Victorian Government Solicitor's Office

Case Note

Momcilovic v The Queen [2011] HCA 34 (8 September 2011)

September 2011

Background

Ms Momcilovic owned and occupied an apartment where drugs were found. She was charged with trafficking in a drug of dependence against s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (**the Drugs Act**) on the basis that she had methylamphetamine in her "possession for sale" pursuant to the definition of traffick in s 70(1) of the Drugs Act. Her partner shared the apartment with her and was convicted of trafficking in a separate trial. Although he gave evidence at Ms Momcilovic's trial stating that she had no knowledge of the drugs, she was convicted. At trial, the prosecution relied on s 5 of the Drugs Act, which provides for the meaning of "possession" and shifts the burden of proof to the accused, deeming an occupier of the premises where drugs are found to be in possession of the drugs unless he or she proves on the balance of probabilities that they were unaware of their presence. Section 5 places a legal burden of proof on the accused, rather than an evidential burden that would only require a person to introduce evidence capable of negativing possession.

Before the Court of Appeal, Ms Momcilovic argued that the established construction of s 5 infringed her right to be presumed innocent as protected by s 25(1) of the Charter Act.

Summary

The High Court delivered its much anticipated decision in *Momcilovic v The Queen* on 8 September 2011, ruling on significant human rights, constitutional and criminal law questions. The VGSO acted for the Attorney-General of Victoria who intervened in the case in the Court of Appeal pursuant to the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter Act**) and was joined as a party in the High Court appeal.

A majority of the Court allowed the appeal brought by Ms Momcilovic, setting aside her conviction of drug trafficking and remitting the matter to the County Court of Victoria for a retrial. The decision has implications for the trial of drug trafficking and possession offences in Victoria, the operation and application of the Charter Act and the operation of s 109 of the Commonwealth Constitution where conduct is an offence under both State and Commonwealth laws.

It was contended that s 5 should be 'read down' to only impose an evidentiary burden of proof in accordance with the interpretive rule in s 32(1) of the Charter Act, which provides that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

The Court of Appeal refused to do so and held that while s 5 infringed the right to be presumed innocent, s 32(1) could not be used to reinterpret s 5. The Court of Appeal refused leave to appeal and, being of the opinion that that s 5 was inconsistent with a human right, it made Victoria's first 'declaration of inconsistent interpretation' under s 36(2) of the Charter Act.

High Court decision

While the High Court agreed that s 5 could not be read down to impose an evidentiary burden of proof only, it found that s 5 did not apply to the offence of trafficking. The High Court also considered the following major constitutional questions not raised in the Court of Appeal: (1) whether ss 32(1) and 36 of the Charter Act confer a legislative power on the Victorian Supreme Court and are thus contrary to the Constitution and invalid; and (2) whether s 71AC of the Drugs Act was inconsistent with the provisions of Part 9.1 of the *Criminal Code 1995* (Cth) (**the Commonwealth Code**) and therefore rendered inoperative by s 109 of the Constitution.

Implications for the trial of drug offences

Trafficking: s 5 of Drugs Act does not apply to the offence of trafficking in s 71AC

A majority of the High Court (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) held that s 5 was *not engaged* because it is not applicable to the offence of trafficking in s 71AC. This conclusion accepted the appellant's argument that the definition of "traffick" for the purposes of s 71AC was the compound expression of "possession for sale" in s 70(1) of the Drugs Act, and that s 5 does not speak to that compound expression but only to "possession" per se. While this interpretation was reached on ordinary principles of construction, the majority highlighted that it was also the preferable interpretation applying s 32(1) of the Charter Act.

Heydon J held that s 5 did apply to s 71AC and dismissed the appeal.[1] Bell J held that s 5 applied to s 71AC but nevertheless found that the jury had been misdirected, ruling that the offence still requires proof that the accused had an intention to traffick in the drug.[2]

Accordingly, a majority of 6:1 held that Ms Momcilovic's trial had miscarried because the jury had been misdirected.

Possession: s 5 casts a legal burden on the accused and is incompatible with the right to be presumed innocent

French CJ, Heydon, Bell and Crennan and Kiefel JJ confirmed that s 5 of the Drugs Act places a legal burden on an accused, rejecting the appellant's argument that it could be reinterpreted pursuant to s 32(1) of the Charter Act to impose only an evidentiary burden. French CJ and Bell J observed that, while it was inconsistent with the right to be presumed innocent, given the plain language and purpose of s 5, it was not possible to apply s 32(1) to transform the legal burden into a mere evidential burden.

