IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

APPELLANT'S ADDITIONAL WRITTEN SUBMISSIONS

A. SUBMISSIONS ON THE COURT'S QUESTIONS CONCERNING S 38 OF THE CHARTER

1. Is the Director of Public Prosecutions a public authority within the meaning of s 4 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic)?

1.1. Section 4 of the Charter sets out who (or what) is a public authority. Relevantly in this case, s 4(1)(b) provides that a public authority is "an entity established by a statutory provision that has functions of a public nature". In addition, s 4(1)(c) provides that a public authority is "an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State".

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1.2. Section 4(2) of the Charter sets out a list of non-exhaustive, non-determinative factors relevant to the question of whether a particular function is of a public nature, including:

> (a) that the function is conferred on the entity by or under a statutory provision;
> (b) that the function is connected to or generally identified with functions of government;
> (c) that the function is of a regulatory nature;
> (d) that the entity is publicly funded to perform the function;...

10 1.3. The appellant contends that the Director of Public Prosecutions (**DPP**) and Crown Prosecutors are public authorities within the meaning of s 4. Both the DPP and Crown Prosecutors fall within the definition in s 4(1)(b), being entities established by a statutory provision that have functions of a public nature.

The DPP

1.4. Sections 87AA–87AF of the *Constitution Act* 1975 (Vic) provide for the establishment of a Director of Public Prosecutions. The functions of the DPP are set out in s 22 of the *Public Prosecutions Act* 1994 (Vic). Those functions include instituting, preparing and conducting on behalf of the Crown higher court proceedings in respect of indictable offences.

20 1.5. Conduct of criminal proceedings on behalf of the Crown is quintessentially a public function — it is "connected to or generally identified with functions of government"; the function is conferred on the DPP by a statutory provision; and the DPP is publicly funded to perform its functions.

1.6. The DPP is thus established by statute and performing a public function; thus the DPP is a public authority within the meaning of s 4(1)(b) of the Charter.

Crown Prosecutors

1.7. Parts 3 and 5 of the *Public Prosecutions Act* 1994 (Vic) establish the position of Chief Crown Prosecutor and Crown Prosecutor, respectively (and this is so notwithstanding that appointment of Crown Prosecutors is by the Governor in 30 Council;[1] this will be the case in relation to many Victorian statutory offices).

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1 Cf the submissions put by the Crown: *Momcilovic v The Queen* [2011] HCA Trans at 104 and 109.

Section 36(1) of that Act states that the functions of a Crown Prosecutor include making presentment of any person for an offence in the name of the DPP. The office of Crown Prosecutor is thus established by statute and performing a public function; thus the DPP is a public authority within the meaning of s 4(1)(b) of the Charter.

1.8. Pursuant to s 4(1)(k) of the Charter, reg 5 of the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009* (Vic) declares certain entities (namely the Adult Parole Board, the Youth Residential Board and the Youth Parole Board) not to be public authorities for the purposes of the Charter. Neither the DPP nor Crown Prosecutors are excluded from the category of public authority in this way.

2. Did s 38(1) & (2) apply to the decision of the Director of Public Prosecutions to make a presentment against the appellant alleging an offence against s 71AC of the *Drugs Poisons and Controlled Substances Act* 1981 (Vic)?

2.1. Pursuant to s 38(1) and (2), it is unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right in making a decision, unless the public authority could not reasonably have acted differently or made a different decision.

2.2. There are no exceptions to s 38 — it applies to all public authorities in relation to all public functions. There is no room textually or otherwise for the excision of certain kinds of decision from the reach of s 38, such as the decision by the DPP or a Crown Prosecutor to make a presentment against a person. Rather, s 38 contains its own internal limitation, in s 38(2).

2.3. Thus if, as is contended, the DPP and/or Crown Prosecutors are public authorities within the meaning of s 4, the decision to sign the presentment in relation to the appellant filed over in July 2008 would have attracted the requirements of s 38, which commenced operation on 1 January 2008.

2.4. The decision of the Crown Prosecutor and/or DPP to prosecute Ms Momcilovic under s 71AC of the *Drugs Poisons and Controlled Substances Act* 1981 (Vic) (the **DPCS Act**), which attracted the reverse onus provision in s 5, breached the obligation in s 38(1) in two ways:

(a) in signing the presentment the Crown Prosecutor acted in a way that was incompatible with a human right (namely, the presumption of innocence, set out on s 25(1) of the Charter); and

(b) in exercising his discretion to prosecute by signing the presentment, the Crown Prosecutor failed to give proper consideration to a human right (namely, the presumption of innocence).

