SHORT PARTICULARS OF CASES

JUNE 2019

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THE QUEEN v A2 (S43/2019)
THE QUEEN v MAGENNIS (S44/2019)
THE QUEEN v VAZIRI (S45/2019)

Court appealed from: New South Wales Court of Criminal Appeal
[2018] NSWCCA 174

Date of judgment: 10 August 2018

Special leave granted: 15 February 2019

On 12 November 2015, A2 (the mother of the two complainants, known as C1 and C2) and Kubra Magennis were found guilty of two counts of female genital mutilation. This was contrary to s 45(1)(a) of the *Crimes Act 1900* (NSW) ("the Act"). Shabbir Vaziri was found guilty of two counts of being an accessory to those offences.

The offences committed by A2 and Magennis related to separate ceremonies occurring when each of the complainants was aged about seven. The Crown alleged that A2 and Magennis were part of a joint criminal enterprise to perform a ceremony known as "khatna". This involved Magennis cutting (or nicking) each complainant's clitoris in the presence of both A2 and other family members. The Crown alleged that the ceremonies were cultural in nature, being part of the practices followed by an ethno-religious community known as the Dawoodi Bohra community, of which each of the Respondents was a member.

The conduct giving rise to Vaziri's accessorial liability comprised attempts by Vaziri, as the head cleric and spiritual leader of the Dawoodi Bohra community in Sydney, to encourage other Dawoodi Bohra community members to deceive investigators concerning the community's attitude to female genital mutilation.

On 18 March 2016 each of the Respondents was sentenced to an aggregate sentence of 15 months' imprisonment with a non-parole period of 11 months. This was later ordered to be served by way of home detention in relation to A2 and Magennis. Vaziri's sentence however was to be custodial, but he was granted bail pending the appeal to the Court of Criminal Appeal ("CCA").

Upon appeal, the Respondents challenged the trial judge's ruling that the term "otherwise mutilates" in s 45(1)(a) of the Act meant physical injury to the clitoris *to any extent* for non-medical reasons, and that a nick or cut is capable of constituting mutilation. They also challenged his ruling that the word clitoris included the prepuce (or clitoral hood).

On 10 August 2018 the CCA (Hoeben CJ at CL, Ward JA and Adams J) unanimously allowed the Respondents' appeals. Their Honours found that the extrinsic materials relied on by his Honour did not permit a construction of the word "mutilates" that departed from its ordinary meaning. They went on to find that its ordinary meaning connotes an injury or damage that is more than superficial and one which renders the body part in question imperfect or irreparably damaged. It followed therefore that his Honour had misconstrued the meaning of "mutilates" and that he had misdirected the jury as to an essential element of the offence. The CCA accepted however that a cut or nick could, in a particular case, amount to the mutilation of the clitoris. The error however was contained in his Honour's direction that it included the words "to any extent". This suggested that even a minimal injury would suffice.

The CCA also concluded that the trial judge had erred in finding that the term "clitoris" in s 45 of the Act included not only the clitoral head but also the clitoral hood (or prepuce).

In each of these matters the grounds of appeal are:

- The CCA erred in construing the words "otherwise mutilates" in s 45(1)(a) of the Act as requiring injury or damage that "renders the [labia majora or labia minora or clitoris of another person] imperfect or irreparably damaged in some fashion.

- The CCA erred in construing the terms "clitoris" in s 45(1)(a) of the Act as not including the clitoral hood or prepuce.

BVD17 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S46/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2018] FCAFC 114

Date of judgment: 25 July 2018

Special leave granted: 15 February 2019

BVD17 is a Sri Lankan Tamil who arrived in Australia, without a visa, by boat in 2012. He later applied for a protection visa, claiming to fear harm by the Sri Lankan Army and the Criminal Investigation Department, on account of an imputed support of the Liberation Tigers of Tamil Eelam. He also feared harm by the Karuna Group, from which he claimed to have escaped after being abducted and beaten (in an attempt to force him to join the Group) in 2008. BVD17's visa application was refused by a delegate of the Minister for Immigration and Citizenship on 30 September 2016.

The Immigration Assessment Authority ("the Authority") reviewed the delegate's decision and affirmed it. The Authority's findings included that BVD17 had never been targeted by the Karuna Group. In its reasons for decision, the Authority stated that it had given some weight to the fact that a summary of details that had been given by BVD17's brother in support of a protection claim of his own ("the Summary") had made no mention of an abduction of BVD17 by the Karuna Group.

A record of the claims made by BVD17's brother was the subject of a certificate dated 30 September 2016 ("the Certificate") issued to the Authority by a delegate of the Minister under s 473GB(5) of the *Migration Act 1958* (Cth). The Certificate (which was issued by a delegate other than the original decision-maker) stated that in the delegate's view the claims made by BVD17's brother should not be disclosed to BVD17, since the information had been given in confidence. None of that information, including the Summary, was ever disclosed to BVD17 and the existence of the Certificate was not disclosed until after the Authority's reasons had been published.

