HIGH COURT OF AUSTRALIA

GAGELER J

EDWARD MOSES OBEID APPLICANT

AND

THE QUEEN RESPONDENT

Obeid v The Queen
[2016] HCA 9
Date of Order: 19 January 2016
Date of Publication of Reasons: 4 April 2016
S265/2015

ORDER

The applicant's summons filed on 17 December 2015 be dismissed.

Representation

G O'L Reynolds SC with D P Hume for the applicant (instructed by Breene and Breene Solicitors)

W J Abraham QC with S F Beckett for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Obeid v The Queen

Practice and procedure – High Court of Australia – Appeal – Stay of proceeding – Application to stay criminal proceeding in Supreme Court of New South Wales pending determination of application for special leave to appeal – Applicant made interlocutory application before empanelment of jury in proceeding on indictment in Supreme Court to quash indictment or permanently stay proceeding – Application refused by single judge – Appeal dismissed by Court of Criminal Appeal – Application made for special leave to appeal – Whether criminal proceeding should be stayed pending determination of special leave application.

High Court Rules 2004 (Cth), r 8.07.

1 GAGELER J. This is a revised version of the reasons for decision delivered orally in open court on 19 January 2016 at the conclusion of a hearing on that day of an application for a stay of criminal proceedings pending the determination of an application for special leave to appeal. There being no urgency about the publication of the reasons in written form, their publication has been delayed until the expiration of a non-publication order has made redaction unnecessary. My reasons for making that non-publication order are to be published separately.

2 The applicant for special leave to appeal pleaded not guilty in the Supreme Court of New South Wales to the common law offence of wilfully misconducting himself in public office. The charge, as it came to be formulated in an amended indictment, related to representations the applicant was alleged to have made to a senior employee of the Maritime Authority of New South Wales between 1 August 2007 and 30 November 2007 when the applicant was a Member of the Legislative Council of New South Wales. The trial, originally fixed to commence in October 2015, was adjourned. In October 2015, it was re-fixed to commence on 10 February 2016.

3 On 22 September 2015, Beech-Jones J overruled a demurrer to the amended indictment and otherwise dismissed a notice of motion by which the applicant sought either to quash the indictment or permanently to stay the proceedings[1]. Relevant to the special leave application, his Honour considered and rejected two contentions. The first was that the Supreme Court of New South Wales lacked jurisdiction to entertain the charge against the applicant because the subject matter of the charge was within the exclusive cognisance of the Legislative Council. The second was that a Member of the Legislative Council did not hold a public office for the purpose of the common law offence of wilful misconduct in public office.

4 On 8 December 2015, the Court of Criminal Appeal, which comprised Bathurst CJ, Beazley P and Leeming JA, granted leave to appeal from the orders of Beech-Jones J, but dismissed the appeal[2]. In joint reasons for judgment, their Honours examined and resolved the same two contentions unfavourably to the applicant.

5 On 15 December 2015, the applicant filed an application for special leave to appeal to this Court from the orders of the Court of Criminal Appeal. The two grounds identified in the application for special leave to appeal reflected the two contentions I have referred to as having been considered and rejected by Beech-Jones J and the Court of Criminal Appeal.

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1 *R v Obeid (No 2)* [2015] NSWSC 1380.

2 *Obeid v The Queen* [2015] NSWCCA 309.

6 The applicant filed his summary of argument and draft notice of appeal on 12 January 2016. He did not seek expedition of the application for special leave to appeal. He indicated orally through his counsel in submissions before me on 19 January 2016 that he would seek expedition in the event that a stay was granted. Absent expedition, the application for special leave to appeal was extremely unlikely to be determined in advance of the date which had been fixed for the commencement of the trial. That was, and had always been, obvious.

7 On 14 December 2015, just before the filing of the application for special leave to appeal, Beech-Jones J granted the applicant leave to file in court a notice of motion in which the applicant sought from the Supreme Court an order that his trial be stayed pending the hearing of his special leave application. Beech-Jones J went on to hear and dismiss that motion on 17 December 2015[3].

8 In the detailed reasons for judgment which his Honour then gave for refusing the stay of the trial, Beech-Jones J concluded that the grant of a stay was not necessary to prevent the applicant's rights of appeal being rendered futile in circumstances where the applicant would retain the ability to agitate the contentions on which he seeks to rely in a further application for special leave to appeal, in the event that he is convicted at trial and that any subsequent appeal to the Court of Criminal Appeal is unsuccessful. His Honour went on to assess the prospects of special leave to appeal being granted, prospects which he concluded were "very low"[4]. Turning to the balance of convenience, his Honour noted that the state of the Supreme Court's lists meant that the granting of a stay would be likely to result in a delay to the start of the trial until at least July 2016, almost nine years after the events to which the charge relates. His Honour assessed the prejudice that would arise from a delay to the trial as outweighing the potential for the applicant to suffer reputational damage from the trial going ahead.

