IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A39 of 2016

BETWEEN:

PEDRO PERARA-CATHCART

Appellant

and

THE QUEEN

Respondent

APPELLANT'S REPLY

PART I: Certification as to internet publication

1 This submission is in a form suitable for publication on the internet.

PART II: Concise reply to the submissions of the Respondent

Construction of s 353(1)

2 The issue is how s 353(1) of the CLC Act applies in the unusual circumstance where opinion in the Full Court is split such that one Judge finds no error and would dismiss the appeal, one Judge finds error and would allow the appeal, and one Judge finds error but nevertheless concludes that no substantial miscarriage of justice has actually occurred.

3 The application of s 353(1) involves two distinct stages. For the proviso to be applied requires two decisions by "the Full Court" — acting unanimously or by majority at each stage. The first stage requires consideration of whether error of a kind identified in s 353(1) has been established. If so, then (subject to the proviso) the Full Court "shall allow the appeal", and otherwise "shall dismiss the appeal". This stage does not require the judges to agree on the particular error: the first issue on which a majority view is required is that (subject to consideration of the proviso) "the verdict of the jury should be set aside" and this

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does not require agreement as to any particular reason for that conclusion. It is that view which is later described by the shorthand expression "the point raised in the appeal".

4 If a majority of the Full Court is of the view that an error or miscarriage has occurred, the default position is that the appeal is to be allowed. It is only if there is a second unanimous or majority decision, holding that despite that premise no substantial miscarriage of justice has actually occurred, that the proviso is to be applied.

5 Although it urges attention to the text of s 353(1), the Respondent nowhere in its submissions articulates how it contends the actual words of s 353(1) can be construed so as to produce the conclusion that, when "the Full Court" has found an error of law in the trial Judge's summing up, the Full Court may dismiss the appeal even though only one Judge, and not "the Full Court", would apply the proviso.

6 Ultimately, the Respondent's construction inevitably requires:

a. the words "the Full Court ... shall allow the appeal" to be read as if they were "each individual Judge comprising the Full Court shall favour orders allowing the appeal";

b. the words "in any other case shall dismiss the appeal" to be read as though they said "in any other case, each Judge comprising the Full Court shall favour orders dismissing the appeal"; and

c. the words "the Full Court may ... dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred" to be read as though they said "a Judge may favour orders dismissing the appeal if that Judge considers that no substantial miscarriage of justice has actually occurred".

The Respondent's construction departs from the language of the provision markedly, and in a fundamental way.

7 Further, the Respondent's construction requires the expression "the Full Court", as used in s 353(1), to be given a different meaning than that which the same expression clearly bears in the remaining subsections of s 353. Those provisions deal with the powers of the Full Court — acting as a body — to make orders. They are not dealing with powers or discretions of individual judges. Sections 353(2a) and (3a), in particular, can readily be seen to be companions of s 353(1), in that each of them addresses the powers of "the Full Court" in respect of each of the different classes of appeals that may be brought under s 352(1).

8 The Respondent's argument as to the construction of s 353(1) of the CLC Act ignores the evident purpose of s 353(1). The terms of s 353(1) (as well as its colocation with ss 353(2), (2a), (3) and (3a)) indicate plainly that its purpose is to prescribe the circumstances in which the Full Court should make orders allowing an appeal and the circumstances in which it should make orders dismissing an appeal. The Respondent's construction changes the nature of the provision from one which focusses upon what orders "the Full Court" should make

under certain conditions, to one that directs individual judges as to how they should determine which order to favour. The Respondent is then forced to rely upon the "traditional" (unstated) rule to dictate how to determine what order is to be made, even though that is the very subject matter to which s 353(1) is, in its own terms, plainly directed.

9 Contrary to the implicit assumption in [37] of the Respondent's submissions, the Appellant's argument does not require "a judge ... to choose or adopt orders dealing with the final rights of the parties with which that judge disagrees". It is s 353(1) which determines what orders the Full Court is to make. The concurrence of a Judge who personally considers that "no miscarriage of justice has actually occurs", in the making of orders by the Full Court in accordance with the instruction in s 353(1), does not involve that judge "choosing" or "adopting" orders with which the Judge disagrees.

10 The Respondent misunderstands the Appellant's position when it asserts, at [56] of its submissions, that "the appellant states that Gray J should have undertaken" an assessment of whether the proviso could be applied. The Respondent's point is simply that Gray J did not in fact engage in any such assessment. The consequence is that one member of the Full Court only (Stanley J) determined that the proviso should be applied. The Respondent does not contend that Gray J should have undertaken such an assessment.

11 The denial of error or miscarriage in the first place is antithetical to consideration of the proviso. Gray J's finding that no error of law, and thus no miscarriage of justice, occurred is irrelevant to the second stage.

