

THE QUEEN v CORNWELL (S281/2006, S282/2006)
CORNWELL v THE QUEEN (S215/2006)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 11 April 2006

Date of grant of special leave: 4 August 2006 (S281 & S282/2006)

Date referred to Full Bench: 4 August 2006 (S215/2006)

Cornwell was charged, along with eight others of an offence of conspiring to import a commercial quantity of cocaine, an offence against s 233B(1)(k) of the *Customs Act* 1901 (Cth). The trial of this matter was first heard in the Supreme Court before Howie J and a jury commencing in February 2003 ("the first trial").

The Crown case against Cornwell to prove his involvement in the charged conspiracy consisted almost entirely of listening device recordings of Cornwell's conversations with the two alleged co-conspirators, John Lawrence and Juan Diez (both of whom were convicted in the first trial). Those conversations involved two inter-related topics: Cornwell's (and Diez and Lawrence) then current dealings in supplying cocaine and the imminent arrival of a large shipment of cocaine from abroad. The listening device evidence was admitted over objection. That evidence revealed, inter alia, that Cornwell was involved in large scale local cocaine distribution, which was not the subject of the indictment, but it was evidence that was admitted on the basis that it tended to prove the involvement of Cornwell in the alleged conspiracy.

Cornwell gave evidence in the first trial. An issue arose as to whether he was entitled to claim the privilege against self incrimination. Howie J upheld Cornwell's claim of privilege and granted a certificate pursuant to s 128 of the *Evidence Act* 1995. As it happened the certificate did not formally issue in the course of the trial. That fact was only discovered after the trial before Blackmore DCJ ("the second trial") had commenced and the question was raised as to the admissibility of the transcript of Cornwell's evidence at the first trial.

The jury in the first trial could not reach agreement. The second trial commenced. In the second trial, the Crown sought to tender (large parts of) the transcript of Cornwell's cross-examination in the first trial as constituting admissions against Cornwell. The subject of nearly all of this cross-examination was Cornwell's conversation with the two alleged co-conspirators. On behalf of Cornwell this evidence was objected to on the basis that Cornwell had a s 128 certificate which, it was claimed, applied to this evidence and that such evidence could not therefore be tendered in the second trial.

As Cornwell's legal advisors had failed to obtain the certificate which Howie J had said he would grant, application was then made, on behalf of Cornwell, to Howie J, for the issue of such certificate. The Crown contended that no certificate should issue given the delay in seeking it. Howie J issued the certificate. The Crown then lodged an appeal under s 5F of the *Criminal Appeal Act* 1912 against the granting of the certificate.

In relation to the tendering of Cornwell's evidence from the first trial in the second trial, Blackmore DCJ held that the evidence in question was evidence in respect of which Cornwell could never have claimed privilege in the first place and that the certificate did not encompass such evidence. The evidence was admitted. Cornwell was convicted on 8 June 2004 of the offence of conspiring to import cocaine and was subsequently sentenced by Blackmore DCJ to imprisonment for 24 years with a non-parole period of 14 years and 6 months.

The Crown's appeal against the issue of the certificate was dismissed. Cornwell's appeal against his conviction was upheld and a new trial was ordered.

The Court of Criminal Appeal (McClellan CJ at CL with Hulme and Adams JJ agreeing) found that on its face the s 128 certificate encompassed the cross-examination evidence tendered by the Crown and Blackmore DCJ should have refused to admit the evidence. The Court agreed that the approach taken by Blackmore DCJ caused the trial to miscarry and that the evidence given by Cornwell at the first trial was given with the knowledge that the evidence would be protected by a certificate. In relation to the Crown's submission that the certificate be set aside the Court noted that Cornwell only gave evidence after Howie J had determined that a certificate would be granted and if the s 128 certificate were quashed "not only could the evidence be tendered at a retrial of the original trial but would also be available to the Crown to tender against [Cornwell] at a separate trial on the 'domestic charges'. This could result in significant injustice."

On 4 August 2006 the Full Court granted special leave to appeal in the Crown's two applications and stood over Cornwell's own application for special leave to appeal to an expanded Full Court.

The grounds of appeal include:

The Queen v Cornwell

S281/2006

- The Court of Criminal Appeal erred in failing to hold that s 128(8) of the *Evidence Act* does not confer on an accused giving evidence in a criminal trial privilege against self-incrimination when giving evidence about relevant facts even if that evidence tends to reveal that the accused is guilty of an offence other than that which (s)he stands charged.
- The Court of Criminal Appeal erred in failing to hold that section 128(7) of the *Evidence Act* has no application to retrials of a criminal offence.

S282/2006

- The Court of Criminal Appeal erred in failing to hold that s 128(8) of the *Evidence Act* does not confer on an accused giving evidence in a criminal trial privilege against self-incrimination when giving evidence about relevant facts even if that evidence tends to reveal that the accused is guilty of an offence other than that which (s)he stands charged.
- The Court of Criminal Appeal erred in failing to quash the section 128 certificate.

