



HIGH COURT OF AUSTRALIA

8 September 2011

MOMCILOVIC v THE QUEEN & ORS

[2011] HCA 34

Today the High Court allowed an appeal by Ms Vera Momcilovic against her conviction for drug trafficking contrary to s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ("the Drugs Act"), but held that s 71AC is not invalid under s 109 of the Constitution for inconsistency with the trafficking offence provision of the *Criminal Code* (Cth).

In 2008, Ms Momcilovic was convicted, following trial by jury in the County Court of Victoria, of trafficking in methylamphetamine contrary to s 71AC of the Drugs Act. The prosecution case was that drugs were found in an apartment that Ms Momcilovic owned and lived in. However, Ms Momcilovic lived in the apartment with her partner, Mr Velimir Markovski, who had been convicted in a separate trial of trafficking in methylamphetamine and cocaine. At her trial, Ms Momcilovic and Mr Markovski gave evidence that she had no knowledge of the presence of drugs in the apartment. In order to establish possession of the drugs by Ms Momcilovic, the prosecution relied upon s 5 of the Drugs Act, which provided that "any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him ... unless the person satisfies the court to the contrary". The jury was directed that, once it was proved that Ms Momcilovic was in occupation of the apartment, she was deemed to be in possession of the drugs unless she satisfied the jury that she did not know of their presence.

On appeal to the Court of Appeal of the Supreme Court of Victoria, Ms Momcilovic submitted that on its ordinary construction or, alternatively, pursuant to the interpretive rule created by s 32(1) of the Charter, s 5 of the Drugs Act did not impose on her any onus of proof. Alternatively, she submitted that the provision should be interpreted as imposing an evidential onus rather than a legal onus. Section 32(1) of the Charter provides that "[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". The Court of Appeal refused Ms Momcilovic leave to appeal against her conviction. The Court of Appeal also made a declaration of inconsistent interpretation pursuant to s 36(2) of the Charter, on the basis that s 5 of the Drugs Act could not "be interpreted consistently with the presumption of innocence under s 25(1) of the Charter".

On appeal to the High Court, Ms Momcilovic raised several issues of constitutional importance in seeking to have her conviction quashed, including:

- the validity of the Charter, in particular s 32(1) which conferred a statutory interpretation function upon courts, and s 36 which conferred on the Supreme Court the power to make a declaration of inconsistent interpretation where the Court was of the opinion that a statutory provision could not be interpreted consistently with a human right;
- whether the offence of trafficking contrary to s 71AC of the Drugs Act is invalid under s 109 of the Constitution for inconsistency with the offence of trafficking contrary to s 302.4 of the *Criminal Code* (Cth);

- the construction of s 71AC of the Drugs Act, and whether s 5 is applicable to the offence.

The High Court, by majority, allowed Ms Momcilovic's appeal against her conviction. French CJ, Gummow, Hayne, Crennan and Kiefel JJ held that s 5 did not apply to the offence of trafficking contrary to s 71AC of the Drugs Act. Their Honours held that, as a result, Ms Momcilovic's trial had miscarried because the jury had been misdirected. Bell J held that s 5 did apply to s 71AC, but nevertheless that the jury had been misdirected. Further, French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ held that s 71AC of the Drugs Act was not invalid for inconsistency with the trafficking offence provision of the *Criminal Code* (Cth). The Court quashed Ms Momcilovic's conviction, set aside her sentence, and ordered that a new trial be had.

In relation to the validity of the Charter, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that s 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts. With respect to the declaration of inconsistent interpretation made by the Court of Appeal, French CJ and Bell J held that s 36 of the Charter was valid but that there could be no appeal to the High Court from a declaration made under that section. Crennan and Kiefel JJ held that s 36 of the Charter was valid but that a declaration of inconsistent interpretation should not have been made by the Court of Appeal in this proceeding. Gummow, Hayne and Heydon JJ held that s 36 was invalid for impermissibly impairing the institutional integrity of the Supreme Court. As a majority of the Court was of the view that the declaration of inconsistent interpretation made pursuant to s 36 either was invalid or ought not to have been made by the Court of Appeal in this proceeding, the Court ordered that the declaration be set aside.

The Attorney-General for Victoria was ordered to pay two-thirds of Ms Momcilovic's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*