HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

ALAN BOND APPELLANT

AND

THE QUEEN RESPONDENT

Bond v The Queen [2000] HCA 13
9 March 2000
P57/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of Western Australia made on 22 August 1997 and in lieu order that the appeal purportedly instituted by notice dated 21 February 1997 is dismissed as incompetent.*

On appeal from the Supreme Court of Western Australia

Representation:

D F Jackson QC with O P Holdenson QC and M M Lodge for the appellant (instructed by Melasecca Zayler)

E M Heenan QC with P C Govier for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with C J Horan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

CATCHWORDS

Bond v The Queen

Criminal law – Offences against State law – Appeal against sentence by the prosecution – Power of Director of Public Prosecutions of the Commonwealth to bring appeal against sentence – Distinction between prosecution and appeal.

Constitutional law – Whether State law can unilaterally vest functions in officers of the Commonwealth – Inconsistency between Commonwealth and State laws – Inapplicability of de facto officers doctrine.

Appeal – Whether appellate court will entertain issue not raised below – Irrelevant where issue is as to competence of proceedings below.

Words and phrases – "the prosecution".

The Constitution, s 109.
Director of Public Prosecutions Act 1983 (Cth), ss 9(7), 17.
Corporations (Western Australia) Act 1990 (WA), s 91.
Criminal Code (WA), ss 578, 581, 688(2).

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. This appeal comes to this Court in the following circumstances. In February 1997 the appellant, after pleading guilty to two charges of failing to act honestly in his capacity as an officer of a company, with intent to defraud the company and its shareholders, was sentenced by Murray J, in the Supreme Court of Western Australia, to terms of imprisonment. At the time, he was serving a sentence in relation to another matter. There was an appeal by the prosecution to the Court of Criminal Appeal of Western Australia upon the ground that the sentences imposed by Murray J were inadequate. That appeal was successful. The sentences were increased.

2 The issue before this Court is whether the appeal to the Court of Criminal Appeal was competent. The ground of the challenge to the competency of the appeal is similar to that which succeeded in *Byrnes v The Queen*[1]. In brief, the argument is that the legislation, under which Commonwealth authorities prosecuted the appellant for State offences, distinguishes between instituting and conducting prosecutions, on the one hand, and appealing, on the other. Its practical effect is to reserve to State authorities the capacity to appeal (with all that entails, including the power and responsibility of decision-making).

3 So stated, the argument may appear to involve no more than dry and technical legal questions. Underlying those questions, however, are issues of considerable and general public and constitutional importance.

4 If the argument for the appellant is legally correct, then the consequence is that the appeal to the Court of Criminal Appeal, which was instituted by the Commonwealth authorities, was incompetent.

5 In order to determine the issue raised by the appellant, it is necessary to examine in more detail the proceedings in Western Australia and the provisions of the relevant legislation.

6 On 5 March 1996, an indictment was presented against the appellant in the Supreme Court of Western Australia. It charged him with seven counts of offences committed at Perth between 26 August 1988 and 31 October 1989. All of the offences alleged were offences against the law of Western Australia: one, an offence of conspiracy to defraud contrary to s 412 of the *Criminal Code* (WA) ("the Criminal Code"), and the rest, offences against ss 229 and 570 of the *Companies (Western Australia) Code* ("the State Code"). The indictment began, "Ian Russell Bermingham, Deputy Director of Public Prosecutions of the Commonwealth (Perth) duly appointed to prosecute for Our Lady the Queen in this behalf informs the Court that …". It was signed over the subscription

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1 (1999) 73 ALJR 1292; 164 ALR 520.

"Ian Russell Bermingham
Deputy Director of Public Prosecutions
of the Commonwealth (Perth)
Prosecutor for the Queen".

7 By the time of the presentation of the indictment the State Code had been repealed, with effect 1 January 1991, by the joint operation of ss 85 and 87 of the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act"). However the effect of s 85(1) was to continue the operation of the State Code in respect of offences thereunder on which the appellant later was indicted[2].

8 On 4 December 1996, the appellant was rearraigned in the Supreme Court (before Murray J) and he pleaded guilty to two counts on the indictment. Those counts alleged that on or about 29 October 1988 and 29 April 1989 respectively he and Peter Alexander Mitchell, with intent to defraud Freefold Pty Ltd and its shareholders, had failed to act honestly in the exercise of their powers and the discharge of their duties as officers of that company contrary to ss 229(1)(b) and 570 of the State Code. The appellant's plea in mitigation was heard by Murray J on 3-4 February 1997.

