HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No S215/2007

MATTHEW JAMES ELLIOTT APPELLANT

AND

THE QUEEN RESPONDENT

Matter No S218/2007

BRONSON MATTHEW BLESSINGTON APPELLANT

AND

THE QUEEN RESPONDENT

Elliott v The Queen
Blessington v The Queen
[2007] HCA 51
8 November 2007
S215/2007 & S218/2007

ORDER

In each matter, appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with S E Pritchard and J K Taylor for the appellant in S215/2007 (instructed by Giddy & Crittenden)

B W Walker SC with R W Burgess for the appellant in S218/2007 (instructed by Legal Aid Commission of NSW)

M G Sexton SC, Solicitor-General for the State of New South Wales with A M Mitchelmore and J S Caldwell for the respondent and intervening on behalf of the Attorney-General for the State of New South Wales in both appeals (instructed by Crown Solicitor (NSW))

D M J Bennett QC, Solicitor-General of the Commonwealth with N L Sharp intervening on behalf of the Attorney-General of the Commonwealth in both appeals (instructed by Australian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with P J Davis SC intervening on behalf of the Attorney-General of the State of Queensland in both appeals (instructed by Crown Solicitor for the State of Queensland)

CATCHWORDS

Elliott v The Queen
Blessington v The Queen

Criminal law – Criminal appeals – Jurisdiction of Court of Criminal Appeal – The appellants were sentenced to life imprisonment and were subject to a non-release recommendation made by the sentencing judge – Whether the non-release recommendation was a "sentence" or "order" for the purposes of an appeal pursuant to s 5 of the *Criminal Appeal Act* 1912 (NSW).

Courts – Judgments – Circumstances in which judgments may be reopened – Earlier order not perfected – Relevance of subsequent legislative changes – Whether Court of Criminal Appeal erred in refusing leave to reopen judgment.

Words and Phrases – "non-release recommendation", "order", "reopen", "sentence".

Crimes Act 1900 (NSW), ss 19, 442.
Criminal Appeal Act 1912 (NSW), ss 3, 5, 6.
Sentencing Act 1989 (NSW), s 13A.
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005 (NSW), Sched 1 Item 1.

1 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. On 21 June 1990 at a joint trial upon indictment conducted in the Supreme Court of New South Wales before Newman J and a jury, Stephen Jamieson, Matthew Elliott and Bronson Blessington were found guilty and convicted of offences which included the murder on 8 September 1988 of Ms Janine Balding. At the time of the murder, Elliott was aged 16 and Blessington 14. Jamieson was aged 22.

2 On 17 February 1992 the Supreme Court (Gleeson CJ, Hope AJA, Lee AJ), sitting as the Court of Criminal Appeal pursuant to s 3 of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act"), pronounced orders dismissing appeals by Jamieson and Elliott against conviction, and granting leave to Elliott and Blessington to appeal against sentence but dismissing those appeals[1] ("the 1992 decision"). The leading judgment was delivered by Gleeson CJ.

3 The sentences had been imposed by Newman J on 18 September 1990. The provisions of ss 19 and 442 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"), as they then applied[2], subjected Jamieson to a mandatory sentence of penal servitude for life, but, as juveniles, Elliott and Blessington might, at the discretion of the sentencing judge, be sentenced to a lesser term of imprisonment. The Court of Criminal Appeal held in the 1992 decision that the imposition by Newman J of life sentences upon Elliott and Blessington had been well within the range of that statutory discretion[3].

4 What are now before this Court, many years later, are appeals by Elliott and Blessington against orders of the Court of Criminal Appeal (Spigelman CJ, Howie J, Kirby J dissenting) pronounced on 22 September 2006[4] ("the 2006 decision"). These orders refused leave to pursue further proceedings in the Court of Criminal Appeal designed to achieve a result whereby the life sentences imposed by Newman J would be quashed and the appellants would be resentenced. Kirby J, who was in the minority, would have granted that relief

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1 (1992) 60 A Crim R 68.

2 Section 19 was repealed by the *Crimes (Life Sentences) Amendment Act* 1989 (NSW) with effect 12 January 1990, but, by operation of s 19A(5) of the Crimes Act, continued to apply in respect of proceedings instituted before that date.

3 (1992) 60 A Crim R 68 at 80.

4 (2006) 164 A Crim R 208.

and resentenced Elliott and Blessington each to a term of 28 years imprisonment, with a non-parole period expiring on 8 September 2009.