An application for judicial review of the Authority's decision was dismissed by Judge Street on 6 December 2017. His Honour held that, in the circumstances of BVD17's case, it was open to the Authority not to exercise its discretion to disclose to BVD17 the material which was the subject of the Certificate ("the Material").

BVD17 appealed, contending that the Authority ought not to have assumed that the brother was aware of BVD17's abduction by the Karuna Group, since there was no evidence as to the brother's state of knowledge of that alleged event. BVD17 submitted that it was therefore unreasonable for the Authority to have given weight to the Summary's omission of the event and unreasonable for the Authority not to have disclosed the Material to BVD17.

The appeal was unanimously dismissed by the Full Court of the Federal Court (Flick, Markovic and Banks-Smith JJ). Their Honours held it was not irrational for the Authority to have assumed that BVD17's family members would have some knowledge of their respective experiences, given that BVD17 had stated both that

his brother was abducted in 2009 and that his brother had contacted the family in 2012. Further, the Summary had been only one of several pieces of information used by the Authority to discredit BVD17's claim that he had been detained by the Karuna Group. The Full Court found that there was insufficient evidence from which to infer that the Authority had failed to exercise its discretion as to whether to disclose the Material to BVD17. Their Honours then held that BVD17 had not established that it was legally unreasonable for the Authority to have exercised its discretion not to disclose the Material and invite BVD17 to comment on it.

The grounds of appeal are:

- The Federal Court erred in failing to conclude that the Authority denied procedural fairness to BVD17 by not disclosing to him that it was in possession of material that was the subject of a certificate made under s 473GB(5) of the *Migration Act 1958* (Cth).

- The Federal Court erred in failing to find that the decision of the Authority is affected by legal unreasonableness.

MINOGUE v STATE OF VICTORIA (M162/2018)

Date Special Case referred to Full Court: 5 April 2019

On 12 July 1988, in the Supreme Court of Victoria, the plaintiff was convicted of one count of murder arising from the explosion of a car bomb in the vicinity of the Russell Street Police Complex on 27 March 1986. The explosion resulted in the death of a policewoman. The plaintiff was sentenced to imprisonment for life with a non-parole period of 28 years. On 30 September 2016, his non-parole period expired and he became eligible for the grant of parole. He made an application to the Adult Parole Board ("the Board"), which made a decision to proceed to parole planning. Before the Board could complete the performance of its functions, the *Corrections Act 1986* (Vic) ("the Act") was amended to insert s 74AAA, which provides that the Board must not make a parole order in respect of a prisoner convicted and sentenced to a term of imprisonment with a non-parole period for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer, unless it is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated.

The plaintiff brought proceedings in the original jurisdiction of the High Court contending that s 74AAA should be construed as not applying to the exercise by the Board of its power to make a parole order in respect of him. On 20 June 2018, the High Court held that s 74AAA, on its proper construction, applied to a prisoner sentenced on the basis that the prisoner knew, or was reckless as to whether, the person murdered was a police officer. The plaintiff was not sentenced on that basis. The offence committed was indiscriminate and no particular person or class of persons was targeted. Therefore, the Court concluded that s 74AAA did not apply to the plaintiff.

On 1 August 2018, the Act was amended by inserting s 74AB and substituting a new s 74AAA. Section 74AB(3) provides that, after considering an application for parole by Craig Minogue, the Board may make an order if, and only if, it is satisfied that he is in imminent danger of dying or is seriously incapacitated and, as a result, he no longer has the physical ability to do harm to any person, and that he has demonstrated that he does not pose a risk to the community.

The plaintiff contends that these provisions are inconsistent with the *Bill of Rights 1688 (1 Will & Mar ss II c II)* as applied by the *Imperial Acts Application Act 1980* (Vic) *(Bill of Rights),* and fundamental principles of the separation of the judicial power where punishment of criminal guilt is concerned, and are contrary to the rule of law. He submits that the practical effect of s 74AB(3) and (if it applies) s 74AAA(5) is to deprive him of any relevant prospect of release on parole, thereby making the burden of his sentence heavier.

With respect to the separation of powers, the plaintiff contends that the setting of a minimum non-parole period as part of a sentence is quintessentially an exercise of judicial power. The effect of s 74AB(3) and (if it applies) s 74AAA(5) is to impose on him additional punishment in respect of specific criminal conduct, which is something that may only be done by a court upon an adjudication of criminal guilt.

The plaintiff further contends that s 74AB(3) and (if it applies) s 74AAA(5) have the effect of converting his imprisonment into detention that amounts to cruel and unusual punishment within the meaning of the *Bill of Rights* by its being grossly

disproportionate, or by its being arbitrary and insensitive to individual circumstances.

