



HIGH COURT OF AUSTRALIA

26 October 2011

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS v MALGORZATA
BARBARA PONIATOWSKA
[2011] HCA 43

Today the High Court granted special leave to appeal but dismissed an appeal by the Commonwealth Director of Public Prosecutions against the decision of the Full Court of the Supreme Court of South Australia, which had set aside the respondent's convictions under s 135.2(1) of the *Criminal Code* (Cth) ("the Code").

Section 135.2(1) of the Code makes it an offence for a person to engage in conduct and, as a result of that conduct, to obtain a financial advantage from a Commonwealth entity, knowing or believing that he or she is not eligible to receive that financial advantage. Section 4.1(2) of the Code relevantly defines "conduct" as including "an omission to perform an act" and "engage in conduct" as including "omit to perform an act". Section 4.3(a) of the Code provides that an omission to perform an act can only be a physical element of an offence if the law creating the offence makes it so.

The respondent was charged with 17 counts of obtaining a financial advantage contrary to s 135.2(1). Each of the charges against the respondent related to her receipt of part-payments of the Parenting Payment Single ("PPS") from the Commonwealth entity "Centrelink". The allegation in each case was that the respondent was not entitled to part-payment of the PPS because she had failed to advise Centrelink of her receipt of payments of commission from her employer. It was not alleged that the respondent was under a duty imposed by a law of the Commonwealth to advise Centrelink of the receipt of those commission payments.

The respondent pleaded guilty before the Magistrates Court of South Australia to each of the charges and was sentenced to 21 months' imprisonment, subject to the direction that she be released immediately upon entering a bond to be of good behaviour for two years. The respondent unsuccessfully appealed against the severity of the sentence to the Supreme Court of South Australia. The respondent then appealed to the Full Court of the Supreme Court of South Australia, challenging her convictions on the grounds that the counts did not charge offences known to law, and that the counts were deficient in their failure to identify the transaction, act or omission on which liability was said to depend. The Full Court allowed the appeal and set aside the respondent's convictions.

The Commonwealth Director of Public Prosecutions' application for special leave to appeal to the High Court was referred to the Full Court, where it was heard as on appeal. The central issue on appeal was whether the omission to perform an act that a person is not under a legal obligation to perform may be a physical element of the offence created by s 135.2(1) of the Code. The Court held by majority that the law creating the offence in s 135.2(1) does not make the omission of an act a physical element of the offence, either expressly or impliedly, within the meaning of s 4.3(a).

- *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.*