



HIGH COURT OF AUSTRALIA

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RAYMOND FREDERICK AYLES v THE QUEEN

A trial judge's amendment of the provision under which a person was charged was within power and did not give rise to a miscarriage of justice in the circumstances of the case, the High Court of Australia held today.

Mr Ayles was charged with six counts of indecent assault and two counts of buggery while he was an Anglican priest at Para Hills in Adelaide. In the South Australian District Court in June 2006 he pleaded guilty to two counts of indecent assault and not guilty to the other charges, all involving a boy, T, whose family were parishioners. Counts 1 and 2 alleged indecent assault between 24 October 1971 and 2 May 1972 to which Mr Ayles pleaded not guilty. Mr Ayles had asked T to clean his house for pocket money when he touched T's penis (count 1) and encouraged him to reciprocate (count 2). The prosecutor said T fixed the time as during a short period when his parents separated, about the time he was sitting a high school entry exam. This would have been 1971 when he was 12 years old and Mr Ayles 26. However in his testimony T said he believed he had been 13 and had just started high school. T's birthday is 2 May 1959. The prosecutor applied to amend counts 1 and 2 (and other counts) to make 1 May 1973 the date marking the end of the period in which the offences occurred. Judge Andrea Simpson, who was sitting without a jury, ordered the amendments.

Mr Ayles had been charged under section 70 of the *Criminal Law Consolidation Act 1935* (CLCA). It was amended on 9 November 1972 to replace sections 69 to 71 with a single section, section 69. The offences in the period before 9 November 1972 therefore needed to be identified by reference to section 70 and from that date by reference to section 69. In evidence Mr Ayles agreed that the incident that gave rise to counts 1 and 2 occurred but said it happened about October 1973, when T would have been 14. In her written judgment, Judge Simpson amended the end of the period in which count 1 allegedly occurred to 31 October 1973 and changed the relevant provision of the CLCA to section 69. She found Mr Ayles guilty of count 1. He was sentenced to four years' imprisonment with a two-year non-parole period for the three offences of which he was guilty.

Mr Ayles appealed to the SA Court of Criminal Appeal, arguing that Judge Simpson did not have the power to amend the charge without an application from the prosecutor, and that the effect was to substitute a new charge that went beyond the power of amendment. The CCA held that the prosecutor had foreshadowed an application by identifying the provisions she relied upon at the close of her case. Although she should have formally applied for an amendment so submissions could have been heard, Judge Simpson did not need to wait for an application as a judge was responsible for correcting the pleadings. The CCA held that in the circumstances of the case, there was no miscarriage of justice. Mr Ayles appealed to the High Court.

The High Court, by a 3-2 majority, dismissed the appeal. The majority held that Judge Simpson's correction of the provision to section 69 gave effect to the prosecutor's stated intention and she had not usurped the prosecutor's role as she did not decide for herself to add a charge to the indictment. An indictment referring to a statute not in effect at the time of offence was defective but capable of amendment. There was no unfairness or miscarriage of justice.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*