

AYLES v. THE QUEEN (A40/2007)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia

Date of judgment: 8 March 2007

Date special leave granted: 8 August 2007

The appellant was charged with a number of sexual offences relating to a young boy ("T"). Count 1 of the information charged him with indecent assault contrary to s70(1)(c) of the *Criminal Law Consolidation Act 1935 (SA)* (the Act) and the particulars were that he "between 24 October 1971 and 2 May 1972 indecently assaulted T".

T was born in 1959. The appellant was an Anglican priest and 26 years old in 1971. When T's parents learned of the sexual relationship in 1975, they reported it to the church authorities; however the matter was not reported to the police until many years later.

The trial by judge alone took place in 2006. In her judgment, Simpson DCJ amended count 1 of the information to refer to s69(1)(b)(iii) of the Act and amended the particulars to read "between 24 October 1971 and 31 October 1973". Her Honour then found the appellant guilty of the charge on count 1. The appellant had pleaded guilty to 2 counts (relating to a different period of time) as well as not guilty to a number of other counts on the information. He was found not guilty on those other counts. A sentence of 4 years' imprisonment with a non-parole period of 2 years was imposed.

The appellant appealed to the Court of Criminal Appeal both against conviction and sentence. On conviction, he submitted that the trial judge did not have the power pursuant to s281(2) of the Act to amend the information. It was contended that the trial judge made the amendment without any application being made by the prosecutor. Since the Director of Public Prosecutions is responsible for the conduct of the prosecution, the trial judge had stepped into an area that is the Director's responsibility. It was further submitted that the effect of the amendment was to substitute a new charge which the trial judge could not do. It was submitted that if the power to amend exists, it was exercised unfairly because the appellant was deprived of the opportunity to make submissions on the exercise of that power, giving rise to a miscarriage of justice. The Court (Doyle CJ, Gray & David JJ) dismissed the appeal against conviction, finding that the trial judge did have the power to make the order she made and that in the circumstances in which the order was made there was no injustice to the appellant.

The grounds of appeal include:

- Whether the court below erred in law in holding that the trial judge had power pursuant to section 281 of the *Criminal Law Consolidation Act 1935* to amend the charge in count 1 of the indictment;

- Whether the court below erred in law in holding that the trial judge had power to amend count 1 of the charge on the indictment because the power to lay the charge lies with the Director of Public Prosecutions under section 7 of the *Director of Public Prosecutions Act 1991*.