3. Were any of the following matters relevant to the "proper consideration to a relevant human right" referred to in s 38(1) of the Charter:

(a) The provisions of Part 9.1 of the *Criminal Code* 1995 (Cth)?

3.1. Yes, the provisions of Part 9.1 of the Criminal Code 1995 (Cth) (the **Code**), being an alternative basis for the prosecution of the appellant for the offence of trafficking, were relevant to the Crown Prosecutor's decision as to whether to make a presentment against the appellant for an offence against s 71AC of the DPCS Act.

(b) The absence from those provisions of an equivalent of s 5 of the *Drugs Poisons and Controlled Substances Act* 1981 (Vic)?

3.2. Yes, the absence in Part 9.1 of the Code of an equivalent to s 5 of the DPCS Act was relevant because this meant that the Crown Prosecutor had a choice between a prosecution pursuant to a legislative regime that violated the presumption of innocence (namely, the DPCS Act) and one that did not, at least in relation to the presumption of possession (namely the Code). The prosecution was required to have regard to the presumption of innocence in deciding under which regime to prosecute.

(c) The existence of Commonwealth and State arrangements of the kind referred to in para 13 of the submissions for the Attorney-General for the Commonwealth?

3.3. Yes, those arrangements being plainly that either or both agencies can prosecute State and/or Commonwealth offences, thus making it possible for the Crown Prosecutor to choose to prosecute for the Commonwealth offence, rather than the Victorian offence with its violation of the presumption of innocence.

(d) Section 7 of the Charter?

3.4. Yes, s 7(2) of the Charter is always relevant to the proper consideration of human rights by a public authority and the duty of a public authority to act compatibly with

human rights. In this case, as the Court of Appeal found, the limitation on the presumption of innocence effected by s 5 was not demonstrably justified pursuant to s 7(2).

4. If yes to the preceding question, could the DPP reasonably have acted differently or made a different decision within the meaning of s 38(2) of the Charter?

4.1. The Crown Prosecutor could reasonably have acted differently and made a different decision by declining to sign the presentment, alleging as it did a contravention of s 71AC of the DPCS Act and thus attracting the reverse onus provision in s 5 (which breached the presumption of innocence).

4.2. There is a discretion as to whether to prosecute.[2] The prosecution is not obliged to prosecute matters even where there is sufficient evidence to justify the institution of the prosecution if to do so would not be in the public interest. Furthermore, the Crown retains a discretion as to which offence to prosecute — including, in the Australian federal context, a discretion as to whether to prosecute under State or federal law where both are available.

4.3. Prosecuting an offence the permitted proof of which breaches the presumption of innocence is not in the public interest, particularly where an alternative offence, without the reverse onus in question, is available.

4.4. In this case there was a reasonable alternative course open to the Crown Prosecutor: namely, he could have prosecuted the appellant under the Code rather than the DPCS Act, or allowed the Commonwealth Director of Public Prosecutions to do so.

4.5. Whilst s 302.5 of the Code places a legal burden on the accused at the point where when possession of a traffickable substance is established (and thus at this point puts an accused person at a disadvantage in comparison with the provisions of the DPCS Act, which provide for the establishment of a prima facie case only), the Code is nonetheless more protective of the rights of the accused on a trafficking offence of this kind as it contains a reverse onus only once possession is established beyond a reasonable doubt by the Crown; whereas the DPCS Act

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2 See *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 at 550, 570 and 575.

contains both a reverse onus in relation to possession (s 5) and a *prima facie* evidence provision in relation to intention to traffic (s 73(2)) once possession of a certain quantity of drugs is established by s 5 (at least on the Crown's version of the case — the appellant contended in oral argument that s 5 did not apply to the composite phrase "possession for sale" in s 70(1) of the DPCS Act; and, alternatively, the appellant contended both in writing and orally that, in any event, the reasoning in *R v Tragear* at [43]-[44] and *R v Georgiou* compels the view that, despite s 5, in a case of trafficking based on possession for sale (as distinct from a case of the offence of possession), there must be an acquittal unless the prosecution prove beyond reasonable doubt that the accused knew of the drugs because one cannot have drugs in "possession for sale" unless such knowledge is present).

5. Could the appellant have raised the Charter point by seeking a stay of the proceedings at trial on the basis that the DPP had not complied with the requirements of s 38 of the Charter?

5.1. Yes, given the answers to questions 1 to 4 above.

5.2. The authorities show that the categories of abuse of process are not closed.[3] The Crown Prosecutor's decision to proceed with the prosecution despite the appellant's human right to be presumed innocent until proven guilty was, by reason of s 38(1) of the Charter, unlawful. Such unlawful behaviour on the part of the Crown Prosecutor would have grounded an argument for the grant of a stay for abuse of process.

