

BLESSINGTON v THE QUEEN (S218/2007)
ELLIOTT v THE QUEEN (S215/2007)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 22 September 2006

Date of grant of special leave: 24 April 2007

In 1990 Mr Bronson Blessington and Mr Matthew Elliott ("the Appellants") were convicted of the brutal murder of Ms Janine Balding. Justice Newman sentenced both Appellants to life imprisonment and he also recommended that they never be released ("the Recommendation"). At the time it was made however the Recommendation had no legal effect. In 1992 the Court of Criminal Appeal (Gleeson CJ, Hope AJA & Lee AJ) unanimously dismissed the Appellants' appeals against the severity of their life sentences ("the First Appeal").

Successive legislative changes in 1997, 2001 and 2005 ("the legislative changes") gave legal effect to the Recommendation. Whereas once it was possible that the Appellants may eventually be released, the legislative changes altered that completely. As a consequence, the Appellants now claimed that the Recommendation had become a "sentence" within the meaning of the *Criminal Appeal Act 1912* ("the Act"). They therefore sought leave to appeal out of time. Each Appellant also asked the Court of Criminal Appeal to quash the Recommendation or alternately, to quash their life sentences and impose determinate sentences.

The Appellants further challenged the constitutional validity of Schedule 1 to the *Crimes (Sentencing Procedure) Act 1999* that would have given effect to the Recommendation even if it were quashed. The provisions were said to be incompatible with Chapter III of the Commonwealth Constitution.

On 22 September 2006 the Court of Criminal Appeal (Spigelman CJ & Howie J, Kirby J dissenting) refused the Appellants both leave to appeal out of time and leave to re-open the First Appeal. The majority held that the legislative changes were a constitutionally valid exercise of legislative power. They also held that the Court should not frustrate the intention of Parliament. The majority further found that legislative changes often impinge on existing sentences, but this does not necessarily mean that procedural fairness has been denied. Even if that had occurred, it was committed by the Parliament and not the Court. Consequently there had been no miscarriage of justice.

Justice Kirby however held that the Appellants had had no opportunity to address the appropriateness or otherwise of the Recommendation. There had therefore arguably been a miscarriage of justice and leave to appeal should be granted. By virtue of their youth at the time of Ms Balding's murder, the Appellants' crimes could also not be considered in the worst category of offences. Accordingly, their life sentences were manifestly excessive. His Honour would have allowed the Appellants' appeals and quashed their life

sentences. He would have resented them to 28 years imprisonment with a non-parole period of 21 years.

On 19 July 2007 the Respondent (in each matter) filed a summons seeking leave to file a notice of contention out of time, the grounds of which include:

- The majority in the Court below failed to find that there was no basis, when all relevant factors were taken into account, on which the appeal to the Court of Criminal Appeal, determined in 1992, might be re-opened.

In both matters, notices pursuant to section 78B of the *Judiciary Act* 1903 have been filed. The Attorney-General of the Commonwealth and the Attorney-General of New South Wales have advised the Court that they will be intervening in each case.

In both matters the grounds of appeal are:

- The majority of the Court (Spigelman CJ and Howie J, Kirby J dissenting), having found jurisdiction to re-open the 1992 appeal against sentence, erred in declining to exercise that jurisdiction. In particular, the majority erred in having regard to an attitude evinced by the enactment of subsequent legislation enacted by Parliament notwithstanding the absence of any legislative restriction or proscription in that legislation.
- The Court erred in holding that, although the "non-release recommendation" made by the sentencing judge would have been an order if the *Sentencing Legislation Further Amendment Act* 1997 had been in force at the time it was made, it was not an "order of the court of trial" for the purposes of the Act.