Error in the direction and application of the proviso

12 At [80] of its submissions, the Respondent contends that "this is not ... an instance in which no direction was given" and that the question "was whether the direction was, in all the circumstances, adequate". That tends to mask the true issue on the Notice of Contention. The question is whether the direction given failed to comply with the legal requirements of s 34R(1) of the *Evidence Act* and involved a "wrong decision on any question of law".

13 The error which Stanley J found in the direction was not merely a "lack of specificity" in the direction[1] but failure to comply with the statutory requirements of s 34R(1).

14 As explained in the written submissions at [50]-[51] and [53], the Appellant relies upon the reasoning of Kourakis CJ. To recapitulate that reasoning:

a. When he was interviewed by police, the Appellant admitted possessing cannabis that was found at his home. He said that he had it for pain relief. It was that evidence to which objection was taken at trial and in the Full Court.

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[1] Cf Respondent's submissions at [30(a)], [70] and [85].

b. The only relevance of his later possession of cannabis was in evaluating the Appellant's statement (in interview) that he approached J asking to obtain cannabis.[2] When that was put to J in evidence he did not directly deny it.[3]

c. That evidence, and that use of it, was separate and distinct from the use of evidence, originating from K and J as part of "the unfolding of the prosecution case", that the Appellant supplied them with methylamphetamine.

d. It could not safely be reasoned that a person who possessed cannabis was likely to have provided methylamphetamine to K and J. The Appellant's admitted possession of cannabis could not safely be used by the jury to support K and J's evidence that the appellant provided methylamphetamine to them, rather than J providing it to him.[4]

e. The impermissible reasoning was never identified in the trial Judge's directions, and the jury were not warned against reasoning that because the Appellant had possession of cannabis, or (if it so found) that he approached J seeking to sell him cannabis, that they should not use that evidence to conclude it was more likely that he provided methylamphetamine to J and K as they had alleged.[5]

f. The jury were not directed, as required by s 34R(1), that the only proper use of the evidence was in considering whether the prosecution had excluded the possibility that the Appellant's association with K and J was for the purpose of procuring cannabis from J.[6]

15 Stanley J appeared to consider that the appellant's admitted possession of cannabis a week after the offending could be used by the jury to reason (apparently by way of propensity reasoning) that he was more likely to have provided methylamphetamine to J and K as they alleged, describing it as "an item of circumstantial evidence ... from which the jury was entitled to reach the conclusion the accused was a dealer in drugs and made use of his supply of drugs to influence and put pressure on K".[7]

16 Even if Stanley J were correct in holding that that propensity use was permissible:

a. The Judge's directions did not identify the two distinct uses (ie, to discredit the account given by the Appellant in interview, and as circumstantial evidence of his guilt).

b. The prosecutor in closing submissions had invited the jury to consider "who was the dealer" and submitted that it was the Appellant, referring to his possession of "plenty"

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2 [2015] SASCFC 103 at [9]-[10]. The Respondent at [22] appears to misunderstand this aspect of Kourakis CJ's reasons. All Kourakis CJ was saying at [17] was that if the account given by the Appellant in his interview was rejected then the jury could more readily accept beyond reasonable doubt the direct testimony of K and J.

3 Transcript, pp 168-9, set out at [2015] SASCFC 103 at [11].

4 [2015] SASCFC 103 at [10].

5 [2015] SASCFC 103 at [16].

6 [2015] SASCFC 103 at [16]-[17].

7 [2015] SASCFC 103 at [67].

of cannabis at home.[8] This effectively invited the jury to reason that the possession of cannabis supported the conclusion that he Appellant was a drug dealer generally.

c. The jury were not warned about the potential dangers associated with the line of reasoning that possession of cannabis meant that it was more likely that the Appellant had been the provider of methylamphetamine.

d. The jury were given no directions as to the basis upon which they might reason from the Appellant's possession of cannabis a week after the alleged offences to the conclusion that he was a methylamphetamine dealer. This was important because, if it could properly be used as evidence of guilt, the Appellant's possession of cannabis a week later provided independent support for the evidence of J and K. Had that reasoning and its dangers been exposed by the trial Judge, the jury may well have decided (as did Kourakis CJ) that they were not prepared to reason in that way.

e. The possibility that the jury did in fact reason that way, unguided by the necessary directions, cannot be excluded and in fact appears to have been accepted by Stanley J.

16 At [83] of its submissions, the Respondent wrongly conflates the syllogistic reasoning against which the jury was warned with the circumstantial reasoning about which it was not. It is one thing to reason: "he is a drug dealer and user; therefore he must have committed the offences with which he is charged" (against which the jury were warned); it is quite another to reason "the accused is a drug dealer and user, therefore it is more likely that he committed the offences with which he is charged" (the warning required by s 34R(1), never given).

PART III: Estimated time required for oral argument

17 In the written submissions the Appellant inadvertently omitted the estimate of time for oral argument. It is estimated that the Appellant will require between 1 and 1¼ hours for oral submissions.

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[8] [2015] SASCFC 103 at [11].