HIGH COURT OF AUSTRALIA

CALLINAN J

Matter No B70/2003

DAVID WILLIAM ETTRIDGE APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)
RESPONDENT

Matter No B71/2003

PAULINE LEE HANSON APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)
RESPONDENT

Ettridge v Director of Public Prosecutions (Q))
Hanson v Director of Public Prosecutions (Q)
[2003] HCA 68
23 September 2003
B70/2003, B71/2003

ORDER

Applications dismissed.

Representation:

Matter No B70/2003

B W Walker SC for the applicant (instructed by Boe Callaghan)

B G Campbell for the respondent (instructed by Director of Public Prosecutions (Queensland))

Matter No B71/2003

C E K Hampson QC with K S Howe for the applicant (instructed by Nyst Lawyers)

B G Campbell for the respondent (instructed by Director of Public Prosecutions (Queensland))

CATCHWORDS

Ettridge v Director of Public Prosecutions (Q)
Hanson v Director of Public Prosecutions (Q)

Criminal Law – application for bail pending the hearing of an application for special leave to appeal against a refusal of bail by an intermediate appellate court and before even the substantive appeal against conviction has been heard by the intermediate court of appeal – whether exceptional or special circumstances shown.

1 CALLINAN J. Anyone who turns out to have been wrongly imprisoned, even for a day, is entitled to feel a deep sense of grievance. Accordingly our system of law is intended to ensure, so far as is possible, that an accused person be given a fair trial, and if convicted, not be excessively penalised. Even so, trials can and do miscarry, and punishments more harsh than the crime and the circumstances of the convicted person warrant, are sometimes imposed. Unfortunately however whether either of those events has occurred can only be determined in hindsight, and with the careful evaluation of the trial by an appellate court with the benefit of argument and the time to undertake it. In the meantime, conventionally, all concerned are, as a practical and a legal matter, obliged to accept that the conviction and punishment have been regularly entered and imposed.

2 But there are exceptional cases. And when these are shown to exist, the courts may react by allowing bail to a convicted person pending the hearing of his or her appeal.

3 In this Court however matters are somewhat more complicated. By the time that convicted applicants seek to invoke the jurisdiction of this Court they have almost always not only been tried and convicted, but also have had the benefit of a review of their cases by an appellate court. It follows inevitably that no matter how difficult it may be for a convicted person to persuade an intermediate appellate court that he or she should be granted bail pending the disposition of his or her appeal to that Court, the difficulties are compounded when the applicant comes to this Court seeking bail before that appeal is heard. Self-evidently, the difficulties are further compounded by the facts here that the applicants' application for bail has been rejected by the intermediate court, and they have not been granted special leave to appeal to this Court against that rejection.

4 It is convenient to deal with both applicants' cases together.

5 Ms Hanson was convicted on three counts: first, contrary to s 408C(1)(f) of the *Criminal Code* (Q) ("the Code"), of dishonestly inducing the Electoral Commission of Queensland to register "Pauline Hanson's One Nation", a political party, as a political party pursuant to s 70 of the *Electoral Act* 1992 (Q) ("the Act"). To qualify for registration as a party at the relevant time, there were limited formal requirements. One was that the party must have no fewer than 500 members (s 70). Another was that it have a constitution to which there were no requirements as to its control and management.[1] If duly registered its candidates who attracted in total not less than 4 percent of the vote, would

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1 Subsequently s 73A of the Act was enacted prescribing a number of requirements including, by s 73A(1)(f) a rule for the free and democratic election of a candidate for preselection.

qualify for pro rata payment of money by the State. Ms Hanson was also convicted of two other counts, of dishonestly, contrary to s 408C(1)(b) of the Code, receiving two cheques for, in total, almost $500,000. Mr Ettridge, who was jointly tried with Ms Hanson was convicted on the first count only.

6 It is necessary to say something more about the Act, the facts and course of proceedings.

7 The Act (s 3) defines "political party" in this way:

> "'political party' means an organisation whose object, or 1 of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part."

8 It can be seen that the section says nothing about the rules and procedures of a party. The party did have a constitution and Art 9 of it was as follows:

> "**ADMISSION AND REJECTION OF MEMBERS**
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> 9 (1) At the next meeting of the Management Committee after the receipt of any application and the fee applicable for any class of membership, such application shall be considered by the Management Committee, who shall thereupon determine upon the admission or rejection of the applicant.
>
> (2) Any applicant who receives a majority of the votes of the members of the Management Committee present at the meeting at which such application is being considered shall be accepted as a member to the class of membership applied for.
>
> (3) Upon the acceptance or rejection of an application for any class of membership the secretary shall forthwith give the applicant notice in writing of such acceptance or rejection."

9 As well as the party, an incorporated association, "Pauline Hanson Support Movement Inc" came into existence. The applicants were both members of the national management committee of the party. They were, also respectively, president and vice-president of the movement.

10 The case against the applicants at the trial in the District Court of Queensland was that the purported list of more than 500 members of the party that they provided to the Electoral Commissioner to obtain registration and therefore public funding of the party under the Act, was in fact a list of members of the movement. For proof of this, reliance was placed by the respondent

largely upon out of court statements by the applicants proved by the oral evidence of a number of witnesses at the trial.

