HIGH COURT OF AUSTRALIA

McHUGH, KIRBY AND HAYNE JJ

DAVID JOHN MUIR APPLICANT

AND

THE QUEEN RESPONDENT

Muir v The Queen
[2004] HCA 21
2 April 2004
C3/2003

ORDER

Notice of motion dismissed. Application for special leave to appeal from the decision of the Court of Appeal of the Australian Capital Territory refused.

Representation:

No appearance for the applicant

I D Temby QC with J R White for the respondent (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Muir v The Queen

Practice and procedure – High Court – Application for special leave to appeal from orders of Supreme Court of Australian Capital Territory – Application on motion by an indigent prisoner in custody for an order requiring his production to High Court to enable him to make oral submissions in support of application for special leave – Whether the High Court has power to make such an order – Whether it would do so in the case – Whether application to be decided on the papers.

Constitutional law (Cth) – High Court – Appellate jurisdiction – Whether implied powers under the Constitution to uphold the authority of the High Court – Whether question of power of High Court to order production of an unrepresented prisoner applicant for special leave should be referred to a Full Court – Whether appellate jurisdiction of the High Court engaged at stage of special leave application – Whether differing practices of custodial authorities in different Australian jurisdictions relevant to disposition of motion – Whether motion and application could and should be decided on the papers.

Criminal law and procedure – Sentencing – Convicted federal offender – Statutory provisions governing sentencing of prisoner convicted of offences against *Crimes Act* 1914 (Cth) – Whether sentencing judge correctly applied federal sentencing law – Whether decision of Court of Appeal attended by sufficient doubt to warrant grant of special leave.

Constitution, ss 73, 75.
Crimes Act 1914 (Cth), s 16G.
Judiciary Act 1903 (Cth), ss 35(2), 35AA(2), 78.
High Court Rules, O 55 r 1, O 55 r 39, O 69A r 15.

1 McHUGH AND HAYNE JJ. David John Muir has filed an application for special leave to appeal against orders dismissing his appeal to the Court of Appeal of the Australian Capital Territory against sentences imposed on him for certain federal offences. Mr Muir is in prison. He is now being held at Goulburn Correctional Centre. He has been told by a manager at that facility that, without an order of the Court, the prison authorities will not deliver him to the Court for him to make oral submissions in support of his application for special leave.

2 Acting under O 69A r 15 of the High Court Rules, McHugh J directed that the application for special leave be determined on the papers. After the direction under O 69A r 15 had been given, Mr Muir filed a notice of motion seeking an order that he be produced from prison and further, or alternatively, that the application for special leave be adjourned. The tension between this application and the earlier direction may be noted, but need not be resolved.

3 The notice of motion was directed only to the Commonwealth Director of Public Prosecutions. It was not directed to the person most immediately affected by the first form of relief sought, namely, the applicant's gaoler. If the notice of motion and supporting material had been served on the Director of Public Prosecutions, it must necessarily have been served late. We have been informed that that is the case. Ordinarily, this would lead to an order adjourning consideration of the motion. In the particular circumstances of this case, however, so to order would be futile. It would impose unnecessary expense on the party to whom the notice of motion is now directed and on any others upon whom it would have to be served. No less importantly, to adjourn the application would displace the hearing of another application which, but for the adjournment of this application, would be fixed on that future date.

4 It is necessary to explain why adjourning the applications made by the notice of motion would be futile. Mr Muir has filed extensive written submissions in support of the applications. Those submissions reveal that the purpose of seeking an order adjourning the application for special leave is to allow further time to elapse for Attorneys-General to consider notices under s 78B of the *Judiciary Act* 1903 (Cth) which Mr Muir issued on 31 March 2004. These notices relate to the application for special leave, not the application for an order that he be produced from confinement. This aspect of the applications may be put to one side.

5 Insofar as he seeks an order for his production from prison, Mr Muir points to what he says are two sources of power to make such an order: s 78 of the *Judiciary Act* and some particular provisions of the Rules of Court. Neither provides the power to make an order of the kind sought by Mr Muir. Section 78 of the *Judiciary Act* provides:

> "In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein."

6 In *Collins v The Queen*[1], five members of the Court held that s 78 is not engaged by an application for special leave to appeal. An application for special leave is no more than an application for leave to commence a proceeding in the Court[2]. An applicant for special leave is not a party within the meaning of s 78[3]. As McHugh J pointed out in *Milat v The Queen*[4], other decisions of the Court since *Collins* neither require nor permit a different answer.