9 The application which came before me on 19 January 2016 was made by summons filed in the special leave proceeding on the same day on which Beech-Jones J heard and dismissed the equivalent application before him. The applicant acted appropriately in seeking a stay from the Supreme Court before seeking a stay from this Court. The application before me was neither in form nor in substance an appeal from the decision of Beech-Jones J, but my consideration of the relevant issues could be, and to an extent was, assisted by his Honour's analysis.

10 The applicant argued before me, in written and oral submissions, that he had a right not to be exposed to criminal proceedings which have no substance. Terminology of that kind can be apposite in some contexts, but it does not

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3 *R v Obeid (No 5)* [2015] NSWSC 1967.

4 *R v Obeid (No 5)* [2015] NSWSC 1967 at [34], [39], [41].

accurately reflect the nature and the scope of the power which the applicant sought to have exercised in his favour in this Court. Insofar as they inform the exercise of the power to stay proceedings in a court from an interlocutory judgment of which an application for special leave to appeal is pending, an applicant's rights are relevantly to apply for special leave to appeal, and to appeal in the event that special leave is granted.

11 The applicant placed great weight on the statement of Gaudron J in *Polyukhovich v The Commonwealth*[5] to the effect that "it would be a most extraordinary case if the prosecution were to proceed to conviction and punishment whilst the question of validity" – here the applicant inserts "of the charge" – "remained unresolved". In circumstances in which the relevant question of validity has been considered and determined at first instance and again on appeal and is the subject of an application for special leave to appeal, it cannot be said, as it was able to be said by her Honour in that case, that the question is one which remains unresolved.

12 This Court's power to order a stay of proceedings pending its determination of an application for special leave to appeal is an aspect of its inherent or incidental power to preserve the subject matter of the application. The purpose is not to enable the parties, or either of them, merely to maintain the status quo pending the justiciable controversy between them being brought to practical finality by a decision of this Court whether or not to give further consideration to that controversy. The purpose is, rather, to safeguard against the exercise of this Court's appellate jurisdiction being rendered in some degree inutile or a source of adverse collateral consequences in the event of special leave to appeal being granted. The nature and scope of that inherent or incidental power is relevantly reflected in the High Court Rules 2004 (Cth) in the prescription in r 8.07.1 that "[t]he Court or a Justice of its own motion or on application may at any time make such order as is necessary to effectuate the grant of ... appellate jurisdiction in the Court", and in the further and more specific subsidiary prescription in r 8.07.2(a) that, where any proceeding is pending in its appellate jurisdiction, "the Court or a Justice on the application of a party may make such orders as are appropriate ... staying proceedings, whether in the Court or elsewhere, in whole or in part".

13 The limited purpose of a stay and the limited rights protected by the grant of a stay were stressed in *Beljajev v Director of Public Prosecutions*[6], where, in the course of refusing an application for a stay of an order that the applicant be committed to prison to await his trial, Brennan J referred to:

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5 (1990) 64 ALJR 589 at 591; 95 ALR 502 at 506; [1990] HCA 40.

6 (1991) 173 CLR 28 at 31; [1991] HCA 16.

> "the necessity to identify the subject matter of the litigation in order to determine whether a refusal of a stay order will render futile the proceedings in this Court and will prevent a successful appellant from being restored substantially to his former position".

His Honour continued:

> "It is imperative that the jurisdiction to grant a stay be recognized as extraordinary and that applications seeking to invoke that jurisdiction are not made simply in order to secure the intervention of this Court in the preservation of a status quo."

His Honour concluded in that case that the applicant's right to seek special leave to appeal and, if granted, to appeal, would not be rendered futile in the absence of a stay being granted. His Honour found that it was not necessary to "consider the strength of the application for special leave" to appeal in the circumstances of that case[7].

14 Since *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]*[8], judicial exposition of the conditions under which a stay will be granted in the context of an application for special leave to appeal has uniformly emphasised the need for the existence of "exceptional circumstances". The standard exposition has gone on to emphasise the relevance, even where the Court or a Justice is satisfied that a stay is required to preserve the subject matter of litigation, of consideration of whether there is a substantial prospect that special leave to appeal will be granted, of whether the grant of a stay would occasion prejudice to a respondent, and of where the balance of convenience might lie in the circumstances of the case. Those factors, however, do not always arise for consideration and collectively they do not exhaust the considerations that may be relevant in every case.

15 There is a longstanding and general reluctance on the part of this Court in point of policy to make orders which would have the effect of fragmenting a criminal process which has already been set in train. The generality of that reluctance is sufficiently illustrated by the decision and reasoning of the Full Court in the course of refusing special leave to appeal from interlocutory decisions in criminal proceedings in *Yates v Wilson*[9] and in *R v Elliott*[10], and by

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7 (1991) 173 CLR 28 at 32.