The starting point

5 In assessing the submissions advanced by the appellants in this Court, it is important to isolate the appropriate starting point. In *Ratten v The Queen*[5], Barwick CJ stressed the importance of the finality of the outcome of the trial of a criminal offence. The return by the jury of verdicts of guilty both established the guilt of the appellants and amounted to convictions[6]. Subject to the appellate system established by the Criminal Appeal Act, the exercise of judicial power with respect to the trials upon indictment of Elliott and Blessington was spent upon the subsequent imposition of the sentences upon them. The controversy represented by the indictment had been quelled and, allowing for any applicable statutory regime, the responsibility for the future of the appellants passed to the executive branch of the government of the State[7].

6 Something should be said here respecting the Criminal Appeal Act and the position of the Court of Criminal Appeal. Section 23 abolished writs of error and the powers and practice previously existing with respect to new trial motions in criminal cases. The scope of these remedies was recently considered in *Weiss v The Queen*[8].

7 It is well settled that it is the terms of the statutory grant of a right of appeal which determine its nature[9]. Of the system established by the Criminal Appeal Act, in *Grierson v The King*[10], Dixon J noted that the Court of Criminal Appeal had no further authority beyond that found in the statute and continued:

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5 (1974) 131 CLR 510 at 517. See also *Pearce v The Queen* (1998) 194 CLR 610 at 626-629 [59]-[68]; *R v Carroll* (2002) 213 CLR 635; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17-18 [34]-[35].

6 *Griffiths v The Queen* (1977) 137 CLR 293 at 301, 313, 334.

7 See the remarks of Wells J in *R v O'Shea* (1982) 31 SASR 129 at 145.

8 (2005) 224 CLR 300 at 306-307 [13]-[14].

9 *CDJ v VAJ* (1998) 197 CLR 172 at 196-197 [95].

10 (1938) 60 CLR 431 at 435-436.

> "The [Criminal Appeal Act] is based upon the English Act of 1907. It does not give a general appellate power in criminal cases exercisable on grounds and by a procedure discoverable from independent sources. It defines the grounds, prescribes the procedure and states the duty of the court. The statute deals with criminal appeals rather as a right or benefit conferred on prisoners convicted of indictable offences and sets out the kind of convictions and sentences from which they may appeal and lays down the conditions on which they may appeal as of right and by leave and the procedure which they must observe. ... The determination of an appeal is evidently definitive, and a conviction unappealed is equally final. No considerations controlling or affecting the conclusion to be deduced from these provisions are supplied by analogous civil proceedings."

It was held in *Grierson* that the Criminal Appeal Act does not confer jurisdiction to re-open an appeal which has been heard on the merits and finally determined[11]. However in *Grierson* Dixon J had contrasted[12] the statutory powers of the executive exercisable notwithstanding dismissal of an appeal, under provisions such as those later considered by this Court in *Ratten*[13] and *Mallard v The Queen*[14].

8 How then has it come to pass that the 1992 decision, namely that there was no error by Newman J in the exercise of his authority under ss 19 and 442 of the Crimes Act with respect to the imposition of the life sentences upon the appellants, was called into question before that same court in the 2006 decision?

Supervening circumstances

9 The grounds of appeal to this Court are in like form and present two issues. These turn upon the two supervening circumstances which led to the 2006 decision against which the appeals are brought to this Court.

10 The first circumstance is the use the appellants seek to make of the discovery that the orders made on 17 February 1992 by the Court of Criminal

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11 See *Postiglione v The Queen* (1997) 189 CLR 295 at 300.

12 (1938) 60 CLR 431 at 437.

13 (1974) 131 CLR 510.

14 (2005) 224 CLR 125.

Appeal have not been perfected. This is said to provide the scope for an application for leave to reopen the disposition of the initial appeals against the life sentences.

11 The second circumstance is the effect now attributed by the appellants to the statement by Newman J in his sentencing remarks:

> "So grave is the nature of this case that I recommend that none of the prisoners in this matter should ever be released."

The practice whereby sentencing judges made such recommendations was a response to the administrative system whereby grants were made by the Governor of licences (or "tickets of leave") to prisoners sentenced to penal servitude for life. In *Baker v The Queen*[15], Gleeson CJ remarked that it was the knowledge of this administrative practice and procedure that gave rise to the making by sentencing judges of remarks such as those of Newman J. As Chief Justice of New South Wales, his Honour had expressed concerns about that practice, and did so in his judgment in the 1992 decision concerning the appeal by the present appellants[16]. Significantly, Gleeson CJ there remarked[17]:

> "There does not appear to have been any statutory basis for the making of the 'recommendation', nor, for that matter, does there seem to be any statutory basis for appealing against it."

