HIGH COURT OF AUSTRALIA

McHUGH J

IVAN ROBERT MARKO MILAT APPLICANT

AND

THE QUEEN RESPONDENT

Milat v The Queen
[2004] HCA 17
24 February 2004
S230/2002

ORDER

Summons and application dismissed.

Representation:

No appearance by the applicant

G E Smith for the respondent (instructed by Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Milat v The Queen

Practice and procedure – Application for special leave to appeal – Oral submissions – Right to make oral submissions – International practice – Power of Court to order production of prisoner for purpose of making oral submissions in person or by video link – Status of applicant for special leave – Discretionary factors.

Words and phrases – "application for special leave to appeal".

High Court Rules, O 69A rr 3, 15.

1 McHUGH J. The applicant, an indigent prisoner, filed a summons on 17 December 2003 seeking alternative orders. The first order is that he be physically brought before the Court to conduct his special leave application that has been filed in the Court. The alternative order is that he be permitted to appear via video link using the facilities that are available at Goulburn Correctional Centre, where the applicant is presently in custody serving a life sentence.

2 The application for special leave is brought in respect of a decision of the Court of Criminal Appeal of New South Wales. That Court dismissed an appeal against convictions in July 1996 on seven counts of murder and one count of detaining for advantage. Hunt CJ at CL had sentenced the applicant to life imprisonment.

3 The applicant's application for special leave necessarily requires an extension of time within which to file that application. The order of the Court of Criminal Appeal dismissing his appeal was delivered on 26 February 1998. The application for special leave was not filed until 24 June 2002. That was about four and a quarter years later than the time required by O 69A r 3 of the High Court Rules.

4 The applicant claims that the conduct of his trial miscarried in relation to evidence of identification. He claims that the trial judge permitted the Crown to put a case to the jury that was inconsistent with the testimony of its own witnesses without either cross-examining those witnesses as hostile or putting to them that their evidence was mistaken. The applicant also claims that the trial judge erred by putting alternative cases to the jury, one of which had not been relied on by the Crown. He argues that these errors affected the evidence on the detaining for advantage count and that the jury may have used the conviction on that count to convict him on the murder counts. Accordingly, he claims there has been a miscarriage of justice and that all of his convictions are bad and should be set aside.

5 The Crown responds that the particular evidentiary issue about which the applicant complains was not essential to the conviction of the applicant and there was no legal error on the part of the trial judge. The Crown contends that the evidence against the applicant was so strong that counsel for the applicant conceded that a member of the Milat family, or someone closely associated with it, must have committed the murders. The Crown claims that the evidence about which the applicant complains – which related to the presence of a vertically mounted spare wheel on the rear of the applicant's four-wheel drive – was neither crucial to the Crown case nor the subject of extensive questioning by the Crown. The Crown says that the convictions for murder did not depend on the conviction for detaining for advantage.

6 It is unnecessary to make any comments about the merits of the application except to say that an application, brought so long out of time, faces a formidable hurdle in obtaining the grant of special leave to appeal.

7 Order 69A r 15(2) of the High Court Rules provides for the determination of applications for special leave to appeal without oral argument from one or both parties. It provides:

> "Where an application is listed for hearing and it appears to the Court or a Justice that a party is likely to be unable, or that it is likely to be impracticable for a party, to appear personally or by a legal representative to present oral argument, the Court may direct that the party's case be considered on the basis of his or her summary of argument and any reply without oral argument from that party."

8 The applicant claims that, if this Court exercised this power in respect of his application for special leave to appeal, it would deny him procedural fairness. He claims that it is necessary for him to present oral argument in support of the application because he has no legal training, assistance or representation and must personally ensure that the Court has grasped the substance of his application. How he would achieve this is not explained.

9 The argument of the applicant concerning O 69A r 15(2) and procedural fairness is misconceived. Order 69A r 15(2) of the High Court Rules does not cut down the rules of procedural fairness. On the contrary, it facilitates those rules. It ensures that an applicant who is unable to appear personally or by a legal representative or who will find it impracticable to do so, will be able to have his or her case considered on the papers. An order under that Rule facilitates the rules of procedural fairness by allowing an applicant to put his or her case to the Court even though the applicant is unable to discuss his or her case orally with the Court. It was directed to persons in the position of the applicant and was designed to assist, not hinder, their special leave applications.

