HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ

JOSH CARROLL APPELLANT

AND

THE QUEEN RESPONDENT

Carroll v The Queen
[2009] HCA 13
21 April 2009
S30/2009

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 19 September 2008.*

3. *Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for rehearing by that Court.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with G A Bashir for the appellant (instructed by Legal Aid Commission of New South Wales)

D U Arnott SC with J A Girdham for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Carroll v The Queen

Criminal law – Sentencing – Prosecution appeal against sentence – Where sentence said to be "manifestly inadequate" – Where no specific error of principle or law alleged and case said to fall within last category of error identified in *House v The King* (1936) 55 CLR 499, namely sentence "unreasonable and plainly unjust" – Whether Court of Criminal Appeal erred in concluding sentence manifestly inadequate – Distinction between fresh consideration of how appellant's conduct to be characterised, and evaluation of adequacy of sentence by reference to matters of fact different from those found by primary judge.

Words and phrases – "manifestly inadequate".

Criminal Appeal Act 1912 (NSW), s 5D(1).

1 GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. The appellant pleaded guilty in the District Court of New South Wales to manslaughter. Outside a hotel where the appellant and friends had been drinking for eight to nine hours, the appellant head-butted Luigi Criniti, a man who had also been in the hotel. Mr Criniti fell backwards onto the road and hit the back of his head on the roadway, fracturing the back of his skull. Ten days later Mr Criniti died.

2 In the District Court, Judge Flannery sentenced the appellant to imprisonment for a term of three years, to be served by way of periodic detention. A non-parole period of 18 months was fixed.

3 The Director of Public Prosecutions appealed to the Court of Criminal Appeal against this sentence on the sole ground that the sentence was manifestly inadequate. The Court of Criminal Appeal (McClellan CJ at CL and Hislop J; Simpson J dissenting) held[1] that the appeal should be allowed and the sentence passed by the primary judge quashed. The Court of Criminal Appeal re-sentenced the appellant to a non-parole period to be served by way of full-time custody of 18 months to date from 2 May 2008 (the date upon which the primary judge had sentenced him) with a balance of term of 18 months to commence on 2 November 2009. The Court ordered that the appellant be released to parole on 1 November 2009.

4 By special leave, the appellant appeals to this Court. The determinative issue in this Court is whether the majority of the Court of Criminal Appeal erred in concluding that the sentence imposed by the primary judge was manifestly inadequate. The division of opinion in the Court of Criminal Appeal on that question hinged about differing assessments of the objective gravity of the offence. And, of course, the adequacy of the sentence passed on the appellant could not be determined without close attention to that issue.

5 These reasons will demonstrate that the majority of the Court of Criminal Appeal erred in proceeding on the footing first, that the appellant should not have been provoked by what the victim said, and second, that severe injury was a clearly foreseeable result of a head-butt delivered to another's face and that death was at least a possibility. Those two steps were the foundation for the majority's conclusion that the primary judge had been wrong to describe the offence as lying "towards the bottom of the range of objective seriousness for offences of manslaughter". Those two steps being erroneous, the appeal to this Court should

---

1 *R v Carroll* [2008] NSWCCA 218.

be allowed and the orders of the Court of Criminal Appeal set aside. The Director's appeal to that Court should be remitted for rehearing by the Court of Criminal Appeal.

The appeal to the Court of Criminal Appeal

6 Section 5D(1) of the *Criminal Appeal Act* 1912 (NSW) provides that:

> "The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper."

7 It has long been established[2] that "[i]nadequacy of sentence, an expression not found in the *Criminal Appeal Act* ... is not satisfied by a mere disagreement by the Court of Appeal with the sentence actually imposed"[3]. Rather, as pointed out in *Dinsdale v The Queen*[4], error must first be identified by the appellate court. And as was held in *House v The King*[5], an appeal against an exercise of discretion, in this case a sentencing discretion, is governed by established principles.

8 The particular principle which the Director sought to invoke in his appeal to the Court of Criminal Appeal against the sentence passed upon the present appellant was the last category of case identified in the well-known classification stated in *House v The King*[6]:

---

2 *Whittaker v The King* (1928) 41 CLR 230 at 248-249; [1928] HCA 28; *Griffiths v The Queen* (1977) 137 CLR 293 at 310; [1977] HCA 44; *Malvaso v The Queen* (1989) 168 CLR 227 at 234; [1989] HCA 58; *Everett v The Queen* (1994) 181 CLR 295 at 299-300, 306; [1994] HCA 49; *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54.

3 *Griffiths* (1977) 137 CLR 293 at 310.

4 (2000) 202 CLR 321 at 325-326 [6]-[9], 330 [24], 339-340 [57]-[61].

5 (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

6 (1936) 55 CLR 499 at 505.

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

The Director's allegation in his notice of appeal to the Court of Criminal Appeal, that the sentence passed was "manifestly inadequate", was an allegation of this kind of error. It was not an allegation that the primary judge had acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect her, had mistaken the facts or had not taken into account some material consideration. If a case of specific error of any of those kinds was to be made it would have been necessary to identify the asserted error in the grounds of appeal. But as indicated at the outset, no case of specific error was alleged; the sole ground of appeal was manifest inadequacy of sentence.

