



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

DAVID JOHN SMITH

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is suitable for publication on the internet.

Part II: Outline

Issue 1: Did s 389E of the Criminal Procedure Act 2009 (CPA) authorise the meeting?

2. A special hearing is held in court and is recorded. An accused *must be present* at a special hearing: s 372(1)(a) CPA. The public are not permitted to be present (unless authorised by the Court) *because* of the terms of s 372(1)(c) (**RS [46], [53], and [63]**).
3. **Proposition:** Parliament has turned its attention to the balance between open justice and the competing public interest in vulnerable witnesses giving their best evidence. That balance is reflected in the provisions of the CPA concerning special hearings. It follows that if the legislature had intended an introductory meeting outside of open court prior to the special hearing it would have said so (**RS [48], [50], [64], [81]**).
4. Section 389AB CPA cannot be used to affect the construction of s 389E because it was not in operation at the time of the meeting (**RS [6]; R v Sieders at [125], JAB 981**).
5. **Proposition:** It would be wrong to use s 389AB to *confirm* the purpose of a ground rules hearing and to assist in the statutory construction of s 389E.
6. Section 389I of the CPA sets out the intermediaries' role in communicating questions to the vulnerable witness. It is linked to s 389E(2) which refers to the proposed 'questioning' of the witness in court at the special hearing (**RS [54]**).
7. **Proposition:** The purpose and text of ss 389I and 389E(2) do not support the meeting.

8. The ordinary grammatical sense of the words of ss 389E(1) and (2) is clear. It is relevant to the construction of ss (1) that each of the directions at (2) relate to the regulation of the witness's questioning in court – not outside court (**RS [51]**).
9. The objective of the meeting – to assist the confidence of the witness – is not a function of the judge, outside of an open court setting. (**RS 69**). However, the judge could have directed that a support person be beside the witness for the purpose of providing emotional support to her: s 360(c) and ss 365(1) and (2) CPA (**RS [54], footnote 104**).
10. The County Court of Victoria, as a statutory court, has no inherent jurisdiction. It only has such powers as are expressly conferred on it or are necessarily implied from the express conferral of jurisdiction. There was no power to hold the meeting which could be necessarily implied from s 389E.
11. **Proposition:** The language and purpose of s 389E did not authorise the meeting.

Issue 2: Was the introductory meeting a 'hearing' or a 'step' in the proceeding? Did the principle of open justice apply to the meeting?

12. The meeting was a hearing because the judge, counsel and the witness were present; and the purpose of it was to 'hear' the witness and to introduce the judge and counsel to her (**RS [38] – [40]**).
13. The meeting was not a mere 'step' such as the filing or exchange of documents between parties. All such steps are provided for under the CPA. None of them involve the judge, let alone the judge meeting and hearing a witness (**RS [26], [37]**).
14. **Proposition:** The meeting was a hearing.
15. The principle of open justice – and its derivative ordinary rule that all courts sit publicly – applied to the meeting. Because the hearing was not in court, it was not in public. A judge cannot decide, as a matter of discretion, to sit in private. Parliamentary sanction is required for the exclusion of the public (**RS [8]–[9], [31]–[32], [64] *Russell v Russell* at 523 and 523–523.**)
16. **Proposition:** The principle of open justice and its ordinary rule were infringed.
17. The principle of legality is relevant to the interpretation of s 389E because the appellant contends the statutory context and purpose of that section abrogates the principle of open justice. Application of the legality principle is not limited to cases where

construction choices relate only to the validity of a provision (RS [60], [113], *K-Generation v Liquor Licensing Court* at [48] JAB 438 – 439).

18. **Proposition:** Emerton P was correct in her reliance on the application of legality by French CJ in *Hogan v Hinch* (CAB 32, Court of Appeal [9], RS [59]).

Issue 3: Was the respondent required to be present at the meeting?

19. The accused was required to be present at the meeting: s 246 CPA. He had not been excused: s 330 CPA. Chapter 5 of the CPA required the accused's presence at all pre-trial procedures (RS [7], [22] – [25]). It was not for him to request the judge to arrange for him to see and hear the witness so he could instruct his counsel during the meeting (RS [41]).
20. The accused did not waive his right to be present at the meeting. As Emerton P observed, he had no choice but to stay away (CAB 32, Court of Appeal [7]). An accused has no right to be absent from their trial. An accused cannot waive a fundamental irregularity. Waiver did not arise under the Case Stated (RS [57] – [58]).
21. **Proposition:** The accused was required to be present at the meeting.

Issue 4: Was the meeting a fundamental irregularity in the respondent's trial?

22. The meeting was a *fundamental* irregularity because it was not authorised by any provision of the CPA. It was not in court. It was not open to public scrutiny. It was in the absence of the accused. Private communications between the judge and the key Crown witness prior to evidence are a serious departure from the prescribed processes of trial (RS [8] – [9], [67] – [69]).
23. **Proposition:** The meeting was a fundamental irregularity in the accused's trial .

Dated: 17 April 2024.



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