HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

KMC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS (SA) RESPONDENT

KMC v Director of Public Prosecutions (SA)
[2020] HCA 6
Date of Hearing: 6 February 2020
Date of Order: 6 February 2020
Date of Publication of Reasons: 18 March 2020
A20/2019

ORDER

1. *Extension of time for permission to appeal against sentence and permission to appeal be granted.*

2. *Appeal allowed.*

3. *The sentence imposed by the sentencing judge on 17 August 2017 be set aside.*

4. *The matter be remitted to the sentencing judge for re-sentencing according to law.*

Representation

S A McDonald with B J Doyle for the applicant (instructed by Legal Services Commission of South Australia)

C D Bleby SC, Solicitor-General for the State of South Australia, with M E Boisseau and F J McDonald for the respondent and for the Attorney-General for the State of South Australia, intervening (instructed by Office of the Director of Public Prosecutions (SA) and Crown Solicitor for the State of South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales, with J S Caldwell for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with J L Rudolf for the Attorney-General for the State of Tasmania, intervening (instructed by Office of the Solicitor-General for the State of Tasmania)

K L Walker QC, Solicitor-General for the State of Victoria, with K A O'Gorman for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

CATCHWORDS

KMC v Director of Public Prosecutions (SA)

Criminal law – Sentence – Offence of persistent sexual exploitation of child – Where applicant convicted of persistent sexual exploitation of child contrary to s 50(1) of *Criminal Law Consolidation Act 1935* (SA) ("CLCA") – Where *Chiro v The Queen* (2017) 260 CLR 425 handed down after sentencing – Where *Chiro* required sentencing judge to ask jury to identify underlying acts of sexual exploitation found proved or otherwise sentence on basis most favourable to offender – Where not known which alleged acts of sexual exploitation jury found had been proved beyond reasonable doubt – Where applicant not sentenced on basis of facts most favourable to applicant – Where s 9 of *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ("Amending Act") provided that sentence imposed for offence against s 50 of CLCA not affected by error or otherwise manifestly excessive merely because, relevantly, sentencing court sentenced person having regard to acts of sexual exploitation it determined proved beyond reasonable doubt – Whether s 9(1) of Amending Act engaged – Whether sentencing remarks identified acts of sexual exploitation determined by sentencing court to have been proved beyond reasonable doubt.

Words and phrases – "acts of sexual exploitation", "extension of time", "facts most favourable", "persistent sexual exploitation of a child", "proved beyond a reasonable doubt", "sentence", "sentencing judge", "sentencing remarks", "underlying acts".

Criminal Law Consolidation Act 1935 (SA), s 50.
Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017 (SA), s 9.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. The applicant was charged in the District Court of South Australia with one count of persistent sexual exploitation of a child against s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA"), as then in force. The "Particulars of Offence" alleged that over a period of not less than three days, between 1 March 2013 and 6 February 2016, the applicant committed more than one act of sexual exploitation of the victim, a person under the age of 17 years, by (a) performing an act of cunnilingus upon her; (b) causing her to perform an act of fellatio upon him; (c) inserting his penis into her anus; and (d) urinating on her.

2 After a trial before a judge and jury, the jury returned a unanimous verdict of guilty. The jury was discharged without being asked any questions as to the basis of its verdict. In August 2017, the applicant was sentenced to imprisonment for ten years and three days, with a non-parole period of five years, with the sentence back-dated to 19 July 2017.

3 The issue in this Court is whether the applicant was sentenced according to law. The respondent, the Director of Public Prosecutions (SA), seeks to uphold the validity of the sentence on the basis that it was consistent with s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ("the Amending Act"), an Act passed after the applicant was sentenced. For the reasons given below, s 9(1) was not engaged and the applicant was not sentenced according to law.

Section 50 of the CLCA

4 At the time the applicant was tried and sentenced, s 50(1) and (2) said:

> "(1) An adult person who, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age is guilty of an offence.
>
> Maximum penalty: Imprisonment for life.
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> (2) For the purposes of this section, a person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could, if it were able to be properly particularised, be the subject of a charge of a sexual offence."