9 On 4 February 1997, a nolle prosequi under s 581 of the Criminal Code was tendered and filed. The nolle prosequi related to the count on the indictment which alleged conspiracy to defraud. It was signed by Mr Bermingham as "Deputy Director, Commonwealth Director of Public Prosecutions" and, in the body of the document, Mr Bermingham was described as "an officer appointed by the Governor to present indictments on behalf of Her Majesty the Queen". On the same day, a certificate under s 9(4) of the *Director of Public Prosecutions Act* 1983 (Cth) ("the Commonwealth DPP Act") was tendered and filed in relation to the remaining counts on the indictment which alleged offences by the appellant. The certificate recorded that "[t]he Commonwealth Director of Public Prosecutions, who prosecutes in this behalf for Her Majesty the Queen, informs the Court that the Crown will not proceed further" against the appellant in respect of those counts. This certificate appears to have been prepared and filed on the erroneous assumption that offences against the State Code were offences against a law of the Commonwealth. Nothing, however, turns on the procedures that were adopted to deal with the counts to which the appellant did not plead guilty and we say no more about them.

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2 Cf *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1294; 164 ALR 520 at 523.

10 On 5 February 1997, Murray J sentenced the appellant to 3 years' imprisonment on each of the two counts to which he had pleaded guilty. It was ordered that the sentence on one count be served cumulatively upon a sentence then being served by the appellant and that the sentence on the second count be served partly cumulatively commencing on the expiration of one year of the sentence on the first count. The total effective sentence thus imposed was a sentence of 4 years' imprisonment to be served cumulatively upon the sentence the appellant was then serving. An order for parole eligibility was made under s 89 of the *Sentencing Act* 1995 (WA).

11 On 21 February 1997, notice of appeal was given against the sentences imposed on the appellant. That notice was prepared by the Commonwealth Director of Public Prosecutions and signed by "Ian Russell Bermingham for and on behalf of the Commonwealth Director of Public Prosecutions".

12 On 22 August 1997, the Court of Criminal Appeal (Pidgeon, Franklyn and Wheeler JJ) allowed the appeal. The Court resentenced the appellant to a term of 4 years on one count and 3 years on the other and ordered that the sentence on the first count be served cumulatively upon the sentence he was then serving and that the sentence imposed on the second count be served cumulatively upon the whole of the term imposed on the first. The effective sentence thus imposed was 7 years' imprisonment to be served cumulatively upon the sentence the appellant was then serving.

13 The appellant now appeals to this Court by special leave. (The application for special leave was made well out of time but no objection was taken by the respondent to the extension of time, and time was extended.) The appellant contended that the Director of Public Prosecutions of the Commonwealth ("the Commonwealth DPP") did not have the power or authority to institute the appeal against sentence which led to the order of the Court of Criminal Appeal increasing his sentence and that the appeal was "invalid and incompetent".

14 As we indicated earlier in these reasons, there arise issues of considerable and general public importance, which go beyond the construction of the particular statutory provisions which are involved. Is the decision to appeal against what is alleged to be an inadequate sentence for offences against State laws to be taken by Commonwealth or State officials? Does the political responsibility for that decision (which is a decision that can be attended by public controversy) lie with a Commonwealth or State Minister? Can one integer of the federation unilaterally vest functions in officers of another integer of the federation?

15 It is well established that a State by its law cannot unilaterally vest functions under that law in officers of the Commonwealth, whose offices are created by Commonwealth law and who have the powers vested in them by that law[3]. In the judgment of the Court in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*[4], this was put on the basis explained by Brennan J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[5], namely that the Commonwealth Act would be construed as requiring the officers in question to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in them. It follows that if a law of the Commonwealth prescribes the power and authority of an officer of the Commonwealth to perform some function conferred by State legislation, a State law which purports to grant some wider power or authority to that officer is, to that extent, inconsistent with the Commonwealth law and invalid under s 109 of the Constitution[6].

16 On their face, both the indictment and the notice of appeal against sentence appear to have been signed by a member of the staff of the Office of the Commonwealth DPP. (The contrary was not suggested and nothing was said to turn on the particular provisions of the Commonwealth DPP Act which deal with the meaning of "a member of the staff of the Office"[7].) The present appeal was conducted on the basis that each of the steps of signing and presenting the indictment and deciding to institute and instituting the appeal against sentence was taken by an officer of the Commonwealth: a member of the staff of the Office of the Commonwealth DPP. Argument was directed to whether that officer was validly authorised to decide to institute, and institute the appeal. Although it was not submitted that the indictment presented against the appellant had not been signed by a person validly authorised to do so under State and Commonwealth law, it is desirable to say something first about that aspect of the matter.

