

McKELL v THE QUEEN (S223/2018)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 291

Date of judgment: 8 December 2017

Special leave granted: 17 August 2018

On 21 July 2016 the Appellant was found guilty by a jury of the following offences:

- a) importing a commercial quantity of a border-controlled precursor, intending or believing it to be for the manufacture of a border-controlled drug;
- b) conspiring to import a commercial quantity of a border-controlled drug; and
- c) dealing with money to the value of \$100,000 or more, believing it to be the proceeds of crime.

On 11 November 2016 Judge King sentenced the Appellant to 18 years and 9 months imprisonment, with a non-parole period of 11 years and 9 months. The Appellant then appealed against his convictions. The sole issue on appeal was whether the cumulative effect of a number of individual passages in Judge King's summing-up had caused a miscarriage of justice.

On 8 December 2017 a majority (Payne JA & Fagan J; Beech-Jones J dissenting) of the New South Wales Court of Criminal Appeal ("CCA") held that Judge King's summing-up was not unfairly lacking in balance, nor did it cause any miscarriage of justice. The majority held that Judge King had given the jury members clear directions that they alone were the arbiters of the facts. He had also properly directed the jury that they should disregard his comments concerning the facts if they did not accord with their own.

Justice Beech-Jones however held that Judge King's summing-up did not exhibit a "judicial balance". It had therefore deprived the jury of an adequate opportunity to understand and give effect to the Appellant's defence. Justice Beech-Jones additionally held that Judge King's further instructions to the jury did not remedy that prejudice and that this led to the conclusion that there was a miscarriage of justice. This was because the gulf was too great between what Judge King said that he was *not doing* (endeavouring to persuade the jury) and what he in fact *did do* (the opposite).

The ground of appeal is:

- The CCA erred in finding that the summing-up to the jury by Judge King did not give rise to a miscarriage of justice.