HIGH COURT OF AUSTRALIA

KIRBY J

IN THE MATTER OF AN APPLICATION BY
HAJIKA SINANOVIC FOR LEAVE TO ISSUE
A PROCEEDING

Re Sinanovic's Application
[2001] HCA 40
Date of Order: 18 May 2001
Date of Publication of Reasons: 11 July 2001
S73/2001

ORDER

Application refused.

Representation:

M A Sinanovic (by leave) for the applicant

S C Kavanagh assisting the Crown (instructed by New South Wales Director of Public Prosecutions Office)

CATCHWORDS

Re Sinanovic's Application

High Court Practice - Second special leave application where special leave previously refused - Registrar directed by a Justice to refuse to issue process without leave of a Justice first had and obtained - Application for such leave - Principles governing reopening of special leave application - Nature and purpose of such application - Powers of the High Court to reopen hearing of application - Whether exceptional circumstances established to warrant reopening - Whether change of circumstances shown - Whether ground proposed was argued and considered in original special leave hearing.

Practice and procedure - Interlocutory orders - Reopening of interlocutory determination - High Court practice - Special leave application - Special leave refused - Application to reopen - Principles applicable to reopening - Whether exceptional circumstances demonstrated - Whether change of circumstances shown.

Judiciary Act 1903 (Cth), s 35A.
Crimes Act 1900 (NSW), s 178A.
High Court Rules, O 58 r 4(3), O 69A r 9.

1 KIRBY J. This is the second time in a week that Hakija Sinanovic (the applicant) has been before this Court. However, the proceedings today are only distantly connected with the proceedings that were before me earlier. They involved an application for bail in relation to a special leave hearing yet to be heard by the Court[1]. The applicant was represented on that occasion by counsel. The applicant is presently in custody serving a sentence of imprisonment. Today he has not been legally represented. However, I have allowed his wife to speak for him, having been satisfied that she does so with his knowledge and authority and upon his instructions.

Application to reopen a special leave application

2 The present application is for leave to issue proceedings in the Court. Under O 58 r 4(3) of the High Court Rules, a Justice of the Court, after considering the process filed on behalf of the applicant, directed the Registrar to refuse to issue the process without leave of a Justice first being obtained. Pursuant to that order the applicant has sought such leave. The application for that purpose was referred to me. The Court is empowered to deal with such applications on the papers and commonly that is what occurs. However, because the applicant is in custody, seeks to challenge a judgment upon which his custody depends, is unrepresented and, according to the affidavit, illiterate and indigent and relies on his wife to advance his application, it seemed appropriate to allow the matter to be argued in public chambers. However, it was subject to time limits imposed by me, similar to those observed on a special leave hearing[2].

3 Although the application could have proceeded in the absence of the prosecution, I directed that the Director of Public Prosecutions be advised of it, in case he should wish to be present. A representative of the Director's office attended to assist the Court. His assistance, except upon one matter, has not proved necessary.

The trial, conviction and appeal of the applicant

4 On 24 September 1997, in the District Court of New South Wales, the applicant was convicted of fraudulent misappropriation contrary to s 178A of the *Crimes Act* 1900 (NSW). The conviction followed a trial before a jury which lasted two weeks. The jury found the applicant guilty of the charge. The applicant was unrepresented at the trial. He was duly sentenced by the trial judge, Stewart ADCJ. On 3 November 1997, the applicant appealed against his conviction and sentence to the Court of Criminal Appeal of New South Wales.

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1 *Sinanovic v The Queen [No 1]* (2001) 179 ALR 520.

2 cf High Court Rules, O 69A r 9.

That Court, comprising Wood CJ at CL, and Hulme and Greg James JJ, heard the appeal and on 11 December 2000, by majority, allowed the appeal against conviction.

5 The Court ordered that the conviction entered by Stewart ADCJ be set aside and that a retrial be had on the charge in the indictment. The applicant then applied to this Court for special leave to appeal against the order of the Court of Criminal Appeal. The applicant contended either that an order of acquittal should have been entered or that the Court of Criminal Appeal ought to have ordered a permanent stay of any further prosecution of him.