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3 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

4 (1987) 163 CLR 117 at 127-128.

5 (1983) 158 CLR 535 at 579.

6 *Re Cram* (1987) 163 CLR 117; *Byrnes* (1999) 73 ALJR 1292; 164 ALR 520.

7 ss 3(4) and 27-29.

17 On the hearing of the appeal to this Court, evidence was tendered about who signed the indictment and the notice of appeal in this matter and about the authority which the signatory had to take those steps. In addition, evidence was tendered about who decided to institute an appeal against sentence. It is not necessary to decide whether that evidence can or should be received[8]. For present purposes, it is convenient to accept that the indictment was signed by a member of the staff of the Office of the Commonwealth DPP who, with the consent of the Attorney-General of the Commonwealth, held an appointment to prosecute offences against the laws of the State of Western Australia[9]. It is also convenient to accept that the person who signed the indictment did so under the authority given by s 17 of the Commonwealth DPP Act which provides:

> "Where a member of the staff of the Office, with the consent of the Attorney-General, holds an appointment to prosecute offences against the laws of a State, the member may institute and carry on, in accordance with the terms of the appointment, prosecutions for such offences."

18 Was there authority for officers of the Commonwealth to decide to institute an appeal against sentence? Did State law permit that? Did Commonwealth law permit that? We deal first with State law.

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8 *Mickelberg v The Queen* (1989) 167 CLR 259; *Gipp v The Queen* (1998) 194 CLR 106.

9 No challenge having been made to the indictment, either below or on appeal, the conclusion that the indictment was duly signed and presented would probably follow from the third paragraph of s 579 of the *Criminal Code* (WA) which provides:

> "All courts and judges exercising jurisdiction with regard to indictable offences shall take judicial notice of the signature of the Attorney General and all past Attorneys General, and of his and their authority to sign and present indictments; and *all indictments presented which purport to be signed by an officer or person duly appointed to prosecute shall be deemed to be duly signed and presented*, excepting always any such indictment in regard to which it shall be proved that the same was not in fact signed by the officer or person whose signature it purports to bear, or that the officer or person signing the same was not in fact authorised or appointed to sign such indictment." (Emphasis added)

19 Section 91(1) of the WA Corporations Act provides that the Commonwealth DPP "has the same enforcement powers in relation to [the State Code] as has the Crown in right of the State of Western Australia acting by the Attorney General or such other person as may be prescribed by regulations". Section 91(5) of that Act defines what is meant in s 91 by "enforcement power". Those enforcement powers do not include instituting an appeal against sentence.

20 In *Byrnes*[10], the Court considered provisions of the corporations legislation of South Australia which are, for all relevant purposes, identical to s 91 of the WA Corporations Act. The Court held that s 91 of the South Australian Corporations Act did not confer on the Commonwealth DPP a power to appeal against sentence for offences against the *Companies (South Australia) Code*. It was not suggested in argument on the present appeal that some different conclusion could or should be reached about s 91 of the WA Corporations Act. That provision may, therefore, be put to one side.

21 Section 688(2) of the Criminal Code provides for appeals against sentence:

> "An appeal may be made to the Court of Criminal Appeal *on the part of the prosecution* –
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> …
>
> (d) against any punishment imposed or order made in respect of a person convicted on indictment …". (Emphasis added)

(Section 687 of the Criminal Code gives the Court of Criminal Appeal jurisdiction to hear such appeals.) The respondent submitted that "the prosecution" included a staff member of the Office of the Commonwealth DPP who was authorised to sign indictments for offences against Western Australian law. The exact breadth of the expression "the prosecution" in s 688(2) might be open to some debate. Does it include *any* person who *might* have signed and presented an indictment under s 578 of the Code? That is, does it include the Attorney-General and *any* other person appointed in that behalf by the Governor? Or is it confined to the Attorney-General and the person who *did* sign the indictment? We were told that the practice in Western Australia is to understand the reference in s 688(2) to "the prosecution" in the former sense and that the

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10 (1999) 73 ALJR 1292; 164 ALR 520.

decision to institute an appeal by the prosecution against sentence may be taken by *any* person appointed to sign and present indictments. It is not necessary to decide, in this case, whether this construction of s 688(2) is right. For present purposes, it is convenient to assume that the decision to appeal against the alleged inadequacy of sentence passed on the appellant was a decision taken by the person who signed the indictment and was, therefore, a decision taken by "the prosecution". The notice of appeal was signed by that person.