11 On their conviction the trial judge sentenced both applicants to three years imprisonment with no recommendations for parole. Both have appealed to the Court of Appeal against conviction and sentence. Their appeals have not been heard. Both sought bail pending the hearing of their appeals. The Supreme Court (Chesterman J) refused bail. They then unsuccessfully appealed to the Court of Appeal (Jerrard JA, Dutney and Philippides JJ) against that refusal. They have filed applications to this Court for special leave to appeal against the decision of the Court of Appeal. And now they come to a single Justice of this Court, having, it is accepted on both sides, an inherent or incidental power to grant bail pending the application for special leave, if a case for it can be made out.

Submissions on conviction

12 Both applicants argued that their cases were exceptional. They had been, they contended, wrongly convicted: there was overwhelming, objective, generally contemporaneous, written evidence that there were more than 500 members of the party in Queensland at the relevant time. Such statements as may have been made by the applicants to, or having the appearance of being to the contrary, could not contradict the clear legal effect of the written applications for membership of the party, and the acceptance thereof, by employees of the party. No point, it was submitted, was, or could now be taken that Art 9 of the constitution had not been satisfied. At the trial the respondent made an arrangement with the applicants which was tantamount to a concession that the employees concerned were authorized to accept applications and grant membership.

13 The Court of Appeal accordingly erred, the submissions went, in two particular respects: in not finding that the appeals against conviction were likely to succeed; and in having regard to the outcome of a civil trial before a judge without a jury, in which the same or a similar issue was decided in the same way as the jury must have decided it in the criminal proceedings. Counsel for the applicants also submit that in the reasons for the decision of the Court of Appeal there can readily be detected a real sense of unease about the convictions.

Respondent's submissions on conviction

14 The respondent's principal submission is that as members of the management committee the applicants did not merely believe, but actually intended and knew that the persons on the list were not members. The respondent accepted that a concession had been made but submitted that it in no way diminished the prosecution case and the relevance and weight of the oral evidence called about the applicants' knowledge of non-membership.

Decision
Conviction

15 I agree with the Court of Appeal that at this stage it is not possible to form any confident view about the outcome of the substantive appeals against conviction. Indeed, it is important to emphasize that it is not, in any event, for a single Justice in this jurisdiction, to embark, particularly at this stage, upon a detailed exploration of the facts. This will only be able to be done with the benefit of full argument on a substantive appeal.

Submissions on penalty

16 The applicants submit that in any event non-custodial sentences or custodial sentences much shorter in time should have been imposed. They say that the trial judge failed to comply with s 9 of the *Penalties and Sentences Act* 1992 (Q), for example: by disregarding or giving no weight to the applicants' good character, the absence of any prior criminal conduct, their participation in public affairs, and their personal family circumstances; and by not giving proper or real weight to their successful efforts to reimburse the State in full for the money received, not it may be said by them personally, but by the party; and by ignoring the significant popular electoral support that the party and its candidates received. As to the last, it should immediately be said that it was a matter to which her Honour clearly paid attention, and regarded as a factor reflecting on the applicants' characters: that their representation that One Nation was a [registered] party may well have induced electors to vote for its members. It was further submitted that other persons convicted of comparable offences had been dealt with much less harshly than the applicants. Mr Ettridge, as an unrepresented accused, it was said, should have been but was not told by the trial judge that he was entitled to address on penalty. Furthermore, as a person convicted of one of the offences only, he should have received a lesser penalty than Ms Hanson.

17 As arguable as some of the submissions may appear to be - it is not possible or indeed appropriate in a hearing of this kind to delve into the substratum - they do not demonstrate special or exceptional circumstances of the kind which would lead to a grant of bail at this stage.

18 But there are still more fundamental reasons why the applicants cannot succeed.

19 The High Court is not a sentencing court in the ordinary sense. Its general practice, if error of principle in sentencing has been shown, is to send the case back to the intermediate court to apply the proper principles. These cases are still in the jurisdiction of the Supreme Court. It is for the courts of that jurisdiction to decide how they should be dealt with. It would not be right for this Court,

especially a singe Justice of it, to interfere with the exercise of a state discretionary jurisdiction in a pending matter, save perhaps for a very exceptional case which it is not easy to envisage. A judge of the Supreme Court has refused bail and the Court of Appeal has reviewed that refusal and upheld it. It is, among other things, on the prospects of success of obtaining special leave to appeal from the dismissal of an appeal against a refusal of bail by a primary judge, and in turn, if special leave were to be granted, on the prospects of the appeal itself that I am bound to focus. It is highly relevant that the applicants have not even succeeded yet in obtaining a grant of special leave to appeal against the decision of the Court of Appeal refusing bail. It is, in my opinion very unlikely that a Full Court of this Court would grant bail to any applicant whose substantive appeal to an intermediate court of appeal has not been heard. Furthermore, the applicants do have the benefit of a relatively prompt hearing, in, as I understand it, six or so weeks.

20 I am bound to, and dismiss the applications by Ms Hanson and Mr Ettridge.