Judgment Summary
Supreme Court
New South Wales
Court of Criminal Appeal

Flaherty v R; R v Flaherty [2016] NSWCCA 188

Hoeben CJ at CL, Simpson JA and Price J

Today the Court of Criminal Appeal unanimously dismissed the appellant's appeal against conviction and the Crown's appeal against sentence. By majority the Court upheld the appellant's appeal against sentence and resentenced the appellant.

On 7 September 2015 the appellant was found guilty of two counts of indecent assault. Prior to the commencement of the trial he had entered pleas of guilty to three additional indecent assault counts. On 26 February 2016 the appellant was sentenced to an aggregate sentence of imprisonment for 2 years and 3 weeks with a non-parole period of 6 months.

The events giving rise to each count are historical and occurred during the 1970s and early 1980s while the appellant was a Catholic priest. The five counts related to three different complainants who were at separate times young parishioners in the appellant's congregation. The two counts for which the appellant was found guilty by a jury related to two discrete acts that were alleged to have occurred straight after one another to one of the complainants. The first of those counts alleged an act of fellatio and the second alleged an act of penetration.

In his appeal against conviction the appellant submitted that the trial judge had erred in directing the jury that their verdicts to each count must be "logically consistent" with one another. The appellant argued that by imposing such a test the trial judge introduced to the jury's deliberations an impermissible risk that the consideration of the jury in respect of one count might improperly be affected by the desire to render that consideration consistently with their position or approach on the remaining count.

The Court unanimously dismissed this argument. Hoeben CJ at CL found that the direction that had been given by the trial judge was in the circumstances of this case quite unexceptionable. His Honour held that the direction was expressed in simple and easily understood language and was directly relevant to the evidence (*R v Markuleski* [2001] NSWCCA 290; 59 NSWLR 82).

Both the appellant and the Crown appealed the sentence imposed on 26 February 2016.

The appellant submitted that the sentencing judge erred in his approach to the sentencing exercise, erred in applying the correct sentencing regime at the time of sentence and gave inadequate weight to the subjective circumstances of the appellant, thereby resulting in a sentence that was manifestly excessive. The Court unanimously dismissed each of these grounds of appeal. Simpson JA highlighted that it was acknowledged by the appellant in

written submissions that the sentencing judge dealt appropriately with most, if not all, of the relevant sentencing considerations.

The Crown identified five grounds of appeal that it submitted resulted in a sentence that was manifestly inadequate. Of those five grounds the appellant conceded two, namely that the sentencing judge had erred in engaging in two-stage reasoning process rather than an instinctive synthesis (*Wong v The Queen; Leung v The Queen* [2001] HCA 64; 207 CLR 584 at [74] and [76]), and by double counting subjective features of the appellant when setting the indicative sentences and again when making a finding of special circumstances (*R v Fidow* [2004] NSWCCA 172).

Simpson JA (with Hoeben CJ at CL agreeing) was not satisfied that, in the circumstances, the sentence imposed was below the range of sentences that could justly be imposed for the offences consistently with (relevant) sentencing standards. Her Honour therefore dismissed the Crown appeal.

Because error was identified however, Simpson JA (with Hoeben CJ at CL agreeing) held that the appellant had not been sentenced according to law. As a result the Court must uphold the appellant's appeal against sentence, set aside the sentence imposed and re-sentence him. Her Honour held that s 5D of the *Criminal Appeal Act* 1912 (NSW) permits the Court to vary the sentence imposed and substitute "such sentence as to [this] Court may seem proper".

The re-sentencing exercise was particularly difficult. The offences that were the subject of the trial were objectively serious. However, the appellant's physical and mental health were found to be parlous and such as to call for a measure of compassion.

Price J did not agree with Simpson JA that the Crown had failed to demonstrate that the sentence imposed was outside the range of available sentences in all of the circumstances of the case. However, his Honour would have exercised the residual discretion on compassionate grounds and dismiss the Crown appeal.

By majority (Hoeben CJ at CL and Simpson JA) the Court resentenced the appellant to an aggregate term of 2 years with a non-parole period of 3 months.