5 Section 50(4) of the CLCA altered the ordinary requirements for particularity in a charge for a criminal offence. In *Chiro v The Queen*,

which concerned sentencing for an offence committed against s 50 of the CLCA, Bell J explained the operation of s 50(4) in these terms[1]:

> "The actus reus of the offence is the commission of more than one act of sexual exploitation of the same child over a period of not less than three days. An act only qualifies as an act of sexual exploitation if it is an act that, were it able to be properly particularised, could be the subject of a charge of a sexual offence. The inability to properly particularise is addressed in s 50(4)(b), which provides that the Information need not be pleaded with the degree of particularity that would be required if the act were charged as an offence under another section of the CLCA. It suffices if the prosecution avers with sufficient particularity the period during which the acts of sexual exploitation are alleged to have occurred and the conduct on which the prosecution relies as comprising the acts of sexual exploitation [s 50(4)(a)]. The latter requirement does not necessitate the identification of particular acts of sexual exploitation or the occasions on which, or places at which, or the order in which, acts of sexual exploitation occurred [s 50(4)(b)(ii)]."

6 It was not disputed in *Chiro* that the s 50 offence was "comprised of discrete underlying offences", rather than a "course of conduct" per se[2]. The plurality (Kiefel CJ, Keane and Nettle JJ) held that each of the underlying acts of sexual exploitation comprises an element of the actus reus of the offence and it was for the jury to find the acts which constitute the actus reus, not the sentencing judge[3]. The plurality further held that this necessitated a jury direction requiring extended unanimity – that is, agreement by the jury "that the Crown [had] proved beyond reasonable doubt that the accused committed the same two or more underlying acts of sexual exploitation separated by not less than three days"[4]. Thus, the plurality stated that "the judge should request that the jury identify the underlying acts of sexual exploitation that were found to be proved unless it is otherwise apparent to

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1 (2017) 260 CLR 425 at 452 [56] (footnotes omitted).

2 (2017) 260 CLR 425 at 437-438 [22]-[23].

3 *Chiro* (2017) 260 CLR 425 at 447 [42].

4 *Chiro* (2017) 260 CLR 425 at 435-436 [19].

the judge which acts of sexual exploitation the jury found to be proved"[5]. Where a jury is not questioned as to the basis of its verdict, the plurality held, "the offender will have to be sentenced on the basis most favourable to the offender"[6]. If this is not done, it is possible that the court would breach the principle that "an accused is not to be sentenced for an offence which the jury did not find the accused to have committed"[7].

7 Bell J, also in the majority, wrote separately. Her Honour said that "it is the role of the judge to determine the facts relevant to sentencing, subject to the constraint that the determination must be consistent with the [jury's] verdict"[8]. Where the offence is one against s 50, "[t]o sentence the appellant on the basis that he committed all of the particularised acts upon which issue was joined is to deprive the requirement of consistency with the verdict of practical content"[9].

8 In *Chiro*, the sentencing judge did not ask the jury what acts it had found to have been committed[10]. Rather, the judge sentenced Chiro on the basis of those facts which the judge herself was satisfied had been committed[11] and made findings that she was satisfied that Chiro had committed each of the acts alleged

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5 *Chiro* (2017) 260 CLR 425 at 430 [1].

6 *Chiro* (2017) 260 CLR 425 at 451 [52].

7 *Chiro* (2017) 260 CLR 425 at 448 [44], citing *R v De Simoni* (1981) 147 CLR 383 at 389, 395-396, 406.

8 *Chiro* (2017) 260 CLR 425 at 456 [70].

9 *Chiro* (2017) 260 CLR 425 at 457 [71].

10 (2017) 260 CLR 425 at 451 [53].

11 *Chiro* (2017) 260 CLR 425 at 433 [14].

in the Information[12]. The sentence was therefore found to be infected by error and manifestly excessive[13].

Amending Act

9 After the applicant was sentenced, and the decision in *Chiro* had been handed down by this Court, the South Australian Parliament passed the Amending Act. It commenced operation on 24 October 2017[14]. The object of Pt 4 of the Amending Act was to overcome the effect of *Chiro*[15]. Section 9(1) of the Act says:

> "A sentence imposed on a person, before the commencement of this section, in respect of an offence against section 50 of the [CLCA] ... is taken to be, and always to have been, not affected by error or otherwise manifestly excessive merely because –
>
> (a) the trial judge did not ask any question of the trier of fact directed to ascertaining which acts of sexual exploitation, or which particulars of the offence as alleged, the trier of fact found to have been proved beyond a reasonable doubt and the person was not sentenced on the view of the facts most favourable to the person; and
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> (b) the sentencing court sentenced the person consistently with the verdict of the trier of fact but having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt."

