

RIZEQ v THE STATE OF WESTERN AUSTRALIA (P55/2016)

Court appealed from: Supreme Court of Western Australia Court of Appeal
[2015] WASCA 165

Date of judgment: 24 August 2015

Date special leave granted: 7 October 2016

After a trial in the District Court of Western Australia, the appellant, who was a resident of New South Wales, was found guilty of possession of MDMA and methylamphetamine with intent to sell or supply contrary to s 6(1)(a) of the *Misuse of Drugs Act 1981 (WA)* ("the MDA"). He was convicted by a decision of 11 of the 12 jurors.

In his appeal to the Court of Appeal, the appellant submitted that the majority verdict of guilty, permitted by s 114(2) of the *Criminal Procedure Act 2004 (WA)* ("the CPA"), was inconsistent with s 80 of the *Constitution*.

The Court of Appeal held that, having regard to s 75(iv) of the *Constitution*, s 39(2) of the *Judiciary Act 1903 (Cth)* and the decision of this Court in *Momcilovic v The Queen* (2011) 245 CLR 1, the appellant's contention that the District Court was exercising federal jurisdiction was correct, but the question was whether an offence under a State law that is 'picked up' under s 79(1) of the *Judiciary Act* becomes 'an offence against a law of the Commonwealth' for the purposes of s 80 of the *Constitution*.

Based on the reasoning of the majority in *Momcilovic*, the Court of Appeal found there was no s 109 inconsistency between the MDA and the *Criminal Code (Cth)* as the Commonwealth had at no relevant time exercised any power under the Commonwealth Code to prosecute the appellant for the conduct the subject of the charges under the MDA.

Moreover, the existence of differences between the MDA and the Commonwealth Code in relation to penalties and mode of trial (a reference to s 80 of the *Constitution*) did not render the State offence invalid because of inconsistency under s 109 of the *Constitution*. The appellant's claim that the offence creating provision in the MDA under which he was charged was invalid for inconsistency therefore failed.

The Court found that as s 114(2) of the CPA was procedural rather than substantive in character, the weight of authority was that, if not inconsistent with the *Constitution*, s 114(2) would be picked up and applied as a surrogate Commonwealth law under s 79(1) of the *Judiciary Act*.

Section 114(2) of the CPA was not inconsistent with s 80 of the *Constitution* because s 80 applied only to trials on indictment of 'any offence against any law of the Commonwealth'. Based on the reasoning in *Momcilovic*, s 6(1) of the MDA was and remained an offence against the law of Western Australia, notwithstanding that the trial court was exercising federal diversity jurisdiction, or alternatively, it was not relevantly 'a law of the Commonwealth'.

The ground of appeal is:

- The Court of Appeal erred in holding that s 114(2) of the *Criminal Procedure Act 2004* (WA) applied and allowed for the appellant to be convicted by majority verdict of offences against the *Misuse of Drugs Act 1981* (WA) when the District Court of Western Australia was exercising federal jurisdiction. Whereas the Court of Appeal should have held that s 114(2) of the *Criminal Procedure Act 2004* (WA) had no application to the appellant's trial as s 80 of the *Constitution* provided otherwise and required the appellant to be convicted by unanimous verdict.

The Attorneys-General of the Commonwealth, New South Wales, Queensland, Tasmania, Victoria and South Australia have given notice of their intention to intervene in this appeal.