



HIGH COURT OF AUSTRALIA

11 September 2024

DIRECTOR OF PUBLIC PROSECUTIONS v SMITH [2024] HCA 32

Today, the High Court allowed an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria. The appeal concerned the operation of provisions of Pt 8.2A of the *Criminal Procedure Act 2009* (Vic) ("the Act"), which applied to criminal proceedings for sexual offences if a witness (including a complainant) was, relevantly, under the age of 18 years. The relevant issues in the appeal were: whether an introductory meeting between a complainant, the judge, and counsel for both the prosecution and the accused, on the day before the judge presided over a special hearing to take the complainant's evidence, was authorised by s 389E of the Act; and whether the meeting gave rise to a fundamental irregularity. Section 389E(1) provided that "[a]t a ground rules hearing, the court may make or vary any direction for the fair and efficient conduct of the proceeding".

The accused was charged with sexual offences against a child under 16 years. At the "ground rules hearing", a judge in the County Court of Victoria directed, purportedly pursuant to s 389E, that the judge and counsel meet with, and be introduced to, the complainant (who was a minor at the time) before the complainant gave evidence at a "special hearing". The accused was not present at the meeting and the meeting was not recorded. The meeting occurred consequent to a recommendation in a report of an intermediary, appointed under s 389J(1) of the Act, which recorded that the complainant had told the intermediary that it would assist her confidence to meet counsel and the judge in person on the day she gave evidence if that was possible. When directing that the meeting occur, the judge said that its purpose was for the complainant to "say hello". Counsel for the accused confirmed he had no objection to the meeting and was content to introduce himself to the complainant at the same time.

After the special hearing, in *Alec (a pseudonym) v The King*, the Court of Appeal of the Supreme Court of Victoria set aside the conviction of an accused on the ground that a substantial miscarriage of justice had occurred because the judge who had conducted the special hearing met with the complainant "privately" (in the presence of the intermediary, but in the absence of counsel for the prosecution or accused). After *Alec*, on application by the prosecution in the criminal proceeding in this matter, a judge of the County Court reserved questions of law for determination by the Court of Appeal regarding the introductory meeting. The Court of Appeal reasoned that the meeting was not authorised by s 389E, and inconsistent with the principle of open justice identified in *Alec* and a fundamental irregularity in the accused's trial that could not be waived. The Court of Appeal further determined that the only remedy was for the complainant's evidence to be taken at a further special hearing before a different judge.

In allowing the appeal, a majority of the High Court held that s 389E(1) included a power for the judge, counsel for both the prosecution and the accused, and the intermediary, to meet with the complainant before the special hearing; the problem in *Alec* was that the judge attended a meeting with the complainant privately. Neither the occurrence of the meeting, nor the admission into evidence of the recording of the special hearing, constituted, or would constitute, a fundamental irregularity. This was because, in the circumstances, it could not be concluded that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of any issue in the proceeding.

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.