10 Section 9(1) applies where four events occurred in sentencing: (i) the trial judge did not ask any questions of the trier of fact directed to ascertaining which

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12 *Chiro* (2017) 260 CLR 425 at 434 [15].

13 *Chiro* (2017) 260 CLR 425 at 452 [53].

14 See *Acts Interpretation Act 1915* (SA), s 7(1).

15 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 19 October 2017 at 8021-8023. See also South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 19 October 2017 at 11650.

acts of sexual exploitation (or particulars of the offence as alleged) it found had been proved beyond reasonable doubt; (ii) the offender was not sentenced on the view of the facts most favourable to the offender; (iii) the sentencing court sentenced the person consistently with the verdict of the trier of fact; and (iv) the offender was sentenced "having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt".

11 As is apparent, s 9(1) of the Amending Act was drafted on the basis that all judges who had passed a sentence for an offence against s 50 of the CLCA had done so in the same manner as the sentencing judge in *Chiro*[16]. The sentencing judge in this matter did not do so.

Removal to the High Court and disposition

12 In 2019, the applicant applied for an extension of time, and permission, to appeal against his sentence to the Full Court of the Supreme Court of South Australia on the grounds that the sentence and the non-parole period were manifestly excessive and that, contrary to *Chiro*, the sentencing judge had not sentenced the applicant on the basis most favourable to him consistent with the verdict of the jury.

13 The respondent sought to uphold the sentence on the basis that it was valid by reason of s 9(1) of the Amending Act. The applicant contended that the Amending Act did not apply to him and that, if it did apply, the Amending Act was constitutionally invalid because s 9(1): (i) constituted an impermissible legislative direction to the Supreme Court of South Australia as to the exercise of its jurisdiction; (ii) impermissibly removed the jurisdiction of a Supreme Court to review a sentencing decision for jurisdictional error, contrary to *Kirk v Industrial Court (NSW)*[17]; and (iii) impaired the institutional integrity of the Supreme Court of South Australia, contrary to *Kable v Director of Public Prosecutions (NSW)*[18].

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16 See [8] above.

17 (2010) 239 CLR 531.

18 (1996) 189 CLR 51.

14 On the application of the Attorney-General for the State of South Australia, the whole of the cause was removed into this Court pursuant to s 40(1) of the *Judiciary Act 1903* (Cth). The Attorneys-General for the State of New South Wales, the State of Victoria, the State of Queensland and the State of Tasmania also intervened.

15 Prior to the hearing before the Full Court, the parties were informed that the Court would be assisted by submissions as to whether the sentencing judge did make a finding as to which of the alleged underlying acts of sexual exploitation by the applicant were proved beyond reasonable doubt within the meaning of s 9(1)(b) of the Amending Act. If the sentencing judge had not made the necessary findings within the meaning of s 9(1)(b), the Amending Act would not apply to the applicant and the constitutional questions raised by the applicant would not arise[19].

16 After hearing from the parties on whether s 9(1)(b) applied to the applicant, the Court announced that it was unanimously of the view that the applicant should be granted an extension of time for permission to appeal against sentence and permission to appeal, the appeal should be allowed, the sentence imposed by the sentencing judge on 17 August 2017 be set aside and the matter be remitted to the sentencing judge for re-sentencing according to law. These are our reasons for making those orders.

Section 9(1) not engaged

17 In determining whether s 9(1) is engaged in this case and, in particular, in determining whether the sentencing judge made a finding as to which of the alleged underlying acts of sexual exploitation by the applicant were proved beyond reasonable doubt, it is necessary to say something further about the trial, the trial judge's directions to the jury and his Honour's sentencing remarks.

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19 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; *Knight v Victoria* (2017) 261 CLR 306 at 324 [32]; *Clubb v Edwards* (2019) 93 ALJR 448 at 479-480 [135]-[138], 519 [326]-[330]; 366 ALR 1 at 33-34, 87 and the authorities there cited.