22 What, then, does Commonwealth law provide?

23 Section 9(7) of the Commonwealth DPP Act deals with appeals in respect of prosecutions for offences against a law of the Commonwealth. It may be put aside. Attention must be directed (as it was in argument) to s 17 of the Commonwealth DPP Act.

24 The authority or power given to certain persons by s 17 of the Commonwealth DPP Act is to "institute and carry on, in accordance with the terms of the appointment [that is, the appointment to prosecute offences against the laws of a State], prosecutions for such offences". Obviously, then, a question would ordinarily arise about exactly what the State appointment authorised. And an appointment to sign indictments may be insufficient to authorise institution of an appeal. Commencement of prosecutions and commencement of appeals are distinct steps.

25 It was sought to tender evidence, on the hearing of this appeal, of the terms of the relevant State appointment of the signatory of the indictment and notice of appeal. Again, however, it is not necessary to consider whether that evidence should be received. Even if it is assumed that the State appointment, held by the member of the staff of the Office of the Commonwealth DPP who signed the indictment against the appellant, would, on its true construction, purport to authorise the appointee to institute an appeal against alleged inadequacy of sentence, the question then becomes whether s 17 of the Commonwealth DPP Act permitted the Commonwealth officer to exercise that power. (It matters not, for these purposes, whether the relevant State law which purports to grant a wider power or authority to the Commonwealth officer is identified as s 578 or s 688 of the Criminal Code.)

26 Section 17 does not authorise the persons referred to in that section to institute appeals.

27 There are several reasons why that is so. Appeals against an alleged inadequacy of sentence have "long been accepted in this country as cutting across the time-honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed"[11]. And although such a jurisdiction has now become commonplace, in this country and elsewhere in the common law world, it is a jurisdiction the exercise of which is attended by some restraints[12]. It is, therefore, an exceptional jurisdiction. Moreover, it is one which, before the States enacted legislation creating an office of Director of Public Prosecutions, could be invoked only by the Attorney-General for the State and it was the Attorney who took political responsibility for the decisions that were taken. Being, then, an unusual power, it would not be surprising to find that the power to make decisions about its exercise should be conferred on a limited number of persons.

28 The Commonwealth DPP Act distinguishes between the power to institute, carry on and, in some cases, take over prosecutions, on the one hand, and the right (or power) to appeal, on the other. The conferring of rights of appeal on the Commonwealth DPP by s 9(7) (which is predicated upon the Director having instituted, taken over or carried on a prosecution) is, perhaps, the clearest example in the Act of this distinction.

29 Even without regard to such internal textual indications of the provision of limited powers under s 17, the exceptional nature of prosecution appeals would, as *Byrnes* held in relation to s 91 of the State Corporations Acts, lead to the conclusion that s 17 should not be construed as permitting a State to confer power on a member of the staff of the Office of the Commonwealth DPP to institute an appeal against sentence. "[A] convicted person should not be deprived of the liberty left after sentencing at first instance except by procedures which have been expressly authorised[13] and strictly complied with in a court of

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11 *Everett v The Queen* (1994) 181 CLR 295 at 299 per Brennan, Deane, Dawson and Gaudron JJ.

12 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ, 327 per Jacobs J, 329-330 per Murphy J; *Malvaso v The Queen* (1989) 168 CLR 227 at 234-235 per Deane and McHugh JJ; *Everett* (1994) 181 CLR 295 at 299-300 per Brennan, Deane, Dawson and Gaudron JJ.

13 *Malvaso v The Queen* (1989) 168 CLR 227 at 233.

proper jurisdiction."[14] The power which a State may give to a staff member of the Office of the Commonwealth DPP in accordance with s 17 is limited to a power to institute and carry on a prosecution for offences against a law of the State. A State law which purports to give wider powers is, to that extent, inconsistent with a law of the Commonwealth (s 17 of the Commonwealth DPP Act), and invalid. Members of the staff of the Office of the Commonwealth DPP had no power to institute an appeal against the sentence imposed on the appellant.

30 The issues debated on the hearing of the appeal in this Court go to whether an appeal was properly instituted in the Court of Criminal Appeal. These issues were not raised below but they are not points that could have been remedied in the proceeding which it was said had been instituted by the notice of appeal that was filed. The only remedy that was open was to seek leave to start a fresh appeal out of time[15]. It follows that no question arises about when an appellate court will entertain a point not taken below[16]. The issue is whether there *was* an appeal before the Court of Criminal Appeal, not whether one "party" took a point below. Only if there were an appeal is it right to speak in terms of parties taking or not taking points in the appeal.

