



HIGH COURT OF AUSTRALIA

1 September 2021

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2019
[2021] HCA 26

Today the High Court dismissed an appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria on a reference by the Director of Public Prosecutions (Vic) ("the DPP") concerning the correct interpretation of recklessness in s 17 of the *Crimes Act 1958* (Vic).

Section 17 of the *Crimes Act* provides that a person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence. In 1995, in *R v Campbell* [1997] 2 VR 585, the Court of Appeal held that in order for a person to be convicted of recklessly causing serious injury under s 17, the prosecution must establish that the person foresaw that serious injury *probably* would result from the act or omission which in fact caused the serious injury. In 2017, in *Aubrey v The Queen* (2017) 260 CLR 305, the High Court cast doubt on the correctness of *Campbell*. The Court in *Aubrey* held that for the similar offence of maliciously inflicting grievous bodily harm under s 35(1)(b) of the *Crimes Act 1900* (NSW), recklessness meant foresight of the *possibility* of harm. This appeal concerned the present correctness of *Campbell*.

In February 2017, an accused was charged under s 17 of the *Crimes Act*. During the trial, the trial judge declined to direct the jury in relation to recklessness in accordance with *Aubrey* and, instead, directed the jury consistently with *Campbell*. The accused was acquitted by the jury. The DPP referred the correctness of *Campbell* as a point of law to the Court of Appeal for its opinion. The Court of Appeal unanimously decided that unless and until it is altered by legislation, the meaning of "recklessly" in s 17 of the *Crimes Act* is that stated in *Campbell*.

A majority of the High Court found that the point of law was answered correctly by the Court of Appeal. When Parliament enacted s 17 of the *Crimes Act* the intention must have been to leave the development of the meaning of recklessness to the courts. The Court of Appeal took up that task in *Campbell*, adopting a foresight of *probability* test for recklessness which has since been followed in Victoria. Two legislative amendments have been made to the *Crimes Act* since *Campbell* was decided which are relevant to s 17. The first amendment, in 1997, increased the maximum penalty for the s 17 offence to 15 years' imprisonment. The second amendment, in 2013, revised the statutory definition of "serious injury" and inserted an aggravated form of the s 17 offence into the *Crimes Act*. Both amendments followed expert reviews and extensive consultation with key stakeholders in the criminal justice system. There was no suggestion in those reviews or consultations that the meaning given to recklessness in *Campbell* had caused any difficulty in directions to juries. By contrast, there could be real unfairness in departing from a long-standing decision of a State court which has been acted upon in such a way as to affect rights. *Campbell* should be followed unless and until it is altered by legislation.

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.