6. What effect, if any, does the absence of any such application have upon the outcome of this appeal?

6.1. Ordinarily, an application for a permanent stay of proceedings on the ground of abuse of process is made to the trial judge, whose refusal of that application may be appealed (at least post-conviction).[4]

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[3] See, e.g., *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-76.

[4] In the years prior to the appellant's trial, and probably at the time of her trial (in July 2008), in Victoria, whilst an accused might apply pre-trial for judicial review in the Supreme Court of a County Court judge's refusal to grant a permanent stay of criminal proceedings, an accused could not appeal pre-trial to the Full Court of the Supreme Court (or, since 1995, to the Court of Appeal) against a refusal by a Supreme Court judge to grant a permanent stay of criminal proceedings or against a Supreme Court judge's decision to decline prerogative relief from a County Court judge's refusal to stay criminal proceedings (see *Boehm v Director of Public Prosecutions* [1990] VR 494). Rather, that was a matter that could be raised on appeal post-conviction

6.2. The appellant accepts that it would be unusual to seek to have an appellate court exercise the discretion to grant a stay when no application was made to the trial judge. However, the appellant contends that, if an appellate court is satisfied that facts existed that would have provided the basis for a grant of a stay by the trial judge, then the appellate court may allow an appeal and quash the presentment against the accused on that ground. This is consistent with the approach adopted by the House of Lords in *R v Director of Public Prosecutions; Ex parte Kebilene*,[5] where their Lordships held that a decision of the UK DPP to prosecute was not amenable to judicial review — but that challenges could be raised on appeal.

10 6.3. The appellant contends that this Court should, in this case, allow the appeal and quash the presentment on the basis that it was unlawful.

7. Having regard to the declaration of inconsistent operation and to s 38(1) of the Charter, could the appellant take action against the prison authorities if she were in custody, on the basis that keeping her in custody constituted false imprisonment or misfeasance in public office or another tort?[6]

7.1. The declaration of inconsistent interpretation made in this case was that s 5 of the DPCS Act was inconsistent with the right to the presumption of innocence. But that declaration did not render s 5 invalid or inoperative. In effect the Court of Appeal concluded that the appellant had been lawfully convicted of the offence of
20 trafficking, albeit in breach of her human right to be presumed innocent until proven guilty.

7.2. A prison authority is a public authority within the meaning of s 4; it is thus bound by the obligation in s 38(1) unless s 38(2) applies to displace that obligation.

7.3. In the case postulated by Crennan J, the prison authorities could not reasonably have acted differently. That is, the prison authorities are required, pursuant to the order of the County Court and under the *Corrections Act 1986* (Vic), to keep in custody a person who has been lawfully convicted and sentenced to a term of

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pursuant to the provisions of Part 6 of the *Crimes Act* 1958 (Vic). Similarly, the Crown could not appeal to the Full Court of the Supreme Court (or, since 1995, to the Court of Appeal) against a Supreme Court judge's decision to grant a permanent stay (see *Smith & Ors v The Queen* (1994) 181 CLR 338). Since 1 January 2010, i.e. well after the appellant's trial was conducted, interlocutory appeals against a judge's decision to refuse or grant a permanent stay of a criminal proceeding have been permissible in Victoria – see ss 3 and 295 of the *Criminal Procedure Act* 2009 (Vic).

5 [2000] 2 AC 326.

imprisonment. This is so even if the process that led to that lawful conviction involved a violation of the person's human rights protected by the Charter.

7.4. Thus s 38(2) would apply to the actions of the prison authorities, displacing the obligation under s 38(1) to act consistently with human rights and give those rights proper consideration. As a consequence, there would be no unlawful action on the part of the prison authorities that might ground an action for false imprisonment or misfeasance in public office or another tort.

B. SUBMISSIONS ON THE RELEVANCE OF THE FACT THAT THE COURTS BELOW WERE EXERCISING FEDERAL JURISDICTION

10 8. The appellant contends that the fact that the County Court of Victoria and the Court of Appeal may have been exercising federal jurisdiction in relation to the trial of the appellant (because she was resident in Queensland at the time of the trial) has no bearing on the appellant's case; and, in particular, no bearing on the appellant's reliance on the Charter in the interpretation of s 5 of the DPCS Act. This is because s 32 of the Charter would be picked up and applied by s 79 of the *Judiciary Act 1902* (Cth); thus s 32 was relevant to the interpretation of s 5 by each of the lower courts in their exercise of federal jurisdiction.

20 **Dated**: 17 February 2011

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6 This question was asked by Crennan J in oral argument: *Momcilovic v The Queen* [2011] HCA Trans at 35-36.