9 In support of that ground of appeal the Director submitted to the Court of Criminal Appeal that there were three reasons the sentence was manifestly inadequate. Those arguments were recorded[7] by McClellan CJ at CL as being:

(a) the primary judge "erred in finding that the youth of the [present appellant] and the need to foster his rehabilitation reduced the need for retribution and general deterrence";

(b) the primary judge "gave too much weight to the [present appellant's] subjective circumstances and failed to appreciate the objective seriousness of the offence"; and

(c) the primary judge "erred in finding that there were exceptional circumstances such that a sentence of periodic detention would reflect the objective seriousness of the offence and fulfil the manifold purposes of punishment".

Although the majority in the Court of Criminal Appeal directed chief attention to the second of these matters, and in particular the issue of objective seriousness of the offence, it is as well to point out that none of the three matters identified by

---

7 [2008] NSWCCA 218 at [6].

the Director was, or was advanced as being, an error of principle or fact such as would have enlivened any of the forms of error identified in *House v The King* other than the last category. Each of the three arguments advanced was put as no more than some explanation for what was alleged to be a sentence which, on its face, was "unreasonable or plainly unjust".

10 Because the assessment of the objective gravity of the offence was critical to the reasoning of McClellan CJ at CL it is necessary to say something further about the facts of the matter.

The facts

11 The facts relevant to sentence, as found by the primary judge, can be summarised as follows. The appellant, his brother and a friend went to a hotel at about 1.00 pm on Sunday, 20 May 2007. They had lunch, consumed alcohol and watched the football. While at the hotel they socialised with two women. At the same time the victim, then aged 51 years old, and a companion of about the same age, were playing the poker machines.

12 Shortly before the 10.00 pm closing time, one of the two women had a conversation with the victim and his companion in which the woman convinced the victim to collect the amount he had won on the poker machines. The victim gave the woman $50 to buy a round of drinks for her friends. She took the money, but the bar was closed, and she tried to return the money to the victim. He would not take it and suggested she try the bottle shop.

13 A short time later the appellant left the hotel with his brother, his friend and the two women. They walked, as a group, towards the appellant's home. At about the same time the victim left the hotel and called out to the woman to whom he had given the $50, asking her to give it back. There was an exchange of words between the men in the appellant's party and the victim indicating that the money would not be returned.

14 By then the victim was standing in or near the group and it was alleged that one of the men (not the appellant) pushed the victim, causing him to take one step back. The victim said, "I'll get a gun and shoot youse all". A bystander heard him say, "I'm going to kill your whole family". The appellant said to the victim, "You want to talk about guns" and head-butted him in the face. As recorded at the start of these reasons, the victim fell back, struck his head, and later died.

The appellant's personal circumstances

15 The appellant was 20 years old at the time of the offence. His subjective circumstances were powerful mitigating considerations. The primary judge described him in her sentencing remarks in the following terms:

> "He had successfully negotiated high school where in his final year he had been a prefect, and had received both the Principal's Award, and the Community Spirit Award. He had never been a problem to his parents and was, according to his mother, always helpful and good humoured. He was in his second year of a plumbing apprenticeship and was a highly valued employee. He was the captain of his rugby league team and was renowned for stepping in to calm situations on the field before they got out of hand. In his 17 year playing career he had never been sent to the sin bin or sent off. He had certainly never been in trouble with the criminal law.
>
> In the light of all the material before me about this young man what occurred on the night of 20 May 2007 is inexplicable. He is unable to explain it. What is clear is that the events of that night have touched him deeply and irrevocably. He is no longer the carefree young man he was. He lives each day conscious that he has taken a human life. He suspended his apprenticeship as he felt it was unfair to his employer to keep working as he was too distressed, anxious and depressed to do the job properly. He stopped playing football as he felt emotionally unable to face people.
>
> He has been diagnosed as suffering clinically significant levels of depression and anxiety. He is troubled by thoughts of worthlessness, hopelessness, and personal failure. He has almost entirely ceased using alcohol. And yet to keep himself busy he sought and obtained labouring work which requires less concentration than his apprenticeship, and he has sought to deal with his emotional distress by undergoing treatment with Professor Stephen Woods, clinical psychologist, as he feels that confronting his sense of [guilt] and remorse, though painful, would benefit him.
>
> I am satisfied that this young man genuinely understands the enormity of what he has done, and the suffering he has caused. I am also satisfied that he will live with what he has done for the rest of his life."

Objective seriousness – the primary judge's conclusions

16 The primary judge accepted that "this offence lies towards the bottom of the range of objective seriousness for offences of manslaughter". This conclusion proceeded from an acceptance of the argument urged on behalf of the appellant that the offence was to be classified in this way "as there was some provocation from the victim, there was only one blow, which was spontaneous, and there was no weapon involved". The primary judge recorded that the prosecution had conceded "that there was some provocation but [submitted] that it was certainly not sufficient to warrant a head butting".

