

MOMCILOVIC v THE QUEEN & ORS (M134/2010)

Court appealed from: Court of Appeal of the Supreme Court of
Victoria
[2010] VSCA 50

Date of judgment: 17 March 2010

Date special leave granted: 3 September 2010

After a trial in the County Court of Victoria, the appellant was convicted of one count of trafficking in methylamphetamine. She was sentenced to two years and three months' imprisonment. The drugs in question were found in the appellant's apartment. Under s 5 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* ('the DPCS Act'), the appellant was deemed to be in possession of the drugs unless she 'satisfie[d] the court to the contrary'. Her partner (Markovski) owned another apartment in the same building but mostly lived with the appellant in her apartment. In evidence given at the appellant's trial, Markovski admitted that he was involved in drug trafficking and said that the drugs were in his possession for that purpose. He denied, as did the appellant in her own evidence, that she had any knowledge of the drugs or the trafficking operation.

The appellant appealed to the Court of Appeal (Maxwell P, Ashley and Neave JJA). She submitted that on ordinary principles of construction, s 5 should be construed as imposing only an evidentiary, rather than a legal, burden on the accused. The Court rejected that argument, finding that the question of construction was straightforward: the phrase '*unless the person satisfies the Court to the contrary*' conveyed unambiguously the legislative intention that the accused should carry the legal burden of establishing, to the Court's satisfaction, that he/she was not in possession of the relevant substance.

The appellant further argued that s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, which provides: '*So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights*', required that s 5 be interpreted as placing only an evidentiary burden on the accused. The Court held s 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question. Accordingly, when it is contended that a statutory provision infringes a Charter right, the Court held that the correct methodology is as follows:

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984 (Vic)*.

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.

Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

The Court found that, on any view of s 32(1) of the Charter, it was not possible to interpret s 5 of the DPCS Act, consistently with its purpose, otherwise than

as it had been traditionally interpreted – that is, as imposing a reverse legal onus of proof. The appeal was rejected.

This appeal came on for hearing before the Court for 3 days in February 2011. At that hearing the Attorneys-General of the Commonwealth, Western Australia, New South Wales, South Australia and the Australian Capital Territory appeared and intervened. The Human Rights Law Resource Centre was given leave to appear as *amicus curiae*. The second respondent was given leave to file a Notice of Contention.

Following the hearing the parties and intervener filed further written submissions in response to a number of questions raised by the Court. The matter has now been re-listed for further argument.

The grounds of appeal include:

- (a) In interpreting s 5 of the DPCS Act as casting on an accused a legal - as opposed to only an evidential burden - of disproof of possession of drugs;
- (b) in concluding that it was not possible, within the meaning of s 32(1) of the Charter to interpret s 5 of the DPCS Act as casting on an accused only an evidentiary - as opposed to a legal - burden of disproof of possession of drugs in circumstances where the Court also concluded (correctly) that, insofar as s 5 of the DPCS Act placed a legal burden of disproof on an accused, it was not compatible with the right to the presumption of innocence in s 25(1) of the Charter and did not, within the meaning of s 7(2) of the Charter, place a reasonable limit on that right.