This argument has been made in United Kingdom (UK) and New Zealand (NZ) in respect of reverse onus provisions akin to s 5 of the Drugs Act. Applying similar interpretive rules in the *Human Rights Act 1998* (UK) (**UKHRA**) and the *Bill of Rights Act 1990* (NZ) (**NZBORA**) respectively, the UK House of Lords found that a deeming provision could be "read down" to impose an evidentiary burden, while the NZ Supreme Court held that, although incompatible, such provisions could not be read down.

Because the High Court considered that s 5 did not apply to the offence of trafficking, this was not a decisive point in the appeal, however it does confirm that the proper construction of s 5 in relation to drug possession offences. The High Court has essentially rejected the strong rule of interpretation that operates in the United Kingdom, and preferred a more conservative approach to interpretation that would not allow the courts to depart from the clear text or purpose of statutory provisions.

Constitutional Issues

Whether s 71AC of the Drugs Act is inconsistent with the Commonwealth Code and therefore invalid under s 109 of the Constitution

A majority of the High Court (6:1) rejected the appellant's argument that the Victorian trafficking offence was inconsistent with the provisions in Part 9.1 of the Commonwealth Code and therefore invalid under s 109 of the Constitution.[3]

The appellant raised this as a ground of appeal before the High Court, relying on *Dickson v The Queen.*[4] In *Dickson*, the High Court held the Victorian offence of conspiracy to commit theft[5] was directly inconsistent with the Commonwealth Code[6] because it rendered criminal conduct not caught by, and deliberately excluded from, the conduct rendered criminal by the Commonwealth Code. The High Court in *Dickson* held that the State law closed up an area of liberty deliberately left open by the Commonwealth, and to allow the State law to operate would impose on the appellant obligations greater than those provided by the federal law. The Victorian offence was therefore found to be invalid under s 109.[7]

In this case, despite a provision in the Commonwealth Code providing that Part 9.1 was not intended to exclude or limit the concurrent operation of a State law (s 300.4), the appellant argued that s 109 inconsistency arose on three points: (1) whereas s 5 applies as a deeming provision in the Victorian trafficking offence, the Commonwealth trafficking offence requires the prosecution to prove each element of the offence beyond reasonable doubt; (2) the Victorian offence has a maximum penalty of 15 years whereas the Commonwealth's is 10 years, and different sentencing regimes operate; and (3) Victorian law permits conviction of the Victorian offence by 10 jurors, whereas conviction for the Commonwealth offence must be by unanimous jury.

The majority (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) held that there was no inconsistency.

Different methods of proof

For French CJ, Gummow, Crennan and Kiefel JJ, the first argument regarding different methods of proof fell away because of their finding that s 5 did not apply to the offence of trafficking.

Heydon and Bell JJ held that s 5 *did* apply to s 71AC, but still rejected the s 109 argument that the deeming provision in the State offence could result in inconsistency. Hayne J ruled that by forbidding the same conduct and leaving unforbidden the same conduct 'the area of liberty each [offence] leaves is the same': it is the substantive criminal law, not the procedural law (such as a burden of proof), which determines what areas of liberty are left.[8] Similarly, Bell J concluded that making different provisions regarding proof of the offence 'does not trench on an area of liberty that the Commonwealth has chosen to leave open.'[9]

Different penalties and different methods of trial

The Court was unanimous in holding that different methods of trial resulted in inconsistency. The majority (6:1) held that the different maximum penalties and different sentencing regimes did not result in inconsistency. Justice Hayne dissented, holding that the differences in penalties and sentencing regimes were significant and resulted in inconsistency.

For French CJ and Gummow J, the existence of the double jeopardy provision in s 4C of the *Crimes Act 1914* (Cth) was significant. By ensuring that a person could not be prosecuted for an offence under both Commonwealth and State laws, the provision diminishes the prospect of conflict. The majority also considered that the concurrent operation provision in s 300.4 of the Commonwealth law was a strong indication that the Commonwealth

did not intend to 'cover the field' in the sense of exhaustively or exclusively dealing with the subject matter.

Charter Act issues - ss 32, 7(2) and 36

The validity and interpretation of ss 32, 7(2) and 36 were central issues in the case.

- The "interpretive obligation" in s 32(1) of the Charter Act provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.
- The "reasonable limits" provision, s 7(2), provides that 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.
- Section 36(2) provides that 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section'.

Is s 32(1) of the Charter Act constitutionally valid?

French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that s 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts. It does not confer on courts a function of a law-making character repugnant to the exercise of judicial power. Each held that there is nothing in its text or context to suggest that the interpretation required by s 32(1) departs from the established understandings of the courts' role in construing legislation and that it must be understood as a process of construction understood and ordinarily applied by courts.

How does s 32(1) operate and what role, if any, does s 7(2) play?