10 It is not an order under O 69A r 15(2) of the High Court Rules that would prevent the applicant from putting oral argument to the Court. It is the fact that he is imprisoned and that apparently the prison authorities will not bring him to the Court to present an oral argument that prevents him discussing his case orally with the Court. To obtain the orders that the applicant seeks in his summons, he must point to a right, absolute or discretionary, that would authorise an order to bring him before the Court or an order that his application be heard by video link. Such a right, if it exists, has nothing to do with O 69A r 15(2).

11 As at present advised, I do not think this Court has any power to order the Governor or Comptroller or any officer of a prison to bring a prisoner, serving a sentence, before the Court *merely* because the prisoner wishes to present oral argument to the Court in a special leave application. If the Court has power to

make an order bringing a serving prisoner to the Court to present oral argument, it can only arise by necessity when the circumstances are such that to deny the power to do so would thwart the exercise of the jurisdiction of this Court.

12 The right to bring, and for this Court to hear, a special leave application is given and governed by the *Judiciary Act* 1903 (Cth). There is nothing in that Act or in the Rules of this Court dealing with special leave applications that expressly authorises an order such as the applicant seeks. Hence, a power to make an order of the kind sought by the applicant can only arise by necessary implication, and because it arises by necessity it "must be limited by the extent of the need": see *Board of Fire Commissioners (NSW) v Ardouin*[1]. As long as prisoners without legal representation can put their argument by written submissions, it seems impossible to suggest that it is necessary that they should always be entitled to support their application by participating in an oral hearing.

13 The power that the applicant seeks to invoke is not comparable to the Court's power to stay a sentence pending the hearing of a special leave application. That power is exercised, and in my view can only be exercised, when it is necessary to prevent the Court's appellate jurisdiction being rendered futile or impracticable. It is a power whose occasional exercise is necessary to preserve the effectiveness of the Court's authority to grant special leave and determine appeals. It is far from obvious – indeed, it is absurd to suggest – that the Court's special leave jurisdiction would be rendered futile or impracticable unless a serving prisoner who is an applicant for special leave to appeal is always able to participate in an oral discussion of his or her case for the 20-minute period given in respect of that application.

14 In that respect, it can be noted that until the early 1990s the Rules of this Court required all persons who were without legal representation to present their applications for special leave in writing. They were not heard orally. Moreover, this Court is one of the few ultimate appellate courts in the world that permit oral argument, as of right, in support of an application for leave to appeal.

15 The House of Lords, the Scottish High Court of Justiciary, the Supreme Court of Ireland, the Supreme Court of the United States, the Supreme Court of Japan, the Federal Constitutional Court of Germany and the Court of Appeal of New Zealand do not give any right, as of course, to present oral argument to support a leave application. In those Courts, it is either the usual or only course to deal with applications for leave to appeal without oral submissions from any party. Where oral argument or discussion is permitted, it is usually of the Court's own motion on its assessment of the need for oral argument.

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1 (1961) 109 CLR 105 at 118.

16 The rules of the Supreme Court of Canada also restrict oral argument. They give a right to request an oral hearing in a criminal case only where the court below has set aside an acquittal and ordered a new trial of the charge.

17 The Supreme Court of India goes further than other courts. In India, the whole of the appellate jurisdiction excludes litigants who are without legal representation, although the Rules of Court contain extensive provisions for the appointment of advocates-on-record for those unrepresented, particularly for applicants in custody where appointment of representation is compulsory.

18 The European Court of Justice – a court dealing extensively with human rights issues – requires a litigant to be represented to initiate and conduct any kind of proceeding in that Court.

19 Nor is there any express power in the Constitution, in my opinion, to order the prison authorities to bring the applicant before the Court to present oral argument in support of his application. The applicant relies on the comments of Kirby J in *Cameron v The Queen*[2] to support his claim that the Court should order that he be brought to the Court. In that case, Kirby J expressed the view that, in the case of indigent prisoners denied legal aid[3]:

> "it would be open to the courts, by their orders, to ensure such arrangements in defence of the utility of their exercise of the judicial power in a just way to all persons invoking that power."

His Honour went on to say:

> "Ultimately, in proper cases, such orders might be enforced by requiring the release of a prisoner on bail pending the provision of proper representation before the appellate court."

His Honour appears to have thought that the power to make these orders might have a constitutional foundation such as "the implied constitutional right to due process of law"[4].

20 Kirby J cited passages in the judgments of Deane and Toohey JJ and Gaudron J in this Court in *Leeth v The Commonwealth*[5] in support of this

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2 (2002) 209 CLR 339 at 369-370 [96]-[98].

3 (2002) 209 CLR 339 at 370 [97].

4 (2002) 209 CLR 339 at 370 [103].