12 With the leave of the Court of Criminal Appeal, a person convicted on indictment may appeal to that Court against the sentence passed on conviction (s 5(1)(c) of the Criminal Appeal Act). The definition of "sentence" in s 2(1) has been amended from time to time, but has always fixed upon an "order made by the court of trial" and a sentence of imprisonment has been given as a prime example of such an order.

13 The effect of the appellants' submissions is that any matter that "enforceably" affects the liability for punishment of a prisoner is a sentence or part of the sentence.

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15 (2004) 223 CLR 513 at 520 [7].

16 (1992) 60 A Crim R 68 at 80.

17 (1992) 60 A Crim R 68 at 80.

14 On this branch of the appeal the appellants make two principal submissions. They first submit that (i) the recommendation made by Newman J had legal effect upon the punishment of the appellants and (ii) it could then have been the subject of an appeal against sentence. Secondly, the appellants submit that, in any event, the treatment of the recommendation by subsequent legislation has rendered it an "order made by the court of trial" within the definition of "sentence" in s 2 of the Criminal Appeal Act and that this may found fresh or further appeals against sentence, consequent upon a grant of leave to overcome the lapse of time.

15 For the reasons that follow the appeals against the orders made in the 2006 decision should be dismissed. It is convenient to begin with the submissions attaching determinative significance to the sentencing remarks of the trial judge.

The remarks on sentence

16 As observed earlier in these reasons, the recommendation made by the trial judge was offered against the background of the administration of the "ticket of leave" system which then applied in New South Wales. The appellants submit that, by analogy to decisions respecting parole and probation orders made by sentencing judges under statutory authority, the recommendation by Newman J was "part of" the sentence for the purposes of the Criminal Appeal Act. But the analogy is a false one. Here, the recommendation was not an order made under statutory authority given to the sentencing judge. The same may be said of the appellants' reliance upon *R v Carngham*[18]. This Court there decided that an order by the sentencing judge, pursuant to s 20 of the *Crimes Act* 1914 (Cth), for release after part of the term of imprisonment had been served was a "sentence" against which the Attorney-General might appeal.

17 With effect 12 January 1990, the *Prisons Act* 1952 (NSW) ("the Prisons Act") had been amended[19] so as to constitute a Serious Offenders Review Board with functions including the revocation or variation of licences granted under the "ticket of leave" system. The ticket of leave system had been given a statutory basis by s 463 of the Crimes Act, but s 463 was repealed also with effect

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18 (1978) 140 CLR 487.

19 By the *Prisons (Serious Offenders Review Board) Amendment Act* 1989 (NSW) ("the 1989 Prisons Act").

12 January 1990[20]. Also with effect 12 January 1990, s 13A of the *Sentencing Act* 1989 (NSW) ("the Sentencing Act") created[21], in respect of a class which was to include the appellants, a new and distinct original jurisdiction in the Supreme Court. This empowered the Supreme Court, upon application made after service of eight years imprisonment, to determine, in respect of such life sentences, a minimum and an additional term for the sentence. Section 13A(9)(c) provided that the Supreme Court was to have regard, among other things, to:

> "any relevant comments made by the original sentencing court when imposing the sentence".

18 The recommendation by the original sentencing court thus might play a part in the later exercise by the Supreme Court of the jurisdiction created by s 13A. However, the additional regime created by the Sentencing Act did not give to such a recommendation the character of an order by that Court against which an appeal against sentence would lie forthwith. Any legal consequence of the recommendation was postponed until such later time as an application might be made to the Supreme Court in the original jurisdiction created by s 13A of the Sentencing Act. The first submission in this branch of the appeal fails.

19 The alternative submission respecting the effect of subsequent legislation also should be rejected. In the joint judgment in *Baker*[22] an account was given of the legislative changes made in New South Wales following the repeal of s 463 of the Crimes Act and the introduction by the Sentencing Act of the system outlined above. Section 13A(2) of the Sentencing Act provided that "a person serving an existing life sentence may apply to the Supreme Court for the determination of a minimum term and an additional term for the sentence". After amendment made to the system by the *Sentencing Legislation Further Amendment Act* 1997 (NSW) ("the 1997 Act"), s 13A(3) imposed upon those serving existing life sentences a requirement of eligibility to make such an application. It denied eligibility until the person in question had served at least eight years of the sentence.