The applicant's trial and the trial judge's directions

18 The particulars of the offence, as set out earlier[20], were that over a period of not less than three days, between 1 March 2013 and 6 February 2016, the applicant committed more than one act of sexual exploitation of the victim, a person under the age of 17 years, by (a) performing an act of cunnilingus upon her; (b) causing her to perform an act of fellatio upon him; (c) inserting his penis into her anus; and (d) urinating on her.

19 In his summing up, the trial judge said that it was necessary for the jury to find that the applicant had committed at least two acts of sexual exploitation, whether of the same type or different types, over a period of not less than three days. Thus, the trial judge said that it was not necessary for the jury to find that the applicant had committed *all* of the acts alleged in the Information in order to find him guilty of the offence. Consistent with authority[21], the trial judge further directed the jury that extended unanimity was required: it was necessary for the jury members to agree on the occasions and types of sexual offences which constituted the acts which the jury found to be proved. As stated earlier, the jury returned a unanimous verdict of guilty and was discharged without being asked any questions as to the basis of its verdict.

Sentencing remarks

20 The sentencing remarks are short. At the outset, the sentencing judge records that the offending occurred from when the victim was six years of age until she was approaching nine years of age and that, over that time, the applicant "subjected [the victim] to a range of sexual acts on a frequent basis". The sentencing judge said that:

> "There were three distinct occasions of sexual offending by you that she recalled. I will briefly mention these three occasions. She also gave evidence of other abuse that she said occurred frequently."

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20 See [1] above.

21 *KBT v The Queen* (1997) 191 CLR 417 at 422, 431, 433; *R v Little* (2015) 123 SASR 414 at 417 [11], 420 [19].

The three occasions are then specified.

21 The sentencing judge considered both the victim impact statements and the "personal circumstances" of the applicant. It is in the latter context that the sentencing judge said that the applicant "regularly cared" for the children of his partner (including the victim) when his partner was absent and that "[i]t was during these absences that this offending took place". The "offending" is not specified. The sentencing judge referred to the limited prior criminal history of the applicant.

22 The sentencing remarks continued:

> "I turn to sentence.
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> ... Your offending is a serious example of this type of offending involving multiple acts of penile-anal penetration, cunnilingus and fellatio and urinating upon a child.
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> ...
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> In the circumstances, the only appropriate sentence is one of imprisonment ... [The victim] was a very young child when you began sexually abusing her ... This is serious offending considering the young age of the complainant, your position in the family and the duration of time over which the offending occurred."

The term of imprisonment was then set, along with a non-parole period[22].

Issues and submissions

23 There was no dispute that s 9(1)(a) was satisfied in this case. The trial judge did not ask any questions of the jury directed to ascertaining which acts of sexual exploitation (or particulars of the offence as alleged) it found had been proved beyond reasonable doubt and the applicant was not sentenced on the view of the facts most favourable to him. The issue was whether, within the meaning of s 9(1)(b), the applicant was sentenced "having regard to the acts of sexual

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22 See [2] above.

exploitation determined by the sentencing court to have been proved beyond a reasonable doubt".

24 The applicant submitted that s 9(1) of the Amending Act was not engaged because nowhere in the sentencing remarks were the necessary findings made by the sentencing judge. The applicant accepted that acts were identified by the sentencing judge, but submitted that recounting evidence did not constitute a finding as to that evidence. Next, the applicant accepted that the sentencing judge referred to the unanimous jury verdict, but submitted that his Honour did not identify what was proved by that verdict. Moreover, the applicant submitted that the sentencing judge did not say that he had to be satisfied of matters "beyond reasonable doubt"[23]. The lack of findings made "beyond reasonable doubt" was in contrast to the sentencing remarks at issue in *Chiro*[24].

25 There were two further aspects to the applicant's argument. First, the applicant submitted that the sentencing remarks did not refer to or address the applicant's arguments during the sentencing hearing concerning the unlikelihood of some of the offending having occurred. Second, it was submitted that during the course of that hearing, the sentencing judge had said that it was not his role to place himself in the position of the jury – the jury was the "trier[] of fact". These arguments were said to support the view that the sentencing judge did not see his role as requiring him to make findings of fact for himself.