5 (1992) 174 CLR 455.

proposition. His Honour also thought that *Dietrich v The Queen*[6] was based on this wide foundation. However, Kirby J was one only of five Justices who decided *Cameron*.

21 His Honour also referred to *Castlemaine Tooheys Limited v South Australia*[7] to support a proposition that prisoners on appeal are entitled to equal justice before the law and that they should not be confined to written submissions on appeal. None of the other Justices in *Cameron* expressed any concern in respect of the position of indigent prisoners on special leave applications. Nor did any of the other four Justices suggest that there was any constitutional right to be legally represented.

22 If I understand the remarks of Kirby J in *Cameron* correctly, they are based on this proposition: Courts exercising judicial power have power to stay an indigent prisoner's application on the ground that it would be unfair to require him or her to put a case on paper when other applicants can present their cases through legal representatives. Until legal aid is forthcoming, the Court could order the release of the prisoner on bail. It is not clear from his Honour's remarks what would happen if the Crown refused to provide legal aid. Presumably, the prisoner would remain on bail indefinitely.

23 It is apparent from what I have said that I find it difficult to accept his Honour's remarks in *Cameron* as correctly stating the law. Insofar as his Honour refers to passages in the judgments of Deane and Toohey JJ and Gaudron J in *Leeth*, they were dissenting judgments. Insofar as his Honour refers, by way of comparison, to passages in the judgments of the majority Justices in that case, they deny rather than accept the proposition for which Kirby J contends in *Cameron*.

24 Nor do I find it easy to reconcile his Honour's remarks concerning an "implied constitutional right to due process of law" with the unanimous decision of this Court in *New South Wales v Canellis*[8]. That decision made it plain that the decision of this Court in *Dietrich*, to which Kirby J referred, was not based on any right to public funding of legal representation. It was based on the common law power of a court to set aside a conviction that was unfairly obtained by reason of lack of legal representation or to stay a trial that might result in an unfair conviction because of lack of legal representation. To stay an application for leave to appeal or an appeal – which are statutory rights – after a conviction is

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6 (1992) 177 CLR 292.

7 (1990) 169 CLR 436.

8 (1994) 181 CLR 309.

to enter a different area of legal discourse. As at present advised, I can see nothing in the Constitution or the common law that would sanction it.

25 Nor does the joint judgment of Gaudron J and myself in *Castlemaine Tooheys*[9] give any support for the proposition for which his Honour cites it. That passage was concerned with discrimination in a protectionist sense for the purpose of s 92 of the Constitution. It had nothing to do with equality of representation in appeals.

26 In *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth*[10], this Court unanimously upheld the legality of the special leave process, inherent in which is the absence of a right of appeal to the High Court. The contingent nature of an application for special leave to appeal had previously been discussed by Barwick CJ, Stephen, Mason and Jacobs JJ in *Collins v The Queen*[11] where their Honours said:

> "until the grant of leave or special leave, there are no proceedings inter partes before the Court. This is so even in a case in which the application for leave or special leave is opposed. ... When the motion is moved, the applicant for such leave or special leave is no more than an applicant desiring to obtain the Court's leave to commence proceedings in the Court. ... There is no right to leave or special leave."

In *Eastman v Director of Public Prosecutions (ACT)*[12], I pointed out, consistently with this passage in *Collins*, that before the grant of leave there is no matter engaging the Court's jurisdiction.

27 Accordingly, with great respect, I find it difficult to accept the views of Kirby J in *Cameron*. Given his Honour's views, for a time I considered whether I should adjourn this application to a Full Court to be heard by all Justices of the Court, but a close reading of his Honour's remarks suggests that they were tentative. This is clear from his Honour's statement that[13] "if *Dietrich* rests ... on a broader, and possibly a constitutional foundation ... improved arrangement for the presentation of applications by indigent prisoners in custody may be required". Moreover, his Honour's judgment is principally directed to the

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9 (1990) 169 CLR 436 at 480.

10 (1991) 173 CLR 194.

11 (1975) 133 CLR 120 at 122-123.

12 Unreported, High Court of Australia, 4 September 2002.

13 (2002) 209 CLR 339 at 370 [97].

provision of legal representation for indigent prisoners, not bringing them before the Court to participate in oral discussion of their cases. The whole discussion of his Honour in *Cameron* is under the heading "Legal representation of prisoners".