7 Insofar as Mr Muir prays in aid the High Court Rules, in particular O 55 r 1 and O 55 r 39, none of those rules supplies the power to make an order of the kind now sought. Order 55 rr 1 and 39 are concerned only with proceedings for relief under s 75(v) of the Constitution or like relief. They are not rules directed to the powers of the Court in the wholly different and distinctive circumstances of an application for leave to commence a proceeding in the Court's appellate jurisdiction. Mr Muir points to no other source of power. But even if, contrary to the views expressed by McHugh J in *Milat*, some other source of power to make an order of the kind sought could be identified, there would be no occasion in this case to exercise it in favour of Mr Muir.

8 In this, as in all other applications for special leave, the written submissions are the primary vehicle for persuading the Court that there is a point appropriate for the grant of special leave. There are undoubtedly cases in which oral argument may assist the Court, but very rarely will that be so where the applicant is not represented. In the present case, the point which Mr Muir seeks to argue in an appeal to this Court, that the primary judge did not take account of s 16G of the *Crimes Act* 1914 (Cth)[5] when fixing the sentence on him, is clear. It is not a point which admits of development. Either account of s 16G was taken or it was not. Oral argument of the application for special leave would not assist.

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1 (1975) 133 CLR 120.

2 (1975) 133 CLR 120 at 122.

3 (1975) 133 CLR 120 at 123.

4 [2004] HCA 17 at [26].

5 The provision has now been repealed by the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act* 2002 (Cth).

9 In these circumstances, in our view, to adjourn the application for special leave is futile. Accordingly, we would dismiss the notice of motion.

10 In accordance with the direction that McHugh J gave under O 69A r 15, the application for special leave to appeal will be determined on the written submissions of both parties: the applicant and the Commonwealth Director of Public Prosecutions.

11 Having considered the written submissions of the parties, the Court is of the opinion that the decision of the Court of Appeal is not attended by doubt. Accordingly, special leave is refused.

12 KIRBY J. Sooner or later – preferably sooner – this Court will have to decide whether it has the power to order that a person, having the custody of a prisoner, bring that prisoner to court, or to some other secure place, where the prisoner can be heard in support of an application for special leave or in an appeal, if leave is granted, when the prisoner is not represented by a lawyer.

13 In my view, it is arguable that this Court has the relevant power, as incidental to its constitutional function to hear and determine appeals from all judgments of Supreme Courts[6]. That power appears to be even more clear where, as here, the court of trial and appeal was a Territory court, namely the Supreme Court of the Australian Capital Territory. And it is still more clear because that Court was exercising federal jurisdiction in the trial and sentencing of the applicant, Mr David Muir. He was tried and sentenced for an offence of fraud, contrary to the *Crimes Act* 1914 (Cth).

14 A grant of special leave is virtually always now a prerequisite to the invocation of this Court's constitutional function in appeals[7]. In deciding contested matters of constitutional power, this Court considers the substance, and not the form, of the matter in contention[8]. In substance, unless a person such as the applicant secures a grant of special leave to appeal, he or she cannot appeal. Securing such a grant depends upon communication and persuasion by the applicant, addressed to the Justices deciding the question. No matter of form can eliminate that constitutional reality.

Features of the proceedings

15 The applicant has sought an order that he be produced from confinement in the Goulburn Correctional Centre in New South Wales, where he is serving

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6 Constitution, s 73. See *Tait v The Queen* (1962) 108 CLR 620 at 624-625 per Dixon CJ ("... so that the authority of this Court may be maintained"). In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557, the Court said that a power conferred by the Constitution, "embraces all that is necessary to effectuate" it, referring to *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

7 *Judiciary Act* 1903 (Cth), ss 35(2) and 35AA(2). There are exceptions such as the power given to the Family Court of Australia to grant a certificate permitting appeals under the *Family Law Act* 1975 (Cth), s 95(b): *DJL v Central Authority* (2000) 201 CLR 226 at 259 [80].

8 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Ha v New South Wales* (1997) 189 CLR 465 at 498; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 572 [103].

the sentence imposed on him in the Supreme Court. It is that sentence which the applicant wishes to challenge in this Court. The sentence is for a total of seven years and six months imprisonment, commencing from 5 June 2001. For the purpose of disposing of the challenge, this Court has before it the applicant's application for special leave. The applicant has filed written submissions in support of that application. So has the respondent. The written submissions for the applicant, and, of course, for the respondent, are detailed, intelligent and well presented. However, the written submissions for the applicant do not today have the support of oral submissions, either by the applicant personally or by a legal practitioner on his behalf.

16 The respondent is represented before the Court by the Director of Public Prosecutions of the Commonwealth. Mr Ian Temby QC, a most experienced barrister, has appeared together with junior counsel in the Director's interest. So this is the position: experienced barristers are present in Court to support the respondent in the motion and application that are before us. The applicant is not present. The seat at the Bar table for the applicant is empty. On the face of things, this is a somewhat unequal contest of arms.

