



HIGH COURT OF AUSTRALIA

10 August 2022

O'DEA v THE STATE OF WESTERN AUSTRALIA [2022] HCA 24

Today, the High Court allowed an appeal from a judgment of the Court of Appeal of the Supreme Court of Western Australia. The appeal concerned the meaning of s 7(a) of the *Criminal Code* (WA) and raised the question of whether an accused person who did not actually do the act constituting an offence, or who the Crown could not prove beyond reasonable doubt actually did the act constituting an offence, could be "deemed ... to be guilty of the offence" under s 7(a).

The appellant ("Mr O'Dea") was charged jointly with another ("Mr Webb") with the offence under s 294(1)(a) of the *Criminal Code* of unlawfully doing grievous bodily harm with intent to maim, disfigure, disable or do some grievous bodily harm. The prosecution's case relied in part upon s 7(a) of the *Criminal Code*, which, "[w]hen an offence is committed", deems "[e]very person who actually does the act ... which constitutes the offence" to be guilty of the offence. The expert evidence led at trial was inconclusive as to which act or acts of Mr O'Dea or Mr Webb, or combination of their acts, caused the victim's traumatic brain injury amounting to grievous bodily harm. The trial judge's directions to the jury relevantly stated that they could convict Mr O'Dea under s 7(a) if they were satisfied beyond reasonable doubt that "Mr O'Dea and Mr Webb were acting in concert, each of them doing one or more of the acts which caused the traumatic brain injury" and that "[t]he relevant accused's acts were unlawful". While Mr O'Dea was convicted of the offence, the jury could not agree upon a verdict in respect of Mr Webb, who was retried and ultimately convicted of the alternative offence of unlawfully doing grievous bodily harm to another contrary to s 297(1) of the *Criminal Code*. The Court of Appeal dismissed Mr O'Dea's appeal against conviction, concluding that the jury directions given were not erroneous and that it was open to the jury to convict Mr O'Dea under s 7(a) by amalgamating the acts of each accused without concluding that Mr Webb's acts were unlawful.

By majority, the High Court held that the Court of Appeal should have found that the trial judge erred in his directions to the jury, which amounted to a miscarriage of justice. The proper approach to s 7(a) requires that the accused person "actually does the act" which constitutes the offence. That approach does not require the recognition of a fictitious implication in s 7(a) that the acts of another person can be attributed to an accused, and treated as "actually" having been committed by the accused, where the accused acts "in concert" with the other person. In the case of an offence under s 294(1)(a) of the *Criminal Code*, criminal responsibility will only arise under s 7(a) where the act causing the grievous bodily harm is the actual and not the attributed act of the accused person. That interpretation of s 7(a) is consistent with its plain textual meaning, drafting history and statutory context, and with the unchallenged reasoning of the Court in *Pickett v Western Australia* (2020) 270 CLR 323.

- *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.*