CMB v ATTORNEY GENERAL FOR NEW SOUTH WALES (S257/2014)

Court appealed from: New South Wales Court of Criminal Appeal
[2014] NSWCCA 5

Date of judgment: 19 March 2014

Special leave granted: 12 September 2014

In October 2011 the Appellant was charged with offences of indecent and sexual assault against his daughter at a time when she was aged between 10 and 12 ("the first charges"). The Appellant was then referred for an assessment of his suitability to enter a program for the treatment of child sex offenders ("the Program"), which had been established under the *Pre-Trial Diversion of Offenders Regulation* 2005 (NSW) ("the Regulation"). The subsequent repeal of the Regulation caused the Program to be unavailable for any charges laid after 1 September 2012.

While undergoing assessment for the Program, the Appellant disclosed additional acts of which the police had been unaware. Such full disclosure was a condition of entry into the Program. After the Appellant had later informed the police of that further disclosure, in November 2012 he was charged with further sexual offences ("the second charges"). He later pleaded guilty to both the second charges and the first charges.

When before the District Court for sentencing, in respect of the first charges the Appellant gave an undertaking to participate in the Program for two years. In respect of the second charges, Judge Ellis imposed a three-year good behaviour bond ("the sentence"). This was with the agreement of the prosecutor, who had also inadvertently misled his Honour as to the operation of the Regulation on any further disclosures made by an offender.

After the Director of Public Prosecutions decided not to appeal against the sentence, the Respondent ("the Attorney") appealed.

The Court of Criminal Appeal ("CCA") (Ward JA, Harrison & R A Hulme JJ) unanimously allowed the Attorney's appeal, after finding that the sentence was manifestly inadequate. This was after considering the objective seriousness of the offences, which involved the most basic breach of trust between parent and child, and the substantial emotional harm caused to the victim. Their Honours found that the appropriateness of a custodial sentence was not negated by factors which militated in favour of the CCA exercising its discretion not to re-sentence the Appellant. Those factors included the Appellant's remorse, the circumstances of his disclosure that gave rise to the second charges and the conduct of the prosecutor before Judge Ellis. This was after their Honours had taken the view that the Appellant bore the onus of establishing that the CCA should exercise its discretion not to re-sentence him. The CCA then sentenced the Appellant to imprisonment for 5 years and 6 months with a non-parole period of 3 years.

The grounds of appeal include:

- The Court of Criminal Appeal erred in the application of s 5D *Criminal Appeal Act* 1912 (NSW) by imposing the onus on the Appellant contrary to *Malvaso v The Queen* (1989) 168 CLR 227; *Everett v The Queen* (1994) 181 CLR 295; *Green v The Queen* (2011) 244 CLR 462; *Hernando v The Queen* (2002) 136 A Crim R 451 and by failing to have regard to the limiting purpose of Crown appeals.