ELIAS v THE QUEEN & ANOR (M29/2013); ISSA v THE QUEEN & ANOR (M25/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2012] VSCA 160

Date of judgment: 30 July 2012

Date special leave granted: 15 March 2013

The appellants pleaded guilty to, and were sentenced in the Supreme Court of Victoria to eight years' imprisonment for, the common law offence of attempting to pervert the course of justice, for which the sentence is fixed by s 320 of the *Crimes Act* 1958 (Vic). The charges arose from each appellant's role in assisting Tony Mokbel to flee the jurisdiction while he was on trial for importing a trafficable quantity of cocaine. This was an offence against a law of the Commonwealth being tried in a State court pursuant to s 68 of the *Judiciary Act* 1903 (Cth). Each appellant appealed to the Court of Appeal against their sentence on the ground that the sentencing judge erred by failing to take into account a less punitive Commonwealth offence (attempting to pervert the course of justice pursuant to s 43 of the *Crimes Act* 1914 (Cth)) which was said to be as, or more, appropriate than the State offence upon which they were sentenced. They also contended, on the basis of *R v Liang & Li* (1995) 82 A Crim R 39, that the less punitive offence should have been taken into account in determining their sentences.

The Court of Appeal (Warren CJ, Redlich, Hansen & Osborn JJA, & Curtain AJA), in rejecting the appeals, held that the principle in *Liang & Li* is to be confined to less punitive offences that exist within the jurisdiction in which the judicial power is being exercised, and it does not require a judge exercising the judicial power of the State of Victoria to take account of like Commonwealth offences.

The Court noted that the fixing of a maximum penalty by the Victorian Parliament involves a pronouncement by the Legislature of its view as to the relative seriousness of the offence. Where the terms of the provision do not permit of an argument that the offence is not intended to cover the field of conduct to which the offence relates, the fixing of the maximum penalty by the Parliament does not leave any scope for a judge to diminish the effect of the prescribed maximum, by taking into account the maximum penalty fixed for identical or comparable offences in other jurisdictions. Where the Parliament has fixed different maximum penalties for a number of statutory offences which cover identical or very similar conduct, the common law principle in *Liang & Li* may apply. But maximum penalties fixed by the Commonwealth Parliament, even upon a subject in which it has an obvious interest, do not entitle a Victorian judge exercising State jurisdiction to depart in any respect from the lawful commands of the Parliament of Victoria, save where the laws of the Commonwealth so require. In this case there was no conflict between the Commonwealth and State offences. There was no constitutional constraint which required a State judge exercising State judicial power in relation to a State offence to have regard to a lesser maximum sentence of a comparable Commonwealth offence.

The appellants also contended that they should have been charged under s 43 of the Commonwealth *Crimes Act* which was the more appropriate charge, as it

rendered it unlawful to interfere with the course of justice in relation to the judicial power of the Commonwealth and each of their offending included conduct in a number of States of Australia and internationally. They submitted that s 43, carrying with it a maximum penalty of five years' imprisonment could not be said to be inappropriate for the offence of attempting to pervert the course of justice when the highest sentence previously imposed for this offence in Victoria was one of four years' imprisonment. The Court of Appeal found, however, that the gravity of the offending conduct by the appellants in undermining the curial process was unprecedented and called for the imposition of sentences more severe than any previously imposed. Having regard to the nature and extent of the appellants' offending conduct, s 43 was not a more appropriate, or even as appropriate an, offence with which to charge them.

The ground of appeal is:

- The Court of Appeal erred in failing to hold that the learned sentencing judge had erred, when sentencing on the count of attempting to pervert the course of justice contrary to common law (the maximum penalty for which is prescribed by s 320 of the *Crimes Act* 1958 (Vic) at 25 years' imprisonment):
  (a) by failing to have regard to the maximum penalty fixed for the offence of attempting to pervert the course of justice contrary to s 43 of the *Crimes Act* 1914 (Cth) (the maximum penalty for which, at the relevant time, was five years imprisonment) particularly in circumstances where the course of justice that the appellant attempted to pervert was in relation to the judicial power of the Commonwealth; or
  (b) by failing to have regard to the maximum penalty fixed for the related offence under State law of assisting an offender contrary to s 325 of the *Crimes Act* 1958 (Vic) (which also carried five years' imprisonment).

The respondent has filed a Notice of Contention which in effect submits that the principle identified in *R v Liang & Li* is not a sentencing principle recognised at common law.

Note: A related appeal in *Pantazis v The Queen & Anor* (M28/2013) was discontinued on 28 May 2013 following the death of the appellant.