28 I know of no other remarks by a Justice of this Court that might support the existence of the power that the applicant asks the Court to exercise. In another application by Mr Eastman[14], Gaudron J expressed views about the Court's power in a case like the present that might go beyond my present view of the power, although I doubt that her Honour intended to do so. For the purpose of this application, however, I will treat her Honour's statement as the governing law and apply what her Honour said:

> "Leaving aside the question whether the Court has power to order that Mr Eastman be brought to Canberra for the hearing of his special leave application, such an order, in my view, should only be made if an applicant cannot be legally represented and it is clear that the issues raised cannot be adequately dealt with by written submissions."

Given the experience of ultimate appellate courts throughout the world, it seems virtually impossible to conclude that the issues in a special leave application cannot adequately be dealt with by written submissions. After all, the United States Supreme Court never hears oral argument in support of their equivalent leave jurisdiction, and, as a matter of general practice, neither does the Supreme Court of Canada. Until the early 1990s, this Court also dealt with applications for special leave by unrepresented persons on the papers.

29 In any event, on the material before me, it is impossible to say that the issues in this special leave application cannot be adequately dealt with by written submissions. It needs to be emphasised that, in all special leave applications, the written submissions are the primary vehicle for persuading the Court that there is a point worthy of a special leave grant. The 20 minutes allotted for oral discussion are not a substitute or supplement for the written argument. The principal function of the oral hearing is to enable the Justices to test the arguments of the parties by a Socratic dialogue, to ensure the parties deal with the key points of each other's case where their written submissions do not do so and to enable the parties to emphasise particular points in the written submissions if they wish. Oral argument is not granted to enable a party to introduce new arguments.

30 After reading the judgment of the Court of Criminal Appeal, it is clear enough that the applicant seeks to agitate matters previously determined against

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14 *Eastman v Director of Public Prosecutions of the Australian Capital Territory*, unreported, High Court of Australia, 28 October 2002.

him in that appeal. While this is the usual course, it emphasises that this Court has at its disposal resources in addition to the written submissions of an applicant for understanding the nature of an applicant's complaint including this particular applicant's complaints about the conduct of the trial.

31 When those complaints were made as part of the appeal to the Court of Criminal Appeal, the applicant apparently had the benefit of legal assistance in producing the written submissions. He has had more than one and a half years in which to develop the grounds for special leave that were filed as long ago as June 2002. He has had since 5 September 2002 to reply to the respondent's summary of argument. That summary essentially relies on the judgment of the Court of Criminal Appeal delivered in 1998. The applicant availed himself of the opportunity to answer the respondent's submissions by filing a supplementary summary of argument in January 2003.

32 The applicant's written submissions in this Court contain copious references to legal cases and passages in the judgments in those cases as well as detailed arguments in support of his application. If his written submissions were written for or copied by him, it is unlikely that orally he could improve on them. If he wrote them without substantial assistance, it is not easy to accept that he has left out matters that he would put before the Court orally. Certainly, it is impossible to say in the words of Justice Gaudron that "the issues raised cannot be adequately dealt with by written submissions". Whether or not his written submissions have any merit is for the Full Court hearing the application to decide, but I have no trouble, and I cannot see how the Justices hearing the application will have any trouble, understanding the claims of the applicant.

33 Accordingly, there is no ground for making an order that the applicant be brought to this Court to make oral submissions in support of his appeal.

34 Nor is there a case for ordering a presentation by video link of the applicant's special leave application. It is not the general practice of this Court to hear applications by video link from prisoners in custody. If the Court heard the applicant's special leave application by video link, it would be difficult to refuse any prisoner the same privilege. There is nothing that indicates that the present applicant's application is unique or so special that he should be given a privilege denied to other prisoners. Nor is there any reason to believe that the administration of this Court's ever-lengthening special leave list would be improved by hearing applications by video link from prison by applicants who are without legal representation. In my experience, applications by such applicants are usually best presented by their written submissions rather than oral submissions.

35 Many unrepresented applicants inferentially acknowledge this point by seeking to read aloud to the Court written material that merely repeats the substance of the written submissions that they have already filed. Given the

ever-increasing workload of the Court, the efficient administration of the Court's business requires that its time not be wasted by oral submissions that do no more than repeat what has already been written. Experience also teaches that the most important part of the oral discussion – the testing of the arguments by a Socratic dialogue – is rarely effective in the case of applicants who are without legal representation. That is because they generally lack the experience and legal knowledge to respond effectively to the Justices' questions. Moreover, given the practices of other ultimate appellate courts throughout the world, the efficiency of this Court's business would appear to be better served by cutting down rather than extending the opportunities for oral discussion.

36 Accordingly, there is no ground for ordering a video link to be set up to hear the applicant's special leave application.

37 The order of the Court is that the summons and application be dismissed.