Annulment of conviction and disqualification from parliament

David Birch reports on *Re Culleton [No 2]* [2017] HCA 4

In the 2016 election, Rodney Norman Culleton was elected as a One Nation senator for Western Australia. However, prior to his nomination, Senator Culleton had been convicted, in his absence, in the Local Court of New South Wales, of the offence of larceny. After the 2016 election, the Local Court granted an annulment of the conviction. In *Re Culleton [No 2]* [2017] HCA 4, the High Court, sitting as the Court of Disputed Returns, held that Senator Culleton was 'incapable of being chosen' as a senator under s 44(ii) of the Constitution.

Consequently there was a vacancy in Western Australia's Senate representation, which the court held must be filled by a special count of ballots. That has since been conducted and the second candidate on the WA One Nation ticket, Peter Georgiou (Mr Culleton's brother-in-law), will fill the vacant senate seat.

The decision is of interest for the characterisation of the annulment procedure under the *Crimes (Appeal and Review) Act 2001* (NSW). The decision also provides an example of the rigid and somewhat arcane nature of s 44, the Constitutional provision for disqualification from parliament.

Background

Section 44(ii) of the Constitution provides:

> Any person who … has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer … shall be incapable of being chosen or of sitting as a senator.

On 2 March 2016 Mr Culleton was convicted of larceny. Under s 117 *Crimes Act 1900* (NSW) the offence of larceny is punishable by imprisonment for a period of up to five years. However, the maximum term of imprisonment that the Local Court could impose in the circumstances was two years: s 268 *Criminal Procedure Act 1986* (NSW). The Local Court, having convicted Mr Culleton of larceny, issued a warrant for his arrest in order to have him brought to the court for sentencing.

On 16 May 2016, Mr Culleton was nominated as a candidate in a group nomination for Pauline Hanson's One Nation party for the Senate. The election occurred on 2 July 2016. On 2 August 2016, the writ for the election of senators was returned, Mr Culleton was noted as elected and he sat as a senator from that date.

On 8 August 2016, Senator Culleton presented himself before the Local Court and the warrant was executed. Pursuant to s 8 of the *Crimes (Appeal and Review) Act 2001* (NSW), the Local Court granted an annulment of Senator Culleton's conviction. The matter was dealt with afresh and Senator Culleton subsequently pleaded guilty at a final hearing.

The decision

Senator Culleton argued that the effect of the annulment on 8 August 2016 was to render the conviction void *ab initio*, so that it was treated as having never occurred.

Section 10(1) of the *Crimes (Appeal and Review) Act 2001* provides that: '[o]n being annulled, a conviction ... ceases to have effect and any enforcement action previously taken is to be reversed.'

The High Court approached the effect of the annulment as a matter of statutory construction.[1]

The High Court plurality (Kiefel, Bell, Gageler and Keane JJ) held that the annulment did not retrospectively treat the conviction as if it had never occurred.[2] Rather, the annulment operated prospectively, only operating to reverse any action taken by way of enforcement against the defendant.[3] In particular, the plurality noted that to say that 'the annulment "ceases to have effect" is to acknowledge that it has been in effect to that point.'[4] Accordingly, at the time of his nomination (the relevant time for s 44), the conviction recorded against Senator Culleton was legally in effect, Senator Culleton was 'subject to be sentenced' and was therefore disqualified by s 44(ii).

While agreeing in the result, Nettle J's reasons were somewhat different. Nettle J agreed that the annulment was not retrospective in that the conviction continues to have effect until and unless it is annulled.[5] However, Nettle J held that the annulment would operate retrospectively for purposes of events occurring *after* the annulment.[6] Thus, if the conviction had been annulled before his nomination, Senator Culleton would have been entitled to stand, even if the charge of larceny had still been pending against him. However, as Senator Culleton's annulment occurred after his nomination, he was at that point 'subject to be sentenced' within the meaning of s 44(ii) and therefore ineligible.

Senator Culleton raised two alternative arguments, neither of which found favour with the High Court.

First, Senator Culleton argued that because he had at no time actually been sentenced to imprisonment for the offence of larceny, s 44(ii) of the Constitution had no application to him. This submission flew in the face of the words of s 44(ii), and the High Court had no difficulty rejecting it.[7]

Second, Senator Culleton argued that he was not 'subject to be sentenced' because he had been convicted as an 'absent offender' and under s 25(1)(a) of the Crimes (Sentencing Procedure) Act 1999 (NSW), a sentence of imprisonment may not be imposed upon an 'absent offender'. The High Court observed that this did not provide Senator Culleton with immunity from imprisonment.8 A warrant had been issued for the purpose of

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having Senator Culleton brought before the Local Court for sentencing. Accordingly, 'the processes of the law pursuant to which he might lawfully be sentenced to imprisonment were set in train' and Senator Culleton was 'subject to be sentenced' at the relevant time.[9]

Endnotes

1. Re Culleton [No 2] [2017] HCA 4 at [25] (Kiefel, Bell, Gageler and Keane JJ), [60]-[61] (Nettle J).
2. Ibid at [29] (Kiefel, Bell, Gageler and Keane JJ).
3. Ibid at [29] (Kiefel, Bell, Gageler and Keane JJ).
4. Ibid at [29] (Kiefel, Bell, Gageler and Keane JJ).
5. Ibid at [62] (Nettle J).
6. Ibid at [61] (Nettle J).
7. Ibid at [16]-[22] (Kiefel, Bell, Gageler and Keane JJ); [64]-[66] (Nettle J).
8. Ibid at [33] (Kiefel, Bell, Gageler and Keane JJ).
9. Ibid at [36] (Kiefel, Bell, Gageler and Keane JJ).

Verbatim

Smith v The Queen; R v Afford [2017] HCATrans 40 (28 February 2017)

Mr Odgers: Of course, your Honour. I am just attempting to respond to the proposition that because you know there is something in the suitcase, the element of intention is met. I just – you can see I am struggling with this. I am saying that cannot be enough.

Kiefel CJ: We know you are struggling, Mr Odgers.

Mr Odgers: I will cease to struggle. I have attempted, manfully, to respond to that.

Nettle J: That is gender normative, Mr Odgers.

Mr Odgers: Yes. Gender – I have struggled personally – whatever the word is – 'person-fully'.