[2021] HCATrans 219

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Canberra

No C8 of 2021

B e t w e e n -

DAVID ALLEN WILL

Applicant

and

THE QUEEN

Respondent

Application for special leave to appeal

KEANE J
EDELMAN J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA BY VIDEO CONNECTION TO BRISBANE

ON FRIDAY, 10 DECEMBER 2021, AT 1.26 PM

KEANE J: I will announce the appearances for the parties.

MR K.D. GINGES appears with **MR J.D. DONNELLY** for the applicant. (instructed by Hugo Law Group)

MS K. WESTON-SCHEUBER appears with **MS K.L McCANN** for the respondent. (instructed by ACT Office of the Director of Public Prosecutions)

KEANE J: Yes, Mr Ginges.

MR GINGES: May it please your Honours. This appeal concerns the proper construction of section 36 of the *Crimes (Sentencing) Act 2005* (ACT), in particular whether concepts of voluntariness or willingness are necessary preconditions to a sentencing court exercising its discretion to impose a lesser sentence where the offender for sentence has previously assisted in a proceeding relating to the offence, or whether voluntariness and willingness are merely factors, among others, to be considered in determining the nature or extent of any sentencing discount to be applied.

This appeal warrants a grant of special leave for the following four reasons. First, the resolution of this issue is of public importance and will have general application to the sentencing of offenders in the Local, District and Supreme Courts of New South Wales and the Magistrates and Supreme Courts in the ACT.

Secondly, it will resolve differences of opinion expressed by different judges sitting in the ACT Court of Appeal and in this matter where the Chief Justice and Justice Charlesworth found that willingness and voluntariness was essential and thus a precondition to the exercise of the discretion, but Justice Burns, who heard the leave application, and Justice Loukas-Karlsson, who was in the minority, found otherwise.

Thirdly, because the New South Wales and ACT sentencing statutory provisions concerning assistance are almost identical, the proper construction of section 36 will have important ramifications on the construction and application of section 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), that is, the resolution of this case will be cross-jurisdictional and not just limited to the ACT.

Fourthly, the five-judge decision in *CC v R; R v CC* [2021] NSWCCA 71 which was coincidentally handed down on the same date as the decision below, being 2 June 2021, found that the utilitarian value of a reluctant witness whose assistance was cross-examined out of him in a murder trial justified a discount on sentence, that is, this appeal will resolve a difference of opinion between the ACT Court of Appeal and the New

South Wales Court of Criminal Appeal on the state of the law and construction of analogous sentencing provisions.

So far as we could discern, the High Court has not previously decided this issue. If this Court does not grant special leave, then this aspect of the criminal law will be left in limbo, particularly in the ACT where the Magistrates Court and the Supreme Court will be bound to follow the ratio of the majority's decision which we respectfully submit is erroneous and is inconsistent with the five-judge New South Wales decision in *CC*.

The issue before this Court, your Honours, is not one which requires the resolution of any factual dispute. The factual background is set out in the applicant's submission in-chief at application book 74 to 75. In the Munro trial – this was the trial in which Mr Will gave evidence – the trial judge directed the jury that the applicant's evidence was important, if not paramount, in the Crown's direct evidence case against Mr Munro, without which the Crown's case collapsed. His Honour directed the jury that if they put aside Mr Will's evidence, then the Crown's circumstantial case collapsed. In construing – sorry, Justice Keane.

KEANE J: Mr Ginges, if I could just interrupt you, I am looking at section 36 itself and 36(2) gives a discretion to impose a lesser penalty having regard to the degree of assistance provided to law enforcement authorities as opposed to, for example, the administration of justice. My question is, how is giving evidence – just giving evidence like any citizen asked a question when an oath has been administered – how is giving the evidence assistance to law enforcement authorities? Why is it not just doing your duty in the administration of justice?

MR GINGES: There might be two answers to your Honour's question. The first answer is this. Firstly, the court below found that the DPP was a law enforcement authority for the purposes of this provision and therefore a person who gives evidence in a proceeding is assisting a law enforcement authority - - -

KEANE J: No, no, no. There is no property in a witness. When one calls a witness, the witness takes an oath to tell the truth - not the party that calls them is being assisted by the evidence, it is the just resolution of the case. It is the administration of justice – a notion that is expressly referred to in section 35A of this Act. So, we know that the two are different. What I am struggling with is the notion that by giving evidence your client has assisted anyone.

MR GINGES: The applicant's contention, your Honour, is one that also, I think, arose in *CC*, in the five-judge Bench in New South Wales.

