SHORT PARTICULARS OF CASES
APPEALS

CANBERRA
AUGUST 2025

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FARSHCHI v THE KING (M20/2025)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2024] VSCA 235

Date of judgment: 14 October 2024

Special leave granted: 6 March 2025

By indictment filed in the County Court of Victoria, the appellant was charged with causing a person to remain in forced labour (charge 1) and conducting a business involving forced labour (charge 2). The charges were laid under sections 270.6A(1) and (2) of the *Criminal Code* (Cth) ("the Code") respectively. As both charges related to alleged offences against Commonwealth laws, for the purposes of the appellant's trial, the County Court was exercising federal jurisdiction under s 68(2) of the *Judiciary Act 1903* (Cth) ("the Judiciary Act"). The prosecution case was that the appellant and his wife had threatened the complainant to keep him in a condition of forced labour in their family business. The defence case focused on the complainant's credibility, including his reliability and whether he was prone to exaggeration and had a motive to lie. Section 63(1) of the *Jury Directions Act 2015* (Vic) ("the JDA") requires a trial judge to explain the phrase 'proof beyond reasonable doubt' to a jury unless there are good reasons for not doing so, and s 64 outlines how the explanation may be given. Under s 64(1)(e), one of the explanations that may be given is that 'a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility'.

In October 2023, a jury found the appellant guilty of both charges. He was sentenced in January 2024 to three years and six months' imprisonment, with a non-parole period of 18 months.

The appellant sought leave to appeal both his conviction and sentence. His grounds in relation to conviction were that the trial judge had erred in: a) directing the jury that 'a reasonable doubt is not an unrealistic possibility' ("the Direction"); and b) failing to direct the jury that the complainant's evidence may be unreliable because of various identified factors outlined.

In relation to the Direction, the appellant submitted that the Direction diminishes the standard of proof of 'beyond reasonable doubt'; and since s 64(1)(e) of the JDA diminishes the criminal standard of proof, it is directly inconsistent with s 13.2 of the Code, so that s 64(1)(e) is invalid. The appellant submitted that there were three alternative bases upon which the ground could succeed: first, consistently with s 63(1) of the JDA, there were no 'good reasons' for giving the jury an explanation of the phrase 'beyond reasonable doubt'; secondly, because the direction under s 64(1)(e) of the JDA is inconsistent with s 13.2 of the Commonwealth Code, it constitutes a law of a State which is inconsistent with a law of the Commonwealth — thereby caught by s 109 of the *Constitution* — so that it is not picked up by s 68(1) of the Judiciary Act and to that extent is invalid; and thirdly, the direction under s 64(1)(e) of the JDA is inconsistent with s 80 of the *Constitution* and therefore is not picked up by s 68(1) of the Judiciary Act. The respondent accepted that, if the Direction diminished the standard of proof, it would be inconsistent with s 13.2 of the Code.

The Court of Appeal (Priest JA, Niall and Taylor JJA agreeing) rejected the submissions on the first ground, and then refused the appellant's applications in respect of both the conviction and sentence.

Before this Court, the issue is whether the Direction diminishes the criminal standard of proof and whether the criminal standard of proof is an essential characteristic of trial by jury under s 80 of the *Constitution*. The appellant has filed a notice of a constitutional matter. Only the State of Victoria has intervened, in support of the respondent. Both the respondent and intervener submit that the Direction as a whole does not diminish the standard of proof. Should it be found that it does, they then both submit that the appeal should be allowed upon ground 1 (below) and it would not be necessary for this Court to embark on any consideration of ground 2 (below).

The grounds of appeal are:

- The Court below erred in holding that there is no inconsistency between the words 'a reasonable doubt … is not an unrealistic possibility' in s 64(1)(e) of the *Jury Directions Act 2015* (Vic) and s 13.2 of the *Criminal Code* (Cth), with the consequence that s 64(1)(e) is picked up in its entirety by s 68(1) of the *Judiciary Act 1903* (Cth).

- The Court below erred in holding that there is no inconsistency between the words 'a reasonable doubt … is not an unrealistic possibility' in s 64(1)(e) of the *Jury Directions Act* and s 80 of the *Constitution*, with the consequence that s 64(1)(e) is picked up in its entirety by s 68(1) of the *Judiciary Act*.

