

KMC v DIRECTOR OF PUBLIC PROSECUTIONS (SA) (A20/2019)

Court removed from: Full Court, Supreme Court of South Australia
(Court of Criminal Appeal)

Date cause removed: 30 August 2019

The central issue in this cause removed is the validity of s 9(1) of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) (the Amendment Act”), which provides:

A sentence imposed on a person, before the commencement of this section, in respect of an offence against section 50 of the Criminal Law Consolidation Act 1935 (as in force before the commencement of section 6 of this Act) is taken to be, and always to have been, not affected by error or otherwise manifestly excessive merely because—

- (a) the trial judge did not ask any question of the trier of fact directed to ascertaining which acts of sexual exploitation, or which particulars of the offence as alleged, the trier of fact found to have been proved beyond a reasonable doubt and the person was not sentenced on the view of the facts most favourable to the person; and*
- (b) 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.*

In June 2017, following a trial before a judge and jury in the District Court of South Australia, the applicant was convicted on one count of sexual abuse of a child against s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) as then in force. In August 2017, he was sentenced to imprisonment for ten years and six months, with a non-parole period of five years.

The information alleged that over a period of not less than three days the applicant committed more than one sexual exploitation of the victim, by: (1) performing cunnilingus on her; (2) causing her to perform an act of fellatio upon him; (3) inserting his penis into her anus; and (4) urinating on her. The particulars were advanced on the basis not that they each identified a single alleged act of sexual exploitation, but rather that they identified four *kinds* of act. The prosecution case, and the evidence of the victim, was that the applicant committed multiple acts of each kind on numerous occasions over a period of up to three years. His Honour directed the jury that they were to deliver a verdict of guilty if satisfied beyond reasonable doubt that the applicant had committed any two or more acts of sexual exploitation of any one or more of the "types" particularised in the information, over a period of not less than three days. They were not asked any questions as to the basis for the verdict. Consequently, the jury never identified the particular two or more sexual acts as to which they were unanimously satisfied.

On 13 September 2017, this Court delivered judgment in *Chiro v The Queen (Chiro)*. On 24 October 2017, the Parliament of South Australia enacted the Amendment Act. On 15 February 2019, the applicant applied for permission to appeal to the Court of Criminal Appeal, in effect relying on *Chiro*, together with an application for extension of time. The applicant submits that, but for the effect of s 9(1) of the Amendment Act, in view of the decision in *Chiro*, the jury not having been asked to identify the

two or more acts about which they were satisfied, and the sentencing judge having sentenced the applicant on the basis he committed all the offences described by the victim, the sentence would be liable to be set aside as manifestly excessive.

On 30 August 2019 Gordon J ordered that the applicant's application to appeal to the Court of Criminal Appeal be removed into this Court. Notices of Constitutional Matter had been served. The Attorneys-General for South Australia, Tasmania, New South Wales, Queensland and Victoria have filed Notices of Intervention.

The questions raised are:

- (1) does s 9(1) on its proper construction apply to the applicant's appeal; and
- (2) if so, is s 9(1) inconsistent with Chapter III of the Constitution, and invalid, because it impermissibly:
 - (a) directs the manner or outcome of the exercise of the appellate jurisdiction of the Supreme Court of South Australia (including in the exercise of federal jurisdiction) and/or this Court;
 - (b) excludes judicial review for jurisdictional error of a sentencing decision of an inferior court of record; and/or
 - (c) impairs the institutional integrity of the Supreme Court of South Australia and/or the sentencing court (being a court of a State)?