17 Counsel for the respondent conceded, properly, that the issue raised by the applicant's motion is not unimportant for the administration of justice. He recognised that, upon it, differing views have been expressed in this Court. He indicated the preparedness of the Director, if so required, to offer written and oral submissions on the point raised in the applicant's motion. I would give him that facility.

18 In an administrative order made earlier[9], McHugh J directed that the application should be heard by the Court today on the papers. This direction followed the indication that the applicant was in prison in New South Wales and would not be legally represented. However, his Honour's order was made before the Court had the applicant's motion. That motion, filed on 31 March 2004, overtakes the administrative order. Self-evidently, this Court is obliged to dispose of the applicant's motion in a judicial manner.

19 The applicant's motion is relevant to the mode of disposal of that process itself. He asks to be given the opportunity to be heard orally in support of the motion as well as of the substantive special leave application. He therefore asks that both proceedings be adjourned. In my opinion, this Court, after first giving an opportunity to be heard, should order the gaoler who is detaining the applicant to bring the applicant to a place in order to allow him to be heard as he requests. Alternatively, if the Court has sufficient doubts as to its power to make such an

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9 Under High Court Rules, O 69A r 15: see reasons of McHugh and Hayne JJ at [2], [10].

order, it should adjourn the hearing of the motion and the application for special leave. It should request the Attorney-General of the Commonwealth, the Human Rights and Equal Opportunity Commission, the relevant Bar Association or some other appropriate person or body to appear by counsel before the Court, as well as the respondent, to assist the Court to resolve the issue of power and to advance, as best we may, the interests of the applicant (and others in a like position) to be heard by the Court in support of the motion and the application for special leave.

The utility of oral submissions from prisoners

20 For more than a decade before my appointment to this Court, I regularly participated in the Court of Criminal Appeal of New South Wales. There, where prisoners were not granted legal aid by the public legal aid body and were not able to afford counsel or did not wish to be so represented, they were invariably brought to court to be heard. More recently, in bail applications in some State Supreme Courts, video links have been established to permit prisoners in that position to be heard by the judges, the prisoners remaining in a custodial institution to which the video link to the court is established. I would reject any suggestion that this form of hearing is invariably a fruitless exercise. Quite apart from the legal and symbolic importance of equality before the courts, the oral submissions of prisoners have, from time to time, assisted me (and doubtless many other judges) in the disposition of their applications for leave or in the hearing of appeals. In this Court, where prisoners have appeared to advance oral arguments, they have assisted me in applications for special leave.

21 When *Cameron v The Queen*[10] first came before this Court, I was sitting in special leave applications in Perth with Gaudron J. In accordance with the practice of custodial authorities in that State, Mr Cameron (who was not legally represented) was brought to the hearing of the application. Like the present applicant, Mr Cameron had filed intelligent and well-expressed submissions. However, on the written submissions, I was not inclined to favour the grant of special leave in his case. When, however, Mr Cameron appeared before Gaudron J and me, he persuaded us both to grant him special leave. He was then granted legal aid or pro bono assistance which he had not earlier received. He won his appeal.

22 The essential point raised in the present application for special leave is not futile or insusceptible to oral elaboration as the majority suggest. The respondent resists the point raised by the applicant under s 16G of the *Crimes Act* 1914 (Cth) by saying that the judge did sufficiently address and apply the section and, in any case, that it has now been repealed. The applicant contests these arguments. In

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10 (2002) 209 CLR 339.

the past, the section has been the subject of substantial oral argument before the courts[11]. We cannot know whether oral argument would again be useful until we have heard it.

The unequal treatment of some prisoners

23 To deny the occasional utility of oral submissions in this Court, including on behalf of prisoners, is to deny the experience of the common law system of advocacy before judges sitting in public. In the press of judicial business, it is arguable that, at the level of a final court, all applicants for special leave should have their applications decided on the papers or should all go through a filter for the purpose of winnowing out cases where there is no basis upon which an oral submission could persuade the Court to grant special leave. However, this is not this Court's present system for special leave hearings. Whilst this Court persists with oral hearings, we should do so, unless there is some strong justification and legal basis for the contrary approach, on a footing of complete equality between all persons appearing before the Court.

24 In Queensland, Western Australia and, where an informal request is made, in South Australia, prisoners are regularly brought to a place of hearing or to the place where the hearing is established by video link to Canberra to permit them to enjoy the right of any other party in a special leave application, namely 20 minutes of oral submissions before the Court. However, in New South Wales and in respect of Australian Capital Territory prisoners committed to New South Wales prisons, the custodial authorities do not co-operate in this way. This is an inequality in the treatment of prisoners and in the exercise of their rights within the Commonwealth in which I do not acquiesce. Whether there is power to correct it should be addressed by this Court without delay. It is unarguably an important issue for the Court. It is also important for the Crown representing the Commonwealth in federal criminal cases, and for prisoners and their families.