6 The application for special leave to appeal came before the Court on 10 April 2001. The Court was then constituted by Gummow and Callinan JJ. Their Honours permitted Mrs Sinanovic to appear on behalf of the applicant. They refused special leave and dismissed the application. The applicant now wishes to reopen that application for special leave and to argue the application afresh. A motion for that purpose to allow the Registrar to receive the process was filed in this Court on 12 April 2001. It is that application which is now before me.

Principles governing reopening

7 In the nature of applications of this kind they usually proceed, as this one did, with the applicant unrepresented by a lawyer and with little or no participation by an opposing party who could act as contradictor. Accordingly, it is not possible to explore at any length the applicable principles. Nevertheless the following represent some of those which I accept as affecting the decision I am asked to make:

1. A decision on a special leave application is not res judicata as between the parties, equivalent to a judgment that finally decides a legal dispute between them. The application is in the nature of an interlocutory proceeding by which a party seeks to engage the jurisdiction of this Court[3]. As a general rule, interlocutory orders may be varied or set aside in appropriate circumstances where the interests of justice so require[4]. At the stage of the special leave application, it has been said, the appellate jurisdiction of this Court has not been engaged, it is simply a process by

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3 cf *Cooper v Williams* [1963] 2 QB 567 at 580, 582.

4 *Mullins v Howell* (1879) 11 ChD 763 at 766; *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443 at 447, 448; *Douglas v John Fairfax & Sons Ltd* [1983] 3 NSWLR 126 at 134.

which a party seeks to persuade the Court to enter upon that jurisdiction[5]. I shall assume that this is a valid distinction, compatible with the Constitution.

2. This Court has the power to reopen an application for special leave. Quite apart from its general powers as the final appellate court of Australia, the Court's power to reopen a special leave decision lies in the implied or inherent jurisdiction of the Court derived from the Constitution and from the *Judiciary Act* 1903 (Cth)[6]. Obviously, unexplained delay or other fault on the part of those seeking reopening would be a discretionary reason for refusing to entertain the request[7].

3. The law puts a high store on finality of legal proceedings, including in this Court. This is because such proceedings are inconvenient and expensive to the parties affected, costly in terms of public resources and also vexing to all parties concerned[8]. Therefore, although the reopening of a special leave application is possible, it is extremely rare for reasons that are self-evident. Having given attention to the issues between the parties, the Justices of this Court should not, except in the most extraordinary case where a change of circumstances can be shown, be required to return to the matter. At the special leave hearing, the parties and their lawyers must expect to put in writing, and if they so elect orally, all that they wish to put in support of, or in opposition to, the application. They must do so when it is first before the Court. The Court has its own internal procedures to ensure that applications are thoroughly considered before and at the hearing. Apart from everything else, the growing number of special leave applications makes it undesirable, and practically impossible, to impose on the Court a burden of multiple hearings of the same matter.

4. The only basis for ordering the reopening of a special leave hearing would, in my opinion, be where it is affirmatively shown that exceptional circumstances exist and new circumstances have arisen that require a

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5 cf *Eastman v The Queen* (2000) 74 ALJR 915 at 943-944 [165]-[168], 946 [182], 951 [207]; 172 ALR 39 at 76-77, 80-81, 87.

6 cf *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302, 322; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215.

7 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215.

8 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 171.

reopening to prevent a serious miscarriage of justice because an error of fact or law has occurred in the earlier determination of the application, which error demands correction.

5. An error of fact will not involve the discovery of fresh evidence that was not tendered at the trial or received in the intermediate appellate court. By the authority of this Court such fresh evidence, even if it were to show a grave factual error, indeed even punishment of an innocent person, cannot be received by this Court exercising its appellate jurisdiction[9]. A good instance of the discovery of such fresh evidence recently arose in the Court of Appeal of Queensland[10]. There DNA evidence, discovered after a trial and before the hearing of the appeal in that Court, conclusively demonstrated that the prisoner was innocent. However, if such evidence were discovered between the hearing in the State or Territory appellate court and this Court, by the authority of *Mickelberg*, it could not be received. The prisoner would be bereft of protection by the Judicature. He or she would be compelled to seek relief from the Executive. I expressed my disagreement with this principle in *Eastman v The Queen*[11]. However, it represents the repeated holding of this Court. Although evidence can be received at a special leave hearing (for example, to show the significance of a case for other cases) it will not be received as fresh evidence relating to the subject of the proceedings because to receive it would be futile having regard to the fact that it could not be used in the appeal.