31 Nor is there any constitutional reason to conclude that the question of competency of the appeal to the Court of Criminal Appeal cannot be agitated in this Court[17]. The question of competency is one which arises under the Constitution or involves its interpretation. This Court's power to give such judgment as ought to have been given in the first instance[18] extends to deciding

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14 *Byrnes* (1999) 73 ALJR 1292 at 1303 per Gaudron, McHugh, Gummow and Callinan JJ; 164 ALR 520 at 536.

15 Criminal Code, s 695.

16 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481; 60 ALR 68; *Coulton v Holcombe* (1986) 162 CLR 1; *Water Board v Moustakas* (1988) 180 CLR 491; *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473.

17 *Mickelberg v The Queen* (1989) 167 CLR 259; *Gipp v The Queen* (1998) 194 CLR 106.

18 *Judiciary Act* 1903 (Cth), s 37.

whether the intermediate appellate court's jurisdiction was properly engaged. Here it was not, because State legislation which, on its face, authorised an officer of the Commonwealth to institute the appeal was, to that extent, invalidated by operation of s 109 of the Constitution.

32 The Attorney-General for Western Australia, intervening in support of the respondent to this appeal, submitted that common law principles about the validity of acts done by a public officer whose appointment to office was invalid[19] should be applied in the present matter. That submission should be rejected. There are at least two reasons why principles about "de facto officers" have no application in this matter.

33 First, the question in the present matter is not whether the person who decided to institute, and did institute, the appeal to the Court of Criminal Appeal was validly appointed to some State or Commonwealth office; the question is one about what are the powers of the holders of particular offices. That is, the question in the present matter is whether an officer of the Commonwealth, validly appointed to institute prosecutions for offences against the laws of a State, has any power to institute an appeal against sentence. The question is not one about the validity of the appointment of that officer. No question arises, therefore, about the validity of acts done in purported performance of the duties

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19 Sir Owen Dixon, *Jesting Pilate*, (1965), "De Facto Officers" at 229; *In re Aldridge* (1893) 15 NZLR 361; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525-527; *Cassell v The Queen* [2000] HCA 8 at [19], [22]. See also Pannam, "Unconstitutional Statutes and De Facto Officers", (1966) 2 *Federal Law Review* 37; Campbell, "De Facto Officers", (1994) 2 *Australian Journal of Administrative Law* 5; Campbell, "Ostensible Authority in Public Law", (1999) 27 *Federal Law Review* 1. Compare the differing treatments of the de facto officers doctrine in the Circuit Courts of Appeal in the United States in *Equal Employment Opportunity Commission v Sears, Roebuck and Co* 650 F 2d 14 (2d Cir 1981); *Andrade v Lauer* 729 F 2d 1475 (DC Cir 1984); *Franklin Savings Association v Director, Office of Thrift Supervision* 934 F 2d 1127 (10th Cir 1991); *Silver v United States Postal Service* 951 F 2d 1033 (9th Cir 1991); *United States v Gantt* 179 F 3d 782, 194 F 3d 987 (9th Cir 1999). By contrast, in *Morrison v Olson* 487 US 654 (1988) and *Freytag v Commissioner of Inland Revenue* 501 US 868 (1991), the Supreme Court of the United States dealt with collateral challenges based on the Appointments Clause of the Constitution (Art II § 2 cl 2) without reference to the de facto officers doctrine.

of an office which would be within power if the holder of the office had validly been appointed.

34 Second, and more importantly, the question of the powers of the particular officer of the Commonwealth is, as has already been noted, a question arising under the Constitution or involving its interpretation. That question cannot be resolved by ignoring the alleged want of power on some basis of colourable or ostensible authority let alone, as would be necessary in this case, on the basis that the bare fact of the purported exercise of a power is to be accorded some constitutional significance. If, as is the case here, s 109 operates to invalidate State legislation which purports to confer power on an officer of the Commonwealth, that constitutional consequence of the inconsistency between State and Commonwealth laws cannot be ignored[20].

35 The appeal is allowed. The order of the Court of Criminal Appeal of Western Australia made on 22 August 1997 is set aside and in lieu order that the appeal purportedly instituted by notice dated 21 February 1997 is dismissed as incompetent.

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20 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 457-458 per Gibbs CJ, 461-462 per Mason J, 468 per Murphy J, 474-475 per Brennan J, 478-479 per Deane J, 484-485 per Dawson J.