25 Prisoners are human beings. In most cases, they are also citizens of this country, "subjects of the Queen" and "electors" under the Constitution. They should, so far as the law can allow, ordinarily have the same rights as all other persons before this Court. They have lost their liberty whilst they are in prison. However, so far as I am concerned, they have not lost their human dignity or their right to equality before the law[12].

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11 See *Director of Public Prosecutions (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370 at 383-384.

12 cf *Gibbons v Duffell* (1932) 47 CLR 520 at 535 per Evatt J; *Raymond v Honey* [1983] 1 AC 1 at 14 per Lord Bridge of Harwich and see Finnane and Woodyatt, "'Not the King's enemies': Prisoners and their Rights in Australian History", in

(Footnote continues on next page)

26 As mine is a minority view, it follows that this Court will proceed in the absence of Mr Muir to dispose of his motion and application for special leave, on the papers without oral argument. I regard that as unjust. This very day, this Court has heard and disposed of seven applications by video link, one from Brisbane and six from Perth. There is no apparent technical difficulty, if the physical presence of the applicant creates insuperable problems, why a video link could not just as readily be established to Goulburn Correctional Centre. What is missing is the will and the perception of the necessity and power to so require.

27 Until the inequality before this Court is corrected, prisoners in New South Wales custodial institutions will continue to suffer a threefold inequality and discrimination as compared to (1) parties who are at liberty and who can come in person to the Court to address it; (2) prisoners who can afford to pay for legal representation or who are granted public or *pro bono* legal aid; and (3) prisoners in other Australian jurisdictions who, at their request, are assisted by the custodial authorities to enjoy the same rights of oral argument as all other parties enjoy in this nation in a special leave hearing before this Court.

28 It is one thing for the Parliament, by legislation enacted under s 73 of the Constitution, to "prescribe" exceptions or regulations limiting a right of parties to be heard in the appellate jurisdiction of the Court[13]. It is quite another thing for the Justices of this Court, acting judicially and exercising the judicial power of the Commonwealth, to adopt, or acquiesce in, a practice that treats some parties in an unequal and even discriminatory way[14]. There is no law that expressly purports to require such unequal and discriminatory treatment by the Court[15]. I regard such treatment as contrary to Ch III of the Constitution[16] and also to the

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Brown and Wilkie (ed), *Prisoners as Citizens: Human Rights in Australian Prisons*, (2002) 81 at 100.

13 See *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194, upholding the *Judiciary Act* 1903 (Cth), s 35(2) as providing the virtually universal requirement of special leave to appeal.

14 By the unequal and differential treatment of persons otherwise equal: *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15] per Gaudron, Gummow and Callinan JJ.

15 cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467 per Mason CJ, Dawson and McHugh JJ; cf at 486-487 per Deane and Toohey JJ (diss), 502 per Gaudron J (diss).

16 McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?" (2001) 21 *Australian Bar Review* 235 at 238 ("Gradual acceptance that Ch III protects due process rights").

statutory implication of equal treatment of parties before this Court contained in the *Judiciary Act* 1903 (Cth), ss 35(2) and 35AA(2). In addition, it is arguably contrary to Australia's obligations under universal principles of human rights[17] recognised in international law binding on this country[18], a consideration that may inform our understanding of applicable Australian law[19].

Orders

29 For these reasons, I would propose that the Court accede to the applicant's motion for adjournment of the hearing of the application for special leave. I would favour referring to a Full Court of this Court the question of whether this Court has the power to accede to the applicant's request that he be brought to the Court or to some other secure place to argue the motion and the application for special leave. That reference would permit necessary notices to be given, including under s 78B of the *Judiciary Act*, and ensure the attendance before the Court of those affected and those who could assist the Court in resolving this question. I dissent from the view taken in the motion by my colleagues.

30 Necessarily, my concurrence in the order proposed by McHugh and Hayne JJ disposing of the application for special leave, and specifically in the conclusion of a lack of sufficient doubt to warrant the grant of special leave, is based on the fact that the application has had to be dealt with on the papers without the benefit of oral submissions by or for the applicant.

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17 *International Covenant on Civil and Political Rights* (ICCPR), art 14.1. The ICCPR was adopted at New York on 16 December 1966 and entered into force on 23 March 1976 in accordance with art 49. ICCPR entered into force for Australia on 13 November 1980: [1980] *Australian Treaty Series* No 23. Art 14.1 of the ICCPR provides that "All persons shall be equal before the courts".

18 See *Weiss v Austria*, Views of the Human Rights Committee, No 1086/02 noted in Joseph, Shultz and Castan, *The International Covenant on Civil and Political Rights - Cases, Materials and Commentary*, 2nd ed (2004) at 395 [14.12].

19 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.