EDELMAN J: Mr Ginges, *CC* is quite different, is it not, because in *CC*, the applicant had spoken with the Crown and obviously given them a statement – they had prepared a statement of agreed facts on that basis. It was not just a case where the applicant was being compelled.

MR GINGES: That is so, but the discount that sounded, with respect, was because of the utilitarian value that flowed. So, it is the utilitarian value to the community that flows from the evidence having been given. If there is only willingness – if a person only has for instance the statement, but then does not follow through by giving evidence, then in cases such *El-Sayed* and others, there is to be no discount that is given, and in fact in *CC*, if he had not given evidence, despite the fact that he had given an earlier statement, there would have been no discount and therefore no assistance – so the assistance is only crystallised in those cases, and in this case, upon the person being compelled, as it were, or giving evidence in the court. So, that is the crystallisation – that is where the assistance derives from – it is not merely facilitating or assisting in the administration of justice.

EDELMAN J: Mr Ginges, is there no aspect of utility or utilitarianism that recognises the message that is sent to other offenders that if they assist and co-operate with the authorities, they will receive a discount in their sentence?

MR GINGES: Certainly, there is, your Honour, and that is what a lot of the common law decisions to which my learned friend has referred, and the majority have referred in their judgment - quite often the assistance commences with somebody speaking to investigators, police and so forth. But that should not be the end of the road. There is a utilitarian value in that, but it is not the only utilitarian value. There will be cases, and there are cases, and this is one, in which the person gives evidence in court.

One thing that Justices Burns and Loukas-Karlsson both said is that it is naïve to suggest that simply because a person is compelled to give evidence before a court, that truthful evidence will be given and that is that there is a benefit to the community and in ensuring that people, particularly those who are involved in criminal activities, are subpoenaed to give evidence, that they do give truthful evidence. In this case - - -

EDELMAN J: But, Mr Ginges, your argument would apply in exactly the same way, would it not, if the subpoena were to produce rather than to give evidence? In either case, there would be a compelled assistance of the authorities.

MR GINGES: I suppose it would have to depend, your Honour, on what was being produced. I had not turned my mind to the production of

material, but my submission would be, I think that is quite different. The subpoena is to attend and give evidence. The subpoena to produce is usually to produce particular documents.

Perhaps a comparison might be an interrogatory, but if upon the person attending and then answering questions and giving truthful evidence or giving the evidence which itself is of utility – that is because in the case of Mr Will it resulted in the conviction of Mr Munro, in the case of CC it resulted in the conviction of the accused and so forth - I do not know, Justice Edelman, that I would necessarily accept the direct comparison between the two compulsions to produce and attend because the evidence that is given is not just under the subpoena. One answers the subpoena by attending and making the oath. What happens after that is a separate stage, and it involves a conscious decision - a consciousness, if you like, in the mind of the person who is giving the evidence – a choice, perhaps.

That is why I directed your Honours to what Justices Burns and Loukas-Karlsson have said and I can, if need, take your Honours to the parts of the application book where they have said that – and I do not mean to be critical of others – but it is said it is naïve in that respect for – and it is not a criticism, of course, of anybody – to believe that the truth-finding exercise ends as soon as the person attends to give evidence.

EDELMAN J: Why should there be any difference between a choice to tell the truth, as is the legal duty of the witness, and a choice to produce a document, as is the legal duty of the witness? In both cases the witness is complying with that which they are compelled to do, and in both cases it may be that the evidence or the document is of assistance to the authorities.

MR GINGES: Your Honour, if it is of assistance to authorities, then that may open the gateway. The question then of the subsection (3) factors may, in the judge's discretion, call for a reduced or more limited discount to be given having regard to the nature or the scope of the assistance that is given. So, your Honour, I would not - - -

EDELMAN J: The same would necessarily apply to a search warrant, would it? If the police came with a search warrant and the owner of the property said, well, I am going to comply with my legal duty to allow you to search the premises, and the search then produced material that was of assistance to the authorities, then there is a discount for that as well?

MR GINGES: I would not accept, your Honour, that that falls within the same scope, with respect. That is a different scope. Where, of course, there is a search warrant, and a person gives information to a police officer during the course of the search warrant, and it is recorded and so forth, it becomes assistance, that falls within assistance. But this is a different character.

This is, in terms of evidence again, a person who, in my respectful submission, makes a choice, and the result of that choice is something that facilitates, or, rather, assists significantly a law enforcement authority, and that is the prosecution of another person.

