HIGH COURT OF AUSTRALIA

18 March 2020

KMC v DIRECTOR OF PUBLIC PROSECUTIONS (SA)
[2020] HCA 6

Today the High Court published its reasons for allowing an appeal against a sentence imposed by the District Court of South Australia. On 6 February 2020, the High Court unanimously pronounced orders allowing the appeal and remitting the matter to the sentencing judge for re-sentencing according to law.

The applicant was found guilty by a jury in the District Court of South Australia of one count of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA"), as it then stood. 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 10 years and three days, with a non-parole period of five years. After the applicant was sentenced, the High Court handed down its decision in *Chiro v The Queen* (2017) 260 CLR 425. In that decision, which also concerned an offence committed against s 50 of the CLCA, the plurality held 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 the judge which acts of sexual exploitation the jury found to be proved", and where a jury is not questioned as to the basis of its verdict, "the offender will have to be sentenced on the basis most favourable to the offender".

Subsequently, the South Australian Parliament passed the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) ("the Amending Act"), which commenced operation on 24 October 2017. Section 9(1) provides that "[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", relevantly, "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". The object of s 9 was to overcome the effect of *Chiro*.

In 2019, the applicant applied for an extension of time, and permission, to appeal against his sentence 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. 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 whole of the cause was removed into the High Court from the Full Court of the Supreme Court of South Australia under s 40(1) of the *Judiciary Act 1903* (Cth). The applicant contended that s 9(1) of the Amending Act was not engaged in this case, and if it was, that s 9(1) was constitutionally invalid.

The High Court unanimously held that the applicant should be granted an extension of time for permission to appeal against the sentence and permission to appeal, the appeal should be allowed, the sentence imposed by the sentencing judge be set aside and the matter be remitted to the sentencing judge for re-sentencing. The High Court held that the judge's sentencing remarks were not sufficient to engage s 9(1), because the sentencing judge did not make findings as to what acts of sexual exploitation he found to have been proved beyond reasonable doubt. Section 9(1) thus could not validate the applicant's sentence, which was contrary to the law as stated by *Chiro*. Questions as to the constitutional validity of s 9(1) therefore did not arise.

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This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.