6. If some oversight or error of law has occurred, and a relevant change of circumstances can be demonstrated, this Court could exceptionally be persuaded to reopen an adverse special leave decision. The rule in *Dietrich v The Queen*[12], as presently expressed, applies only to the *trial* of serious criminal offences. It does not apply to *appeals*. On this footing, it is not unusual, at the stage of special leave to appeal, for prisoners to be unrepresented before this Court. In such cases where the hearing is sometimes conducted on the papers, a significant point of law, or a change in the law, could easily be overlooked. If that could be shown, this Court might, exceptionally, reopen the special leave hearing and order that process be received by the Registrar for that purpose. Clearly relevant to the decision would be the way in which, if at all, the suggested error was

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9 *Mickelberg v The Queen* (1989) 167 CLR 259 at 271, 274, 297-298.

10 *R v Button* [2001] QCA 13; noted (2001) 26 *Alternative Law Journal* 97 at 97-98.

11 (2000) 74 ALJR 915 at 965 [273]; 172 ALR 39 at 106.

12 (1992) 177 CLR 292.

pertinent to the grounds for special leave mentioned in s 35A of the *Judiciary Act*.

Reopening is not justified

8 In this case, none of the foregoing grounds for the exceptional and extraordinary order sought has been shown to apply. No change of circumstances has been demonstrated. At the hearing on 10 April 2001 Gummow J, expressing the reasons of the Court, said:

> "The applicant seeks special leave to appeal against orders of the Court of Criminal Appeal of New South Wales quashing a conviction for an offence of dishonesty and ordering a new trial of it and adjusting the totality of terms of imprisonment imposed with respect to that offence and others of which the applicant was convicted. The applicant's appeal to the Court of Criminal Appeal succeeded substantially on grounds of misdirection. That court was of the opinion, and we agree, that there was admissible evidence available to sustain a conviction by a properly-instructed jury.
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> Accordingly, it was appropriate for the Court of Criminal Appeal not to enter an acquittal and that it order that there be a new trial. It was also necessary and right for the Court of Criminal Appeal to adjust the totality of the sentence imposed on the applicant on the quashing of the conviction the subject of this application. Accordingly, the application for special leave is refused."

9 The foregoing reasons were given at the end of a full hearing which consumed the entire time available to the applicant. It followed consideration by the Court of the written submissions of both parties, which I have seen and which were detailed and substantial. In the Court of Criminal Appeal, Greg James J, with whom Wood CJ at CL agreed, said that although the conviction had to be set aside, it was "plainly sufficiently supported by the evidence and there is no matter which would render a new trial inappropriate nor is there such other ground of appeal as might necessitate an acquittal"[13].

10 It follows that the points which the applicant wishes to reargue were canvassed before the Court of Criminal Appeal and in this Court when it heard the special leave application. There is no change of circumstances nor are any exceptional circumstances established. The applicant contends that, in the earlier hearings, a mistaken assessment was reached both by the Court of Criminal Appeal and by this Court. However, the point which the applicant sought to

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13 *R v Sinanovic* [2000] NSWCCA 396 at [140].

make, and would make if a further special leave hearing were permitted, was well and truly argued before this Court in the special leave application. If the foundation for the point raised still has any merit, it might give rise to remedies at the retrial of the applicant. I was informed that such retrial is proceeding at this very time before Luland DCJ of the District Court of New South Wales.

11 Ordinarily, where a Court of Criminal Appeal sets aside a conviction on appeal, if there is evidence upon which a conviction could be reached, it orders a retrial. It is then left to the Executive Government, acting through the Director of Public Prosecutions, to decide whether that retrial should be had. That is normally the proper delineation between the respective functions of the courts and of the Executive Government[14]. It is what has occurred in this case. Notwithstanding the repeated efforts of the applicant and his wife, it is an order which was justified by the evidence. It will not be disturbed by this Court.

Order

12 For these reasons, the application for leave to file new process is refused.

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14 cf *DPP (SA) v B* (1998) 194 CLR 566 at 579-580 [21].