



HIGH COURT OF AUSTRALIA

13 March 2024

HURT v THE KING; DELZOTTO v THE KING [2024] HCA 8

Today, the High Court unanimously dismissed two appeals: one from a decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory; and one from a decision of the Court of Criminal Appeal of New South Wales.

On 23 June 2020, s 16AAB was inserted into the *Crimes Act 1914* (Cth) by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) ("the Amendment Act"). Sub-sections (1) and (2) of s 16AAB provide, in effect, that if a person is convicted of a Commonwealth child sexual abuse offence and the person has been convicted previously of a child sexual abuse offence then, subject to certain exceptions, the court must impose at least a particular minimum sentence of imprisonment if the person is convicted of an offence listed in s 16AAB(2), one of which was an offence under s 474.22A(1) of the *Criminal Code* (Cth) ("Possessing or controlling child abuse material obtained or accessed using a carriage service"). Each appellant was convicted and sentenced in accordance with s 16AAB of the *Crimes Act* for contravening s 474.22A of the *Criminal Code*. Each appellant contended that his sentence was subject to vitiating error.

The principal issue before the High Court concerned the appropriate approach to statutory minimum sentences under s 16AAB of the *Crimes Act*. On one approach, supported by the respondent to the appeals, the minimum sentence served a double function as a restriction on power and as a yardstick for the calculation of the appropriate penalty. The contrary approach, supported by the appellants, treated the minimum sentence as operating only as a restriction on the power of the sentencing judge. A threshold issue also arose concerning whether s 16AAB was applicable to the appellants' convictions in circumstances where an applicable transitional provision in the Amendment Act provided that the "relevant conduct ... engaged in" must take place on or after the commencement of amendments, including the insertion of s 16AAB. Each appellant was convicted and sentenced in relation to material that he had used a carriage service to obtain child abuse material before the commencement of the amendments. This issue required consideration of whether the "relevant conduct" concerned only the "conduct" element of the offence (here, possession of child abuse material (s 474.22A(1)(a))) or whether it also included "a circumstance in which conduct ... occurs" (here, using a carriage service to obtain or access the material (s 474.22A(1)(c))).

On the principal issue, the High Court held that the correct approach was the double function approach, with the minimum sentence providing a yardstick representing the least worst possible case warranting imprisonment against which the severity of the case before the court may be measured. As a yardstick that imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances, the minimum term operates to increase the appropriate term of imprisonment generally for that offence. On the threshold issue, the High Court held that the expression – "relevant conduct ... engaged in" – is concerned only with acts, rather than the results of those acts or the circumstances in which they occur. It follows that "relevant conduct" means the element of the offence specified in s 474.22A(1)(a).

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.