Objective seriousness – the Court of Criminal Appeal

17 McClellan CJ at CL, speaking for the majority of the Court of Criminal Appeal, concluded[8] that the offence was serious and could not justify the description of falling towards the bottom of the range of objective seriousness. That conclusion was expressed against a characterisation of the facts that differed in important respects from that of the primary judge. In particular, McClellan CJ at CL described[9] the facts in the following terms:

> "Although her Honour found that the deceased made a threat to get a gun, this was an idle boast which could not have justified a violent response from the respondent. Mr Criniti was apparently intoxicated and there was no suggestion that the [present appellant] was under any immediate threat. Perhaps a dismissive word in response to Mr Criniti was justified but not a violent and aggressive act with, on any view, potentially serious physical consequences. Although a head butt delivered to another's face may not be expected to lead to death, severe injury was clearly foreseeable and death at least a possibility."

18 Two features of that description are to be noted. First, while it is undeniably true that nothing the victim had said or done "justified a violent response" the appellant had never suggested that what he had done was justified. The primary judge had not held to the contrary. Rather, the primary judge had taken account of the fact that the appellant had reacted (wrongly and violently,

---

8 [2008] NSWCCA 218 at [19].

9 [2008] NSWCCA 218 at [18].

but spontaneously) to what she had described as "some provocation" from the victim.

19 In recording the arguments advanced to the Court of Criminal Appeal on behalf of the present appellant, McClellan CJ at CL noted[10] that emphasis was given to the prosecution's concession at first instance that the appellant had "acted in response to the deceased's provocative act in threatening to get a gun and kill the 'whole family'". But although the prosecution's concession about *why* the appellant had acted as he had was thus noted, describing[11] the deceased's words as "an idle boast" which perhaps justified "a dismissive word in response" focused attention upon the objective characterisation of the events to the exclusion of the primary judge's finding about what had led the appellant to act as he had. The objective characterisation of the events was never in issue; the subjective reason the appellant reacted to those events as he did was not irrelevant.

20 The second point to notice about the Chief Judge's characterisation of the matter is his encapsulation of why, in the circumstances of this case, the offence of manslaughter was established. He said[12] that although a head-butt delivered to another's face may not be expected to lead to death "severe injury was clearly foreseeable and death at least a possibility".

21 By his plea of guilty the appellant acknowledged that his head-butting the victim was an unlawful and dangerous act that carried with it an appreciable risk of serious injury[13]. He did not admit (and the trial judge did not find) that "*severe* injury was clearly foreseeable" or that "death [was] at least a possibility".

22 Whether what was established by the plea, and by the material led at the sentencing hearing, was sufficiently described in the words of Simpson J[14] as "an act of violence that foreseeably, potentially could have led to injury to the victim" need not be examined. It is enough to notice that by his plea the

---

10 [2008] NSWCCA 218 at [17].

11 [2008] NSWCCA 218 at [18].

12 [2008] NSWCCA 218 at [18].

13 *Wilson v The Queen* (1992) 174 CLR 313 at 333; [1992] HCA 31.

14 [2008] NSWCCA 218 at [39].

appellant admitted that his act carried with it an appreciable risk of serious injury but that he did not admit the larger proposition upon which the majority in the Court of Criminal Appeal acted.

23 Whether, as Simpson J held[15], the appellant "could not have been expected to foresee that [the victim] would fall to the ground and strike his head in such a way as to cause serious injury; far less could he have been expected to foresee death" is a matter that is better examined upon a rehearing of the Director's appeal. So too, it will be for the parties on a rehearing to debate the sufficiency and accuracy of the characterisation of the appellant's conduct adopted by Simpson J when she described[16] it as "an alcohol-fuelled, foolish, possibly thuggish, spontaneous (and immature, even childish) act" in which the appellant "behaved impetuously, plainly without thinking, in the face of a threat" from the victim.

Conclusion and orders

24 In deciding whether the sentence passed by the primary judge was manifestly inadequate it was open to the Court of Criminal Appeal to consider how the appellant's offending was properly to be characterised. In particular, it was open to the Court of Criminal Appeal to form a view different from the primary judge about where, on an objective scale of offending, the appellant's conduct stood. But in the absence of any challenge to the primary judge's findings of fact, it was not open to the Court of Criminal Appeal to evaluate the adequacy of the sentence by discarding reference to why the appellant had acted as he had, or by attributing to him the ability to foresee that his conduct could cause not just serious injury, but severe injury or the possibility of death. Both these steps being erroneous, the majority of the Court of Criminal Appeal erred in reasoning to the conclusion that the sentence passed was manifestly inadequate. The appeal to this Court must then be allowed.

25 This Court should not decide the Director's appeal. That task is better undertaken in this case by the Court of Criminal Appeal.

---

15 [2008] NSWCCA 218 at [39].

16 [2008] NSWCCA 218 at [39].

26 The appeal to this Court should be allowed, the orders of the Court of Criminal Appeal made on 19 September 2008 set aside, and the matter remitted to the Court of Criminal Appeal for rehearing by that Court.