GOVERNMENT OF THE RUSSIAN FEDERATION v COMMONWEALTH OF AUSTRALIA (C9/2023)

Date writ of summons filed: 23 June 2023

Date special case referred to Full Court: 18 December 2024

This proceeding concerns the validity of the *Home Affairs Act 2023* (Cth) ("the Act"), which purports to terminate the plaintiff's lease over certain land. The land that is the subject of this proceeding is a parcel of land comprising approximately 11,526 square metres, situated about 300 metres from Parliament House in Yarralumla, Australian Capital Territory ("the Land").

On 24 December 2008, the defendant as lessor and the plaintiff as lessee entered into a lease for the Land for a term of 99 years, with a condition that the Land was to be used for diplomatic, consular, or the official purposes of the plaintiff ("the Lease")[1]. During the term of the Lease, the plaintiff started, but did not complete, designing and constructing the new diplomatic mission.

On 15 June 2023, the Prime Minister of Australia held a press conference during which he announced that 'the Government has received very clear security advice as to the risk presented by a new Russian presence so close to Parliament House', and that legislation would be introduced with the support of the opposition and the crossbench in the national security interests of Australia. The advice referred to by the Prime Minister was informed by highly classified information from the Australian Security Intelligence Organisation. Later that day, the Act received Royal Assent and commenced immediately, and the Lease was terminated pursuant to section 5 of the Act, which states that:

> *A relevant lease, and any legal or equitable right, title, interest, trust, restriction, obligation, mortgage, encumbrance, contract, licence or charge, granted or arising under or pursuant to a relevant lease, or in dependence on a relevant lease, is terminated by force of this section on the commencement of this section.*

The defendant's purpose for terminating the Lease through the introduction of the Act was not related to it having a need for, or proposed use or application of, the Land itself.

The plaintiff contends that the Act is invalid as it is not supported by a Commonwealth head of power. The plaintiff submits that the Act is concerned with the termination of the relevant lease but does not state the reason for the termination, identify the lessee or identify any other relevant matters – specifically, that it does not refer to any concerns about the security of the defendant or the desire to abide by any international obligation. While public statements and the heads of power purportedly relied on refer to 'national security' grounds, there are no constitutional facts or evidence that support the termination of the 'relevant lease' on 'national security' grounds. The plaintiff submits that it is clear from the history of the Land that its permitted use is for use as a diplomatic mission.

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[1] The Lease was granted pursuant to the *Leases (Special Purposes) Ordinance 1925* (Cth) ("the 1925 Ordinance"), and from April 2022 onwards, pursuant to the *Australian Capital Territory National Land (Leased) Ordinance 2022* (Cth), which replaced the 1925 Ordinance.

It cannot be said that any heads of power support the Act in circumstances where the Act did not seek to terminate the plaintiff's diplomatic presence in Australia (just the interest in the Land), there was no evidence that the plaintiff was planning an internal attack, there was no evidence that the law affects the defendant's relationships with other countries, adjacent parcels of land are leased to other foreign nations, and the Land remains available for use by a foreign nation for use as a diplomatic mission.

Alternatively, the plaintiff asserts that if the Act is considered to be supported by a Commonwealth head of power, 'just terms' under s 51(xxxi) of the *Constitution* must be provided to the plaintiff (which has not been done).

The defendant disagrees and submits that the Act is clearly supported by the *Constitution* by at least:

- Section 122 – the territories power: In which all that needs to be shown in order to enliven the section is 'a sufficient nexus or connection between the law and the Territory'; and

- Section 51(xxix) – the external affairs power: By which it follows that because a law that affects or is likely to affect Australia's relations with other countries is a law with respect to 'external affairs'.

The defendant contends that the Act was enacted to 'protect Australia's national security interests with regard to land within the area adjacent to Parliament House'. It is clear from the terms of the Act that Parliament intended the Act to prevail over a series of statutes that regulate Australia's relations with foreign states – specifically s 7. Further, a requirement to provide 'just terms' to the termination of the Lease having regard to the purpose and operation of the Act would be incongruous.

The plaintiff and defendant have each filed a notice of a constitutional matter.

Justice Jagot ordered that the following questions of law in the form of a Special Case be referred for consideration by a Full Court:

1. Is the *Home Affairs Act 2023* (Cth) invalid in its entirety on the ground that it is not supported by a head of Commonwealth power?

2. If the answer to Question 1 is 'no', does the operation of the *Home Affairs Act 2023* (Cth) result in the acquisition of property from the Plaintiff to which section 51 (xxxi) of the *Constitution* applies?

3. If the answer to Question 2 is 'yes', is the Commonwealth liable to pay the Plaintiff a reasonable amount of compensation pursuant to section 6(1) of the *Home Affairs Act 2023* (Cth)?