26 Counsel for the respondent (who also appeared for the Attorney-General for the State of South Australia) submitted that s 9(1) was engaged and, in particular, for the purposes of s 9(1)(b), that the acts of sexual exploitation determined by the sentencing court to have been proved beyond reasonable doubt were those particularised in the Information. It was submitted that those acts could be expressed at the same level of generality as they appeared in the Information.

27 The respondent then addressed the passages in the sentencing remarks which referred, in general terms, to a range of sexual acts on a frequent basis and other abuse that the victim said in evidence occurred frequently. The respondent submitted that where, as here, the case depended entirely on the victim's evidence, the remarks should be read in the context of the trial as a whole and taken as a

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23 cf *R v Olbrich* (1999) 199 CLR 270 at 281 [27].

24 (2017) 260 CLR 425 at 434 [15].

summary of the judge's findings, with those findings extending to all incidents referred to in the victim's evidence.

28 Moreover, the respondent submitted that sentencing remarks are not reasons for judgment and are not to be read with a hyper-critical eye but on the presumption that the sentencing judge knows sentencing law[25]. The respondent also submitted, correctly, that there is no verbal formula for making findings or rejecting arguments[26].

Sentencing remarks and s 9(1)(b)

29 The question in this case is not whether the sentencing remarks are sufficient or acceptable in a general sense. The question is whether they are sufficient to engage s 9(1) of the Amending Act. They are not.

30 Although exchanges between counsel and judge can sometimes be relevant, in answering the question whether s 9(1) is engaged nothing useful in this case can be taken from the discussion between counsel and the sentencing judge prior to sentencing. Ultimately, what matters is what the sentencing judge said in the sentencing remarks. Contrary to s 9(1)(b) of the Amending Act, his Honour did not make findings as to what acts of sexual exploitation he found to have been proved beyond reasonable doubt.

31 The evidence recounted in the sentencing remarks included the conduct particularised in the Information but the sentencing remarks also referred to other conduct possibly not the subject of the Information. And when the sentencing remarks turn to address the sentence to be imposed, they refer to "multiple acts" of four different types of offending and, later, the duration of time over which the offending occurred. For s 9(1) to be engaged, the acts of sexual exploitation determined by the sentencing court to have been proved beyond reasonable doubt must be identified. The sentencing remarks in this case do not record the sentencing court having identified those acts and do not record the sentencing court having made findings that those acts of sexual exploitation had been proved beyond reasonable doubt. The sentencing remarks do not state whether the three specific occasions of sexual offending recalled by the victim were proved,

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25 *R v Reiner* (1974) 8 SASR 102 at 114-115.

26 cf *Douglass v The Queen* (2012) 86 ALJR 1086; 290 ALR 699.

or whether more or less was found to have been proved, and proved to the requisite standard.

32 The way in which a sentencing judge sentences a person "having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt" is not formulaic. As the plurality accepted in *Chiro*, the s 50 offence was "comprised of discrete underlying offences", rather than a "course of conduct" per se, with each of the underlying acts of sexual exploitation constituting an element of the actus reus of the s 50 offence[27]. Where, as here, the jury was discharged without being asked any questions as to the basis of its verdict, s 9(1)(b) is engaged if the sentencing judge makes findings as to what acts of sexual exploitation had been proved[28]. Given the nature of the offence and the generality of the Information, there may be cases where the evidence of the acts of sexual exploitation – the underlying acts constituting an element of the actus reus – may be found by the sentencing judge to be proved not on a specific date or dates but over a specified period of time, perhaps occurring with a particular regularity.

33 And absent legislative provisions to the contrary, where a sentencing judge takes facts into account in a way that is adverse to the interests of the accused, the facts found to be proved by the sentencing judge must be established beyond reasonable doubt[29]. For the benefit of all involved, the sentencing remarks would, out of an abundance of caution, ordinarily record that this was the approach adopted.

Conclusion

34 The applicant was not sentenced on the basis of the facts most favourable to him. His sentencing was therefore contrary to what the law (as stated by *Chiro*) required. Section 9(1) of the Amending Act was not engaged. Questions of the constitutional validity of that provision do not arise.

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27 (2017) 260 CLR 425 at 437-438 [22]-[23], 445 [37].

28 cf *Chiro* (2017) 260 CLR 425 at 447 [42].

29 *Olbrich* (1999) 199 CLR 270 at 281 [27]; *Filippou v The Queen* (2015) 256 CLR 47 at 69 [64].