The High Court heard extensive submissions from the parties and interveners in relation to the strength of the interpretative rule in s 32(1). The Court was urged by some parties to adopt a similar approach to that in relation to the equivalent provision in the UKHRA. The UK provision has had far-reaching effects and has been said to permit "considerable violence to the statutory language",[10] enabling courts to 'read in words which change the meaning of the enacted legislation'. A clear majority of the High Court rejected this argument and considered that s 32(1) is different from its UK counterpart. It is confined by the purpose of the statutory provision and does not permit a court to strain the language of a provision in the same way as has occurred in the UK. Unlike the UK, it was not possible to read s 5 of the Drugs Act as imposing an evidential onus only.

While the overwhelming majority of the Court were in agreement on the strength of the interpretative rule, different approaches have emerged on the question of whether, in interpreting legislation "compatibly" with human rights, regard should be had to the reasonable limits provision in s 7(2) of the Charter Act.

French CJ held that s 7(2) plays no role in the assessment of compatibility, either under s 32 or any of the other operational provisions of the Charter. Crennan and Kiefel JJ also rejected a role for s 7(2) in the interpretation of legislation, but left open the possibility of its role in assessing compatibility for other key provisions. In their view, 'the notion of incompatibility inherent in s 32(1) can only refer to an inconsistency found by a process of interpretation and no more'.[11] In other words, the court must consider whether it is possible, without straining the language and consistently with the purpose of the provision, to give the statutory provision a meaning that does not limit human rights.

Gummow, Hayne and Bell JJ held that s 7(2) is central to the concept of compatibility in all of the operational provisions. Gummow J, with whom Hayne J agreed, held that s 32(1), like its NZ counterpart, is directed to the interpretation of statutory provisions in a way that is compatible with a human right as reasonably limited under s 7(2). This approach allows the Court, under s 32(1), to identify whether there

is scope for a justified limitation of the right in issue and to ascertain if there is scope to read the right, as modified by a justifiable limitation, as consistent with the relevant provision.[12] Similarly, Bell J accepted that s 7(2) is part of the process of determining whether a possible interpretation of a statutory provision is compatible with human rights. Heydon J also reached this view, although the persuasive value of his judgment in this regard is affected by the fact that he found both s 7(2) and s 32(1), indeed the entire Charter Act, invalid.

Is s 36(2) of the Charter Act valid?

The High Court considered whether the power of the Supreme Court to make a declaration of inconsistent interpretation in s 36 of the Charter Act was invalid for incompatibility with the institutional integrity of the Supreme Court. French CJ outlined:

> As explained by this Court in a line of decisions beginning with *Kable*, the placement of the courts of the States in the integrated national judicial system created by Ch III of the Constitution constrains the range of functions which can be conferred upon those courts. They cannot be authorised or required to do things which substantially impair their institutional integrity and which are therefore incompatible with their role as repositories of federal jurisdiction. Legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the power of the Commonwealth. In particular, a State legislature cannot enact a law conferring upon a State court or a judge of a State court a non-judicial function which is substantially incompatible with the judicial functions of that court.[13]

French CJ, Bell, Crennan and Kiefel JJ held that s 36 was valid, while Gummow, Hayne and Heydon JJ held that s 36 was invalid for impermissibly impairing the institutional integrity of the Supreme Court.

In ruling that s 36 was valid, French CJ, with whom Bell J agreed, considered that while s 36 did not involve the exercise of a judicial function and was not incidental to judicial power, it did not surpass the constitutional limitations on the Court's role; it merely provides a mechanism by which the Court directs the legislature to a disconformity between a State law and a human right in the Charter, and it remains Parliament's ultimate responsibility to determine the laws it enacts.[14] However, French CJ, with whom Bell J agreed on this point, considered that the High Court did not have jurisdiction to interfere with the declaration because 'being non-judicial and not incidental to judicial power, [it] cannot be characterised as a judgment, decree, order or sentence of the Supreme Court falling within the appellate jurisdiction conferred on [the High Court] by s 73 of the Constitution'.[15] And while Crennan and Kiefel JJ considered that a declaration should not have been made in this proceeding and ordered it should be set aside, they similarly upheld its validity. Gummow J, with whom Hayne J agreed, held that the practical operation of s 36(2) was incompatible with the institutional integrity of the Supreme Court and thus invalid. Heydon J similarly held that the making of a declaration was not valid and took the Supreme Court outside the constitutional conception of a "court".[16] Gummow, Hayne and Heydon JJ further held that s 36 was inseverable from ss 33 and 37 of the Charter Act (referrals to Supreme Court and action on declarations), that all three provisions must be declared invalid, and that the declaration in this instance should be set aside.

The result was that, while the validity of s 36(2) was upheld (4:3), the declaration made by the Court of Appeal in this proceeding was set aside.