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20 Also by the 1989 Prisons Act.

21 Section 13A was added by the *Sentencing (Life Sentences) Amendment Act* 1989 (NSW).

22 (2004) 223 CLR 513 at 528-530 [28]-[35].

20 As a result of changes made by the 1997 Act, an eligibility requirement of service of at least 20 years of the sentence was imposed upon those the subject of a "non-release recommendation" (s 13A(3)(b)). This expression was now defined in s 13A(1) as meaning: "a recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment". When considering an application in such cases the Supreme Court, if it were to accede to the application, had to be satisfied that there existed "special reasons" to justify the making of a determination (s 13A(3A)).

21 In *Baker*[23], this selection by the 1997 Act of a "non-release recommendation" was characterised as the creation of a criterion as the "trigger" for a particular legislative consequence. The relevant consequence concerned satisfaction of the eligibility requirement for application to the Supreme Court for determination of a minimum term and an additional term.

22 It is against that background that there falls to be considered the submission by the appellants that the remarks made by Newman J acquired with the enactment of the 1997 Act the character of an "order" within the definition of "sentence" in the Criminal Appeal Act. Of that submission, Spigelman CJ referred to the characterisation in *Baker* of the inclusion of non-release recommendations as a criterion for the operation of the 1997 Act. His Honour held that this was inconsistent with the proposition that the legal consequence of a non-release recommendation now could be said to arise from anything done "by" the court of trial within the meaning of the definition of "sentence" in s 2(1) of the Criminal Appeal Act. His Honour added that at the time Newman J made his recommendation it had no legal effect and that its subsequent legal effect was not something occasioned by anything done "by" the court of trial[24]. We agree.

23 The same conclusion applies to the further change to the legislation made subsequently to the decision in *Baker*. Apparently for more abundant caution, it was provided by the *Crimes (Sentencing Procedure) Amendment (Existing Life*

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23 (2004) 223 CLR 513 at 532 [43].

24 (2006) 164 A Crim R 208 at 225.

Sentences) Act 2005 (NSW) ("the 2005 Amendment")[25] that the definition of existing life sentence:

> "includes any such recommendation, observation or expression of opinion that (before, on or after the date of assent to the [2005 Amendment]) has been quashed, set aside or called into question ..."

The occasion for the more abundant caution may have been an appreciation that in the 1992 decision Gleeson CJ had spoken as follows of the remarks by Newman J[26]:

> "[E]specially where the offender is a young person, and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be made by other persons, and in other proceedings, or under other legislation, over the ensuing decades. For that reason, I should indicate that I do not support the recommendation made by Newman J. This is not intended to be a recommendation by me that either appellant should be released at some time in the future. It is simply intended as an expression of my view that the making of any recommendation on that subject in these circumstances is not appropriate."

24 The effect of the 2005 Amendment was to continue the adoption of non-release recommendations as a criterion for the operation of the amended Supreme Court review structure, notwithstanding curial disapproval or criticism of a particular recommendation. This did not have the consequence that the recommendation in question in this case had now acquired the character of an order by the court of trial.

25 It follows that leave to pursue out of time a sentencing appeal under s 5(1)(c) of the Criminal Appeal Act with respect to the recommendation made by Newman J was correctly refused and on a fundamental basis. This is that the recommendation never was and did not subsequently acquire the character of an "order made by the court of trial", with the result that the Court of Criminal Appeal lacked jurisdiction to entertain the proposed appeal.

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25 Sched 1 Item 1. Before the enactment of the 2005 Amendment the relevant provisions of the Sentencing Act had been repealed and re-enacted in the *Crimes (Sentencing Procedure) Act* 1999 (NSW) Sched 1.

26 (1992) 60 A Crim R 68 at 80.

Reopening the appeal

26 Several further points should first be made respecting the powers of the Court of Criminal Appeal, particularly with respect to the appeal against sentence after conviction upon indictment which is provided by s 5(1)(c) of the Criminal Appeal Act.

27 The Criminal Appeal Rules ("the Rules") made particular provision for the notifying of results of appeals. Among other things, the Registrar was to notify the proper officer of the court of trial of any orders or directions made or given by the Court of Criminal Appeal in relation to an appeal (r 52), and the proper officer was to enter the particulars of such notification on the records of the court of trial (r 53).