The plaintiff submits that s 74AB and (if it applies) s 74AAA offend the rule of law because those provisions single out the plaintiff (either by name or as a one of a small class of prisoners) and place him outside the general operation of the otherwise operative sentencing law, as it was applied by the Supreme Court in his matter without a rational and relevant basis for the discriminatory treatment and certainly not a rational and relevant basis justifying the extraordinary degree of disproportionality of that discriminatory treatment. Moreover, the provisions have been inserted into the Act some 30 years after the plaintiff began serving his sentence and are calculated to destroy the expectation on which he relied throughout that time - not that he would in fact be released on parole at the expiry of his non-parole period, but that he *might* be so released if he could demonstrate his rehabilitation to the parole authorities.

On 5 April 2019 Gordon J referred the Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. The Attorneys-General of New South Wales, Western Australia and South Australia have filed Notices of Intervention.

The questions in the Special Case are:

(a) Is s 74AB of the Act valid?

(b) Does the validity of s 74AAA arise in the circumstances of this case?

(c) If the answer to question (b) is “yes”, is s 74AAA invalid?

TAYLOR v ATTORNEY-GENERAL OF THE COMMONWEALTH (M36/2018)

Date Special Case referred to Full Court: 8 March 2019

On 16 March 2018, in accordance with Part 2.2 of the *Criminal Procedure Act 2009* (Vic), the plaintiff lodged a charge-sheet and summons with a Registrar of the Magistrates Court of Victoria alleging that Ms Aung San Suu Kyi had committed a crime against humanity contrary to ss 268.11 and 268.115 of the *Criminal Code Act 1995* (Cth) (the Code). Ms Suu Kyi is the Foreign Minister of the Republic of the Union of Myanmar. Under s 268.121 of the Code, proceedings for an offence against s 268.11 must not be commenced or continued without the consent of the defendant. The plaintiff sought that consent on 16 March 2018. On or about 19 March 2018, the defendant refused to give his consent, in accordance with the ministerial submission provided to him, which said that "*incumbent heads of state, heads of government and foreign ministers all enjoy full immunity from foreign criminal proceedings under customary international law*".

The plaintiff filed an application in the original jurisdiction of this Court, seeking writs of prohibition, mandamus and certiorari against the defendant, alleging that in making the decision to refuse consent he misunderstood the law, and committed jurisdictional error. The defendant contends that the decision to refuse consent to a prosecution is not susceptible of review, having regard both to the long-settled constitutional position concerning the involvement of the judiciary in reviewing decisions relating to criminal prosecutions and to the clear terms of the provisions under which the impugned decision was made. He further contends that, in any event, the claim that he fell into jurisdictional error rests upon incorrect contentions about the content of international law, and on a flawed understanding of the extent to which s 268.121(1) permitted him to consider international law.

The plaintiff contends that Ms Suu Kyi does not have the claimed immunity because:
(a) the only relevant immunity under Australian law is that conferred under the *Diplomatic Privileges and Immunities Act 1967* (Cth), the *Consular Privileges and Immunities Act 1972* (Cth) and the *Foreign States Immunities Act 1985* (Cth) which do not apply to her; (b) the claimed immunity is inconsistent with the legislated immunities and does not form part of the common law of Australia; or, (c) alternatively, if the claimed immunity formed part of customary international law, it did not form part of the law of Australia and it did not apply to an offence against s 268.11 of the Code.

The plaintiff also contends that the defendant failed to afford him procedural fairness in refusing consent on the basis of Ms Suu Kyi's claimed immunity without giving him notice of, or any opportunity to respond to, that issue.

On 8 March 2019 Nettle J referred the Special Case for consideration by the Full Court.

Notices of Constitutional Matter have been served. No State or Territory Attorney-General has filed a Notice of Intervention.

The questions in the Special Case include:

- Is the defendant's decision to refuse to consent under s 268.121 of the Criminal Code to the prosecution of Ms Suu Kyi insusceptible of judicial review?

- If no, did the defendant make a jurisdictional error in refusing consent on the ground that Australia was obliged under customary international law to afford an incumbent foreign minister absolute immunity from Australia's domestic criminal jurisdiction for one or more of the following reasons:

  (a) Under customary international law as at the date of the defendant's decision, the asserted immunity did not apply in a domestic criminal prosecution in respect of crimes defined in the Rome Statute?

  (b) By reason of:
  (i) the declaration made by Australia upon ratifying the Rome Statute;
  (ii) Australia's treaty obligations under the Rome Statute and/or
  (iii) the enactment of the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth),
  the obligations assumed by Australia under international law were such that the Defendant was not entitled to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?

  (c) By reason of:
  (i) the declaration made by Australia upon ratifying the Rome Statute;
  (ii) Australia's treaty obligations under the Rome Statute;
  (iii) the enactment of the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments)* Act *2002* (Cth); and/or
  (iv) the *Diplomatic Privileges and Immunities Act 1967* (Cth), the *Consular Privileges and Immunities Act 1972* (Cth) and the *Foreign States mmunities Act 1985* (Cth),
  the Defendant was not entitled under Australian domestic law to refuse, on the basis of the asserted immunity, to consent to the domestic prosecution of Ms Suu Kyi in respect of crimes defined in the Rome Statute?