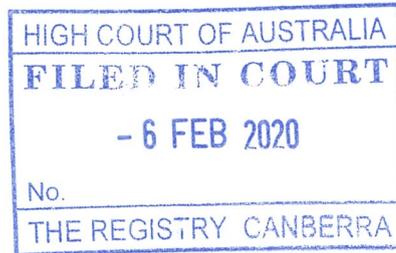


IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

No. A20 of 2019

BETWEEN:



KMC
Applicant

and

10

DIRECTOR OF PUBLIC PROSECUTIONS (SA)

Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT
AND THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
(INTERVENING)**

Part I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF PROPOSITIONS

The sentencing judge found proved beyond reasonable doubt all of the alleged acts

2. The trial judge's sentencing remarks, when viewed in the context of both the course of the trial and the sentencing submissions, are sufficient to demonstrate that the judge found, beyond reasonable doubt, that the accused had, over a period of not less than three days, between the dates particularised on the information, committed all the acts alleged by the complainant.

10 **Section 9(1) applies to this matter**

3. The argument that s 9(1) does not apply to this matter relies on a construction of s 9(1)(b) that renders it incapable of existing together with s 9(1)(a). Read contextually and purposively, the reference to consistency in s 9(1)(b) can only be a reference to consistency with the ascertainable content of the verdict. RS [32]-[34].

Section 9(1) does not direct the manner or outcome of the exercise of the appellate jurisdiction

4. Properly construed, s 9(1) retrospectively alters the powers of a court imposing a sentence for an offence under s 50(1),¹ so as to bring within those powers the ability to sentence in accordance with the process identified in s 9(1)(a) and (b). It is a
20 retrospective modification of the common law sentencing principle pronounced by this Court in *Chiro v The Queen* (2017) 260 CLR 425 (*Chiro*). RS [21], [40].
5. *Chiro* provides essential historical context to the construction of the section. The key element of that context is its statement of two substantive principles of law as to the obligations and powers of a judge on sentencing where a jury has returned a guilty verdict for an offence against s 50(1):
 - a. the requirement that the judge should request that the jury identify the underlying acts of sexual exploitation the jury found proved, unless it is otherwise apparent to the judge which acts of sexual exploitation it found proved. *Chiro*, [1] (Kiefel CJ, Keane and Nettle JJ), [67] (Bell J); and

¹ As it stood prior to substitution by s 6 of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA).

- b. where the acts found proved by the jury are not known, the requirement that the sentencing court sentence on the basis most favourable to the offender. *Chiro*, [52] (Kiefel CJ, Keane and Nettle JJ), see also [74] (Bell J).
6. The second of these principles is a common law resolution of the problem of an unknown circumstance. Consistently with the principle of legality, it is a resolution that avoids the risk of over-punishment. It accepts that it is permissible to sentence a person on the basis of acts of sexual exploitation other than those known in fact to have been found proved by the jury. RS [18], [20], [69]; *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128, [113] (Hinton J).
- 10 7. Section 9(1) must also be read contextually in light of s 9(2). However, the subsections are not inter-dependent.
8. Textually, the *subject* of s 9(1) is any sentence imposed under s 50(1) prior to 24 October 2017. It only has practical moment where ss 9(1)(a) and (b) are met. RS [24]-[26], [41](6).
9. The operative *verb* of the subsection is in accepted language of a substantive, retrospective change to the law: *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83. It is not correct to say that its only significance is in connection with appellate proceedings or judicial review. RS [27]-[28], [41](1)-(2), (5).
10. The *object* circumstance of the section supplies the content to the changed law by
20 specifying that which is authorised. RS [21]-[22], [41](2).
11. There is no reason to read s 9(1) as anything other than a substantive change to the law. Given that such a reading is reasonably open, s 22A of the *Acts Interpretation Act 1915* (SA) requires it to be read as such. RS [42].
12. It is not a necessary consequence of this construction that a discretion has been imposed retrospectively. Cf AR 3-(5).
13. Neither does this construction create other anomalies or difficulties. Cf AR [4].
- Section 9(1) does not preclude review for jurisdictional error**
14. This complaint only arises as a consequence of the argument that s 9(1) does not alter the applicable, substantive sentencing law. It is a necessary consequence of the
30 conclusion that it does alter the substantive law, that the entrenched supervisory jurisdiction remains unaffected. RS [44]-[45].

Section 9(1) does not impair the institutional integrity of any court

15. *Question of Law Reserved (No. 1 of 2018)* is distinguishable. The applicant's reliance on this case does not distinguish between a retrospective legislative grant of power on the one hand, and a prospective requirement of a court that may or may not amount to an impermissible direction, on the other. RS [50]-[51].
16. Section 9(1) did not intersect with any pending judicial process. RS [53].
17. The function of the appellate court is not changed at all. Neither has the applicant, or society, ordered their affairs on a basis that is withdrawn, infringed or negated by the retrospective legislation. RS [54], [56].
- 10 18. The legislation does no more than described by Leeming JA in *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36, [133]. RS [57].
19. In any event, *Question of Law Reserved (No. 1 of 2018)* was wrongly decided.
- a. Section 9(2) no more requires the re-opening and retrying of a controversy resolved in the exercise of judicial power than did the solution in *Chiro*. The judicial task of determining the appropriate factual basis for sentence in respect of the acts of sexual exploitation is repeated in both cases. RS [63]-[65].
- b. The only aspect of the *Chiro* solution that was “*unpalatable to the legislature*”, was the common law solution to the unknown. The jury's exercise of power, and aspects of its outcome, remain intact and unknown in both cases. RS [66].
- 20 c. The protections provided by the jury at trial are not protections of constitutional necessity, but of the common law. Legislative novelty is not itself offensive, particularly where the new process bears “*all the hallmarks of the ordinary judicial process*”. RS [70]-[77].
20. The sins of which the plurality in *Question of Law Reserved (No. 1 of 2018)* complain are not sins that go to the institutional integrity of the Court. The conclusion that the institutional integrity of the Court is undermined by s 9(2) depends on a particular view of the role of the jury that has the effect of giving it a constitutionally entrenched role.
21. The reasoning of the Supreme Court of South Australia in *Question of Law Reserved (No. 1 of 2018)* invalidating s 9(2) cannot be supported. Section 9(1) cannot, therefore,
- 30 cause any analogous impairment of the institutional integrity of the Court.

Dated: 6 February 2020


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CD Bleby