28 Usually a consideration of what was done to perfect the order with respect to the 1992 decision would begin with the course of official conduct provided for in the Rules. It is a basic proposition that[27]:

> "To prove an act has been done, it is admissible to prove any general course of business or office, whether public or private, according to which it would ordinarily have been done, there being a probability that the general course will be followed in the particular case."

29 However, there was no challenge in this Court to the proposition that the order of the Court of Criminal Appeal with respect to the 1992 decision has not been perfected. In particular, in his reasons for judgment in the 2006 decision Spigelman CJ referred to authorities which establish that the perfection of the earlier order required entry on the indictment, and indicated that the indictment now had been inspected by the Court and that this disclosed that the orders made in 1992 had not been entered upon the indictment. The result was that the appellants had established jurisdiction to grant leave to reopen their appeal[28]. Nevertheless, leave was refused and this refusal the appellants challenge in this Court.

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27 Heydon, *Cross On Evidence*, 7th Aust ed (2004) at [1130].

28 (2006) 164 A Crim R 208 at 217.

30 The statement in *Grierson*[29] that the Criminal Appeal Act prescribes the procedures for exercise of the jurisdiction by the Court of Criminal Appeal calls for some elaboration. First, whilst lacking "inherent jurisdiction", a court exercising jurisdiction or powers conferred by statute enjoys, in addition, such powers as are incidental and necessary to the exercise of that jurisdiction and those powers[30]. Secondly, weight must be given to the provision expressly made by s 12(1) of the Criminal Appeal Act. This provides that, if it thinks it necessary or expedient in the interests of justice, the Court of Criminal Appeal may exercise in relation to its proceedings any powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters.

31 It is well settled that a superior court of record such as the Supreme Court has a power to "reopen" a proceeding until judgment in the case in question has been drawn up, passed and entered[31]. But by what criteria is that authority to be exercised?

32 It is here that guidance is provided by remarks of Mason CJ in *Autodesk Inc v Dyason (No 2)*[32]. His Honour gave examples from jurisdictions in this country (including the New South Wales Court of Appeal) and the United Kingdom where the power to reopen had been exercised on grounds not limited to denial of a fair hearing[33], but went on[34]:

> "What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to

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29 (1938) 60 CLR 431 at 436.

30 *DJL v Central Authority* (2000) 201 CLR 226 at 241 [25].

31 *DJL v Central Authority* (2000) 201 CLR 226 at 244 [34].

32 (1993) 176 CLR 300.

33 (1993) 176 CLR 300 at 302.

34 (1993) 176 CLR 300 at 303.

provide a backdoor method by which unsuccessful litigants can seek to reargue their cases."

The circumstance in *Autodesk* that Mason CJ dissented as to the outcome of the reopening application which was before this Court does not detract from his remarks.

33 The question then becomes whether in the 1992 decision the Court of Criminal Appeal, when dismissing the appeals against sentence, proceeded according to some misapprehension of the facts or the relevant law and that this state of affairs is not to be attributed solely to the neglect or default of the appellants.

34 The "relevant law" must include that which identifies the nature of the particular proceeding; here, the appellate and statutory jurisdiction exercised by the Court of Criminal Appeal on the appeals against sentence. In considering that matter, s 6(3) of the Criminal Appeal Act is important. It was only open to the Court of Criminal Appeal to quash the sentences were it of the opinion stipulated in that provision. This opinion is identified in s 6(3) as one "that some other sentence ... is warranted in law and should have been passed ...".

35 In the 2006 decision, Spigelman CJ emphasised that the Court of Criminal Appeal is "a court of error"[35]. That characterisation of the appellate process invoked by the appeals against sentence served to distinguish it from what has been described as an appeal by way of rehearing. In *Da Costa v Cockburn Salvage & Trading Pty Ltd*[36] Windeyer J described such an appeal as one where the appellate court considered for itself the issues determined by the trial judge on the effect of the evidence but applied the law as it was when the appeal was heard not as it was when the trial was conducted.

36 The terms of s 6(3) of the Criminal Appeal Act indicate that the Court of Criminal Appeal is to look to the sentence that should have been passed having regard to what the law warranted. The better view is that the phrase "is warranted in law" which appears in s 6(3) assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal

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35 (2006) 164 A Crim R 208 at 223.