8 (1986) 161 CLR 681 at 684; [1986] HCA 84.

9 (1989) 168 CLR 338 at 339; [1989] HCA 68.

10 (1996) 185 CLR 250 at 257; [1996] HCA 21.

the much more recent decision of French CJ in *Alqudsi v The Commonwealth*[11], which concerned applications for both removal to, and remitter from, this Court in circumstances where an accused in pending criminal proceedings sought to challenge the validity of legislation creating the offence with which the accused was charged.

16 The reasons given by Kirby J in *Frugtniet v Victoria*[12] for refusing to stay a criminal proceeding against an accused pending the determination of a proceeding in this Court's original jurisdiction are particularly instructive in the present context. The proceeding in the original jurisdiction of this Court in that case concerned a challenge to the constitutional validity of legislation which bore on the trial process in a manner which was argued to infringe Ch III of the Constitution. His Honour said[13]:

> "This Court has more than once ... emphasised how rare it is to make orders which would have the effect of interfering in the conduct of a criminal trial. No case has been brought to my notice where the Court has made a stay order equivalent to the one sought on this summons. Although I do not doubt that, in a proper case, the Court would have the jurisdiction to make such an order to protect the utility of its process, it would be truly exceptional for it to do so. The Court expressed its attitude of restraint most recently in its decision in *R v Elliott*. There are many earlier such cases. They evidence the strong disposition of appellate courts in Australia – and especially of this Court – not to interfere in the conduct of criminal trials except in the clearest of cases where the need for such interference is absolutely plain and manifestly required. Analogous principles apply ... to the provision of a stay to prevent the commencement of a trial so as to permit a constitutional point to be argued. That point will not be lost to the plaintiff. If need be, at a later stage, it can be raised again."

17 How then is it argued in the present case that this Court's appellate jurisdiction would become inutile or a source of adverse consequences in the absence of the stay which the applicant seeks and what is it about the present case which is said to make its circumstances exceptional or extraordinary?

18 The applicant points, in somewhat general terms, to reputational, financial and emotional consequences to which he will be exposed if the trial is to go ahead. He does not, however, seek to link those consequences to his ability to

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11 (2015) 90 ALJR 192; 327 ALR 1; [2015] HCA 49.

12 (1997) 71 ALJR 1598; 148 ALR 320; [1997] HCA 44.

13 (1997) 71 ALJR 1598 at 1602; 148 ALR 320 at 326-327 (footnotes omitted).

conduct proceedings in this Court, or to the utility of any order which this Court might ultimately make in the subsequent appeal were special leave to be granted. Nor does he demonstrate that those consequences are themselves of such a nature or degree as to distinguish his circumstances significantly from those of any other criminal defendant who faces trial having been unsuccessful in an attempt to quash the indictment or permanently to stay the prosecution.

19 The applicant then focuses on the nature of the contentions which he seeks to raise on the application for special leave to appeal. He emphasises that his first contention goes to the jurisdiction of the Supreme Court and that his second contention goes to the validity of the charge. To allow the prosecution to proceed if he is right about the subject matter of the charge being in the exclusive cognisance of the Legislative Council, he argues, would be to permit conduct to occur which would amount to a contempt of Parliament. Moreover, he argues, it would expose him to the jeopardy of being subjected to a trial in the Legislative Council in circumstances in which his defence will already have been revealed in the course of the improperly constituted criminal proceeding.

20 It is again difficult to see how the circumstances that the special leave contentions go to jurisdiction and to the validity of the charge bear, in the context of this case, on the utility or consequences of the exercise of the appellate jurisdiction of this Court, or justify characterisation of the circumstances of the case as exceptional or extraordinary in the relevant sense.

21 The applicant is at first sight on stronger ground in relation to his point about contempt of Parliament. What is important to be borne in mind, however, is that the relief which the applicant would ultimately seek from this Court as a result of his jurisdictional contention being upheld is limited to orders which would result in the vindication of his private interest. The possibility of the applicant in fact being dealt with by the Legislative Council, were his jurisdictional contention ultimately to be upheld by this Court, is nothing more than theoretical. Indeed, the possibility was not mentioned before Beech-Jones J or in written submissions in this Court and was raised for the first time in oral argument before me.

22 Given that the applicant would retain the ability to agitate both contentions in a further application for special leave to appeal if he were convicted at trial and unsuccessful in any subsequent appeal against conviction in the Court of Criminal Appeal, neither contention was, in my opinion, sufficient to justify fragmentation of the trial process which was set in motion. The order which the applicant sought would have had that effect.

23 In the result, I considered it unnecessary for me to reach any conclusion as to the merits of the special leave contentions, beyond the conclusion that neither could be characterised, in the terms used by Kirby J in *Frugtniet*, as so obviously

compelling as to make interference with the trial process absolutely plain or manifestly required.

24 The order which I therefore made on 19 January 2016 was that the applicant's summons be dismissed.