Implications for the operation of the declaration of inconsistent interpretation

While the majority of the High Court held that the declaration power is valid, other comments of the Court raise very real uncertainties as to how the declaration might operate in future cases.

First, of the 4 judges who held the power to be valid, French CJ held that it could not be exercised in federal jurisdiction. Nevertheless, his Honour raised the possibility that a declaration could be made once the Court had finished determining the matters that were within federal jurisdiction.

Second, it is unclear how s 36 would operate in practice. The judgments raise an issue as to whether the declaration is made on the basis that the statutory provision limits a right, or whether it is made only where it imposes an unreasonable limit. The difficulty arises because while 4 judges would give s 7(2) a role in assessing compatibility under s 32 and therefore have consequences for s 36, three of those judges found s 36 to be invalid. Of the 4 judges who found s 36 to be valid, the majority (French CJ, Crennan and Kiefel JJ) considered that the declaration is essentially one that simply identifies that the statutory provision imposes a limit upon a right, without any consideration of whether the limit is reasonable.

Third, of the judges who found s 36 to be valid, questions were raised as to the discretionary nature of the power and the circumstances when it may be inappropriate to exercise the discretion. Crennan and Kiefel JJ considered that a declaration would rarely be appropriate in the context of a criminal trial proceeding because the identification of inconsistency with human rights might undermine a conviction.[17]

In light of the above, it may well be that the Supreme Court will now be very hesitant to embark on the process of making a declaration of inconsistent interpretation.

Implications for other provisions of the Charter Act?

Given the Court's findings in relation to the strength of the interpretative rule, the differences in opinion regarding the role of s 7(2) may well not have any significant impact on the outcome of cases. The experience in NZ, which has an interpretative rule of similar strength, is that most decisions tend to turn on the question of whether the interpretation sought is possible.

However, whether or not s 7(2) applies to the assessment of compatibility assumes much greater significance in relation to the obligation on public authorities to act compatibly with human rights in s 38(1). Only French CJ clearly rules out any role for s 7(2) in the context of the public authority obligation. At least 4 judges (Gummow, Hayne, Heydon and Bell JJ), and possibly also Crennan and Kiefel JJ, would give s 7(2) a role in this context.

Looking forward for the Charter Act

The four year review of the Charter Act (mandated by s 44 of the Charter Act) is now underway. The Victorian Scrutiny of Acts and Regulations Committee (**SARC**) tabled its review of the Charter Act on 15 September 2011.

The SARC report presented two options for reform; the minority preferring to retain the current Charter Act framework with reform and simplification, and the majority preferring only to retain the scrutiny of new laws provisions and repeal any function for courts, tribunals or public authorities under the Charter Act. Some of the recommendations of the minority include: to redraft s 7(2) in plain language without reference to comparative jurisprudence;[18] to clarify that s 32(1) does not allow undue recourse to overseas judgments;[19] to replace the definition of "public authority" with an exhaustive list of specific entities and functions;[20] and to redraft the Charter Act's s 38 obligations for public authorities.[21]

The Coalition Government now has six months to prepare a response. Along with these recommendations and the submissions made it will also have to consider two significant judgments that were delivered only a short time prior to SARC's report being tabled: *Momcilovic v The Queen*, and *Director of Housing v Sudi*.[22]

[1] [458]-[463] (Heydon J).
[2] [696] (Bell J).
[3] Section 109 of the Constitution states: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'
[4] (2010) 241 CLR 491.
[5] *Crimes Act* (Vic), s 321.
[6] *Criminal Code* (Cth), s 11.5
[7] *Dickson v The Queen* (2010) 241 CLR 491, [22] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[8] See [477]-[481] (Hayne J).
[9] See [660] (Bell J).
[10] *Ghaidan* [2004] 2 AC 557 at 585 [67] (Lord Millett).
[11] See [571].
[12] See [166], where Gummow J refers to *R v Hansen* [2007] 3 NZLR 1 at 65 [191].
[13] [93] (French CJ), citing *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[14] See [95]-[96] (French CJ).
[15] [101] (French CJ).
[16] [457] (Heydon J).
[17] [604]-[605] (Crennan and Kiefel JJ).
[18] Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011), Recommendation 13.
[19] Recommendations 25 and 27.
[20] Recommendation 22.
[21] Recommendation 23.
[22] [2011] VSCA 266.

VGSO provides advice and representation on constitutional and human rights issues. For more information, contact:

Joanna Davidson, Special Counsel on 8684 0899

Catherine Dixon, Special Counsel on 8684 0241

Alison O'Brien, General Counsel on 8684 0416

Sky Mykyta, Acting Principal Solicitor on 8684 0419

Catherine Roberts, Principal Solicitor on 8684 0261