36 (1970) 124 CLR 192 at 208-209. See further as to the use of the term "by way of rehearing", *Fleming v The Queen* (1998) 197 CLR 250 at 259-260 [20]-[21].

against it. The provision in the Criminal Appeal Act with respect to the method and time for the making of appeals (s 10) establishes a system for the timely institution and prosecution of appeals. Section 6(3) is to be read in that context. Should delay occur between sentencing and the appeal determination it would be insufficient to found the necessary opinion spoken of in s 6(3) that there had been a change in the interval between sentence and appeal determination and that a different sentence should have been passed having regard to what the law had become by the time the appeal was determined. That distinction did not apply to the appeals dealt with in 1992, but it points to the answer to the temporal issue which does arise on the re-opening application.

37 The essential question is whether, in the 2006 decision, the Court of Criminal Appeal erred in declining to reopen the 1992 appeal where it could not be said that the reasons for judgment then given had proceeded upon any misapprehension of the relevant law as it stood. The appellants seek to use subsequent legislative changes to achieve a result that the appeals be allowed on legal grounds which did not exist when the unperfected orders were pronounced in 1992.

38 It is true that in some areas of litigation even final and perfected orders may, on further application, be suspended to allow for supervening legislative change. An example is the suspension of the further operation of a final injunction granted to restrain breach of a statutory prohibition which the legislature since has removed[37]. But that is far from the present case.

39 There are passages in the reasons of Spigelman CJ[38] and Howie J[39] in the 2006 decision where the refusal of leave to re-open appears to have been put on unusual grounds. The appellants particularly complain of the import of what was said. In expressing his conclusions for refusing both leave applications, and after referring to the enactment since 1992 of legislation "impinging" upon the

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37 *Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW)* (1978) 35 NSWLR 365.

38 (2006) 164 A Crim R 208 at 223-224.

39 (2006) 164 A Crim R 208 at 250.

sentences which had been imposed by Newman J upon the appellants[40], Spigelman CJ said[41]:

> "Each of the two bases upon which each Applicant seeks leave, invites this Court to remove the basis upon which the Parliament has enacted constitutionally valid legislation. The invitation to act in this way would, in my opinion, constitute a failure to respect the right and powers of the Parliament to legislate. This Court should be slow to exercise a judicial discretion which has such an effect and should refuse to exercise a judicial discretion, as it has in substance been invited to do, for that purpose."

40 The appellants correctly submit that it is emphatically the province of the judicial branch of government to apply the relevant law governing the case at hand. Here the basis for action was the scheme for appeals against sentence which was established by the Criminal Appeal Act in terms later construed in various judicial decisions. It would be no answer to what otherwise was a proper exercise of that statutory jurisdiction that the result would or might disfavour the policies which the legislature had sought to implement by other legislation. Matters could stand differently if that other legislation expressly or by implication amended or repealed the statutory basis for the jurisdiction of the Court of Criminal Appeal. But the New South Wales Solicitor-General, who appeared in this Court, disavowed any submission of that character.

41 However, leave to reopen was properly refused, consistently with the statement of general principle by Mason CJ in *Autodesk*[42]. What must always be unknown to a sentencing judge and the Court of Criminal Appeal are the paths that may be taken with respect to any status quo by future legislation. The subsequent legislation affecting the position of the appellants did not create any miscarriage of justice by the 1992 decision which called for interception in the perfection of the orders which had then been pronounced.

42 The circumstance that the lapse of time between 1992 and 2006 has seen much legislative activity affecting the service of the sentences imposed upon the

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40 (2006) 164 A Crim R 208 at 223.

41 (2006) 164 A Crim R 208 at 224.

42 (1993) 176 CLR 300 at 303.

appellants is striking and unusual. But the 1992 decision did not proceed upon any misapprehension of the relevant law.

Other submissions

43 Having granted leave to reopen the appeal in the 2006 decision, Kirby J considered a range of material, some of it available neither to the sentencing judge nor to the Court of Criminal Appeal in 1992. His Honour referred to various authorities in several Australian jurisdictions in which a range of opinion has been expressed respecting the admission on sentencing appeals of evidence of subsequent events. Given the outcome in this Court, it is unnecessary and inappropriate to enter upon that subject.

44 In written submissions the appellants raised several questions said to arise under or to involve the interpretation of the Constitution. However, as oral argument progressed counsel indicated those questions would only arise on a particular contingency. This was that this Court granted leave to reopen the first sentencing appeal or to institute a second sentencing appeal, and then if the life sentences were left in place on re-sentencing (whether by this Court or on remittal to the Court of Criminal Appeal) and the non-release recommendation was quashed, set aside or called into question. It follows from the outcome in this Court that the contingency has not been satisfied and constitutional questions do not arise.

Orders

45 Appeals dismissed.