4. Who should pay the costs of the Special Case?

AA v THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF MAITLAND-NEWCASTLE ABN 79469343054 (S94/2025)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2025] NSWCA 72

Date of judgment: 15 April 2025

Special leave granted: 17 June 2025

In 2024, the appellant sued the respondent, a body corporate constituted under the *Roman Catholic Church Trust Property Act 1936* (NSW), for damages in negligence for sexual assaults allegedly committed by Father Ronald Pickin in the late 1960s, when the appellant was 13 years old. The appellant gave evidence that Fr Pickin gave him and his schoolmate, Mr Perry, alcohol and cigarettes in the church presbytery on Friday nights with no-one else present and that, on occasions when the appellant was 'paralytic drunk' and Fr Pickin had sent Mr Perry out to buy cigarettes, Fr Pickin sexually abused the appellant.

Fr Pickin died in 2015, well before the original hearing, and the parish priest and the Bishop who had appointed Fr Pickin as assistant priest at the parish died many years earlier. Mr Perry testified that Fr Pickin had given the boys alcohol and cigarettes on Friday nights but that other boys were present, that he had never been sent out, and that he had never seen the appellant paralytic drunk or assaulted.

Schmidt AJ gave judgment in favour of the appellant, in the sum of $636,840. Her Honour accepted that the assaults had occurred, finding the appellant's memory of them vivid, despite inconsistencies between the appellant's evidence and Mr Perry's as to surrounding matters. Schmidt AJ held that the respondent had breached a duty of care it had owed to the appellant and that it was also vicariously liable for the assaults committed by Fr Pickin.

In an appeal by the respondent, the parties accepted that Schmidt AJ's judgment could not stand on the basis of vicarious liability, in view of the subsequent decision of the High Court in *Bird v DP* [2024] HCA 41.

The appeal was unanimously allowed by the Court of Appeal (Bell CJ, Leeming and Ball JJA), which held that Schmidt AJ had erred by finding the existence of a duty of care. Their Honours found that the case had proceeded upon the incorrect factual basis that Fr Pickin was a parish priest who lived alone, whereas he was an assistant priest who lived in the presbytery with the parish priest. There was also a lack of evidence as to the Bishop's actual or likely knowledge of the risk posed to children by Fr Pickin.

The Court of Appeal unanimously held that the law in Australia did not recognise a non-delegable duty that could be breached by a defendant where a delegate (such as Fr Pickin) had committed an intentional wrong.

Leeming JA held that the fact-finding process had miscarried in several respects. These included an erroneous suggestion by Schmidt AJ that the removal of statutory limitation periods for historical sexual abuse cases might alter the

assessment of evidence, a failure to explicitly weigh unreliable aspects of the appellant's evidence, and an apparent exclusion of the possibility that the appellant's vivid memory of the assaults might be a sincerely held but erroneous belief (in view of the effluxion of time, coupled with the appellant's ill health and his history of drug abuse). Bell CJ indicated agreement, although considered it strictly unnecessary to address the fact-finding challenge. Ball JA however, held that the finding of sexual abuse should stand, since the inconsistencies in relevant evidence were not telling and the appellant's evidence on the critical question should be accepted.

The grounds of appeal are:

- The Court of Appeal erred in holding that the Diocese of Maitland-Newcastle did not owe the appellant a non-delegable duty of care in respect of the sexual abuse committed against him by Fr Pickin, either at common law or by reason of section 5Q of the *Civil Liability Act 2002* (NSW).

- The Court of Appeal erred in holding that the Diocese of Maitland-Newcastle did not owe the appellant a duty of care in negligence in respect of the sexual abuse committed against him by Fr Pickin.

By notice of contention, the respondent seeks to raise grounds that include:

- If (which is denied) the better reading of the reasons of Bell CJ at [16] of the decision of the Court below is that his Honour did not reach any final conclusion on whether Leeming JA was correct that there were material errors in the fact-finding process of the primary judge, then:

    a. This Court should remit the matter to the Court of Appeal to complete the process of determining whether there were such errors and, if so satisfied, then complete the s 75A [of the *Supreme Court Act 1970* (NSW)] rehearing process and determine if the correct conclusion is that the appellant failed to prove that he was sexually assaulted by Fr Pickin.

    b. Alternatively, this Court should conclude for itself that there were such errors and then remit the matter to the Court of Appeal to complete the s 75A rehearing process and determine if the correct conclusion is that the appellant failed to prove that he was sexually assaulted by Fr Pickin.