appealed. The issue on appeal was whether the second indictment was valid in that it contained offences that were not serious children's indictable offences.

The majority of the Court of Criminal Appeal (Whealy & Latham JJ, Basten JA dissenting) allowed the appeal. Latham J gave the majority judgment. Her Honour found that the offence on which the appellant was committed had an aggravating circumstance unknown to the law (occasioning actual bodily harm). Accordingly, the notice failed to identify an essential factual ingredient of the offence and was therefore defective and insufficient to found the committal proceedings against the appellant. The committal proceedings were a nullity. This did not affect the jurisdiction of the District Court to hear and determine the charge or charges on the indictment presented at the appellant's trial. The practical consequence was that the indictments presented in the District Court were ex officio indictments. Further, the DPP had power to present an indictment regardless of the fact that there may have been some defect in the

committal proceedings, and the finding of an ex officio indictment in those circumstances would not produce an abuse of process unless it resulted in unfairness to the accused. Her Honour noted that the Court could not go behind the issue of an ex officio indictment. The District Court had jurisdiction to try the appellant on the indictment filed in that Court. Her Honour noted that the Act created a presumption in favour of summary disposition which was displaced upon the election of the child for committal to trial or upon the Court reaching a conclusion that the charge should properly be tried before a jury. Section 31 did not direct the prosecution or limit the jurisdiction of the District and Supreme Courts and did not stipulate that indictable offences may only be heard and determined by way of summary proceedings, nor did it require that indictable offences be dealt with by way of committal hearings. The ex officio indictment was procedurally valid. The DPP had power to bring an accused discharged at committal to trial, notwithstanding the protective jurisdiction of the Children's Court.

Basten JA found that all offences which were not serious children's indictable offences were required to be dealt with summarily in the Children's Court, and the exceptions to that principle only arose where proceedings had been commenced in the Children's Court under s 31. The second indictment filed in the District Court on which the appellant was arraigned was not valid.

The grounds of appeal are:

The Court of Criminal Appeal of New South Wales erred in law:

- in setting aside the order of McGuire DCJ made on 15 March 2006 remitting the matter to the Children's Court of New South Wales;
- in its interpretation of s 31 of the *Children (Criminal Proceedings) Act 1987* (NSW) in holding that there was only a *presumption* in favour of summary disposition;
- in holding that *Bartalesi and Fragassi* (1997) 93 A Crim R 274 had any relevant application to the issues to be decided in the present matter;
- in holding that the indictment actually presented at the trial of the accused was an ex officio indictment;
- in holding that the indictment presented at the [trial of the accused] was procedurally valid;
- in finding that the New South Wales DPP would have the ability to bring an ex officio indictment with respect to the prosecution of a child for an offence other than a "*serious children's indictable offence*";
- in holding that s 44 of the *Children (Criminal Proceedings) Act 1987* (NSW) was not available because the section was only available where the alleged want of jurisdiction related to the age of the defendant.