Such an approach, your Honour, can be derived, in my respectful submission, from an orthodox statutory construction of the provision, and that is that one of course looks at the text and the context and there is nothing within the provision that limits, or requires, the imposition of voluntariness or willingness as a precondition or as an essential element to it and, of course, having regard to what Justice Beech-Jones, as his Honour then was, in *XX*, *R v XX* in New South Wales, said when his Honour considered the history and the context of section 23.

Now, it was a different context. It did not involve a person who had been subpoenaed to give evidence, but his Honour found then that it should not be construed as being a limited provision. The same submission, your Honour, is made in respect of section 36.

EDELMAN J: Do you accept, Mr Ginges, that your submission would not apply to all of those jurisdictions that instead of using the word "assistance" use the word "co-operation", even though the co-operation regimes are based upon the same utilitarian considerations?

MR GINGES: I accept the first part of what your Honour says, and not the second. So I accept that the first part – that there is a distinction between – or I argue, rather, there is a distinction between co-operation and assistance, and that New South Wales and the ACT have enacted legislation which refers to assistance - other jurisdictions, including the Commonwealth, refer to co-operation, but I do not accept the second part of what your Honour says, with respect, and that is that it is construed in that way, that it is not limited in that way in which the co-operation has been determined.

For instance, under the Commonwealth legislation, and when one is looking at section 16A(2)(h), that does not include co-operation in law - in giving evidence. There is no reference in there to giving evidence or giving evidence in a proceeding. It is only in respect of…..an offence, for instance, and co-operating with law authorities in that respect. The provisions in New South Wales and the ACT are far broader, and they encompass a much greater degree of conduct that is available. So, with respect, your Honour, I do not embrace that one assists in the construction of the other.

Your Honours, the other thing I was going to touch upon - there may be other things Justices Keane and Edelman may like to ask of me, of

course – was the process undertaken by the majority in discerning or construing the provision. They did so by reference to historical aspects and having regard to the development of common law matters, that is other cases, particularly in New South Wales and in the High Court, but they did not, with respect, refer to or engage in the orthodox process of statutory construction. They did not refer to or engage with the principle of legality in construing the provision, which would be necessary, in our respectful submission, because of the effect of it.

When one looks at the judgment of Justice Loukas-Karlsson, she did just that – that is, she engaged in the orthodox process of statutory construction, initially by reference to the text, context and purpose. She had regard to the principle of legality, and she came to the appropriate, we would respectfully submit, conclusion that the text and, indeed, the full process undertaken of this provision leaves a result in which willingness and voluntariness are not essential. They are not mandatory preconditions. They may be relevant as factors to be taken into account, but they are not mandatory preconditions.

KEANE J: Mr Ginges, if all that were to be accepted, one looks at your second ground and one sees that you say that the exercise of the discretion miscarried because it was unreasonable, why would it not, firstly, be open to their Honours to come to the view that they had a discretion, or that the sentencing judge had a discretion, to give a discount and that, having regard to the nature of the assistance, if it could be called that at all, it was so exiguous that it was a sensible exercise of the discretion not to make an allowance?

MR GINGES: Your Honour, that would certainly be permissible. Ground 2 says it was unreasonable because their Honours in the notional resentencing exercise, which I think encompassed about a paragraph or two, did not have regard to the mandatory considerations of section 36(3), so those things must be considered. Their Honours did not do so. His Honour the initial judge did not do so, but once a sentencing judge has enlivened, as we submit has occurred here, the process that needs to be undertaken, and considers those mandatory functions, within the discretion of that judge, that judge could appropriately say no discount has been warranted by virtue of various factors.

But the judge can only come to that conclusion after undertaking the necessary process in accordance with law and we submit, in ground 2, that it was not unreasonable because it was not undertaken consistently with that requirement. We accept, your Honours, that ground 2 only – that leave would only be given to argue ground 2 if it is also given in respect of ground 1.

Your Honours, I note the time. I think that is probably all I wish to say at present in terms of in-chief, that is that I have submitted that there are powerful reasons on four bases why this Court would grant special leave to appeal. In respect of ground 2, your Honours, we would say that it also falls within section 35A the *Judiciary Act*, because the interests of the administration of justice would call for ground 2 being upheld if ground 1 is also upheld.

KEANE J: Thank you, Mr Ginges. The Court will adjourn briefly to consider the course it will take in this matter. Adjourn the Court, please.

AT 1.47 PM SHORT ADJOURNMENT

UPON RESUMING AT 1.49 PM:

KEANE J: We need not trouble you, Ms Weston-Scheuber.

The appeal proposed by this application for special leave does not enjoy sufficient prospects of success to warrant the grant of special leave. Accordingly, the application is dismissed.

The Court will now adjourn.

AT 1.50 PM THE MATTER WAS CONCLUDED