

Availability of post-conviction review for federal offenders in NSW

Attorney-General (Cth) v Huynh & Ors [2023] HCA 13



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The High Court, by majority, has held that ss 78(1) and 79(1)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW) (the CAR Act) apply to a person convicted of a Commonwealth offence by operation of s 68(1) of the *Judiciary Act 1903* (Cth). The effect of the decision is that a person convicted in a NSW court for a Commonwealth offence can apply to the Supreme Court of NSW for an inquiry into conviction or sentence under s 78(1) of the CAR Act, and the Supreme Court can refer the whole case to the court of Criminal Appeal under s 79(1)(b) for determination as an appeal, although the Supreme Court may not direct an inquiry by a judicial officer under s 79(1)(a).

Background

Mr Huynh was convicted in the District Court of NSW of an offence against a law of the Commonwealth, being one count of conspiracy to import a commercial quantity of a border-controlled precursor in breach of s 11.5(1) and s 307.11(1) of the *Criminal Code* (Cth). He was sentenced to imprisonment for 12 years.

After having exhausted all avenues of appeal, Mr Huynh applied to the Supreme Court of NSW for an inquiry into his conviction under s 78(1) of the CAR Act. He sought an order that the whole of the

case be referred to the Court of Criminal Appeal to be dealt with as an appeal under s 79(1)(b). Mr Huynh's application was considered and dismissed by a single judge of the court, Garling J.¹

Mr Huynh applied to the Court of Appeal of the Supreme Court of NSW for judicial review of the decision of Garling J. The Commonwealth Attorney-General was joined as a defendant to the proceeding. By majority, the Court of Appeal held that ss 78(1) and 79(1) do not apply to a conviction by a NSW court for a Commonwealth offence, either of their own force or by reason of s 68(1) of the *Judiciary Act*.² Therefore, Garling J had no jurisdiction to consider Mr Huynh's application under s 78(1) for an inquiry into his conviction.

The Commonwealth Attorney-General and Mr Huynh obtained special leave to the High Court. On appeal to the High Court, the Commonwealth submitted, with Mr Huynh's support, that the Court of Appeal's decision was incorrect. The High Court appointed amici curiae to present arguments responding to those of the Attorney-General and Mr Huynh.

Relevant legislative provisions

Section 78(1) of the CAR Act permits a convicted person to apply to the Supreme Court of NSW for an inquiry into a conviction or sentence. If it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case, s 79 empowers the Supreme Court, on considering such an application or of its own motion, to either:

- (i) direct that an inquiry be conducted by a judicial officer into the conviction or sentence (s 79(1)(a)); or
- (ii) refer the whole case to the Court of Criminal Appeal to be dealt with as an

appeal under the *Criminal Appeal Act 1912* (NSW) (s 79(1)(b)). On receiving a reference, the court is to deal with the case in the same way as if the convicted person had appealed against conviction or sentence (s 86).

In circumstances including where it does not appear that there is a doubt or question as to convicted person's guilt, the Supreme Court may refuse to consider the application (s 79(3)). The registrar of the Supreme Court must report to the Minister as to any action taken under s 79, including a refusal to consider the application (s 79(5)).

Section 68(1) of the *Judiciary Act* applies certain State criminal laws and procedures, so far as they are applicable, to persons who are charged with Commonwealth offences. Section 68(1) extends to laws respecting the procedure for the hearing and determination of appeals, which include 'any proceeding to review or call into question... the decision... of any court'. Section 68(2) of the *Judiciary Act* invests in the several courts of a State exercising jurisdiction with respect to the hearing and determination of appeals arising out of any trial or conviction, like jurisdiction with respect to persons charged with Commonwealth offences.

Reasoning

The majority (Kiefel CJ, Gageler, Gleeson JJ and Jagot J in a separate judgment) found that ss 78 and 79 of the CAR Act do not apply of their own force to Commonwealth offences (at [38], [265]).

In considering whether ss 78 and 79 apply by force of s 68(1) of the *Judiciary Act*, their Honours observed that where a particular provision of State law is an integral part of a State legislative scheme, s 68(1) can pick up part of a State law provided that doing so does not 'give an altered meaning to the



severed part' of the State law (at [65], [269], [271]-[272], citing *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 135).

Their Honours noted that the sole consequence of a referral under s 79(1)(b) is to enliven the jurisdiction of the court to deal with the case as if it was an appeal. Thus, their Honours held that s 78(1) and s 79(1)(b) are laws respecting the procedure for the hearing of appeals and can be applied as Commonwealth laws by force of s 68(1). While the inquiry and reporting process in s 78(1)(a) could not be characterised as a law respecting the procedure for the hearing of appeals, the two courses of action available under ss 79(1)(a) and 79(1)(b) – inquiry and referral to the Court of Criminal Appeal – are distinct and separate and could be severed. The meaning of s 79(1)(b) would not be changed if it were picked up without s 79(1)(a). For those reasons, their Honours held that s 79(1)(b) could be applied by s 68(1) independently of s 79(1)(a) (at [73]-[76], [281]).

The majority therefore concluded that ss 78(1) and 79(1)(b) of the CAR Act are applied as Commonwealth laws by force of s 68(1) on the basis that they are laws respecting the procedure for the hearing

of appeals in the 'like jurisdiction' to that conferred under s 86 of the CAR Act (at [77], [286]). Consequently, the appeal was allowed and orders were made to remit the matter to the Court of Appeal for the hearing and determination of Mr Huynh's application for judicial review of the decision of Garling J.

Justices Gordon and Steward delivered a dissenting judgment, as did Justice Edelman. While their Honours agreed with the majority that ss 78 and 79 of the CAR Act do not apply of their own force to persons charged with Commonwealth offences (at [141], [227], [231]), their Honours found that ss 78 and 79 of the CAR Act cannot be picked up and applied by s 68(1) of the *Judiciary Act* and would have dismissed the appeal.

Their Honours pointed to a number of reasons why neither s 79(1)(a) nor s 79(1)(b) can be applied by s 68(1). First, s 79(1)(a) cannot be picked up because an inquiry is not a judicial proceeding respecting an appeal as required by s 68(1), rather it is an administrative process (at [157]-[160], [246]-[247]). Further, too much rewriting would be required to apply s 79(1)(a) to Commonwealth offences (at [161]-[165]).

Central to the dissent of Justices Gordon and Steward was the finding that s 79(1)(b) cannot be severed from s 79(1)(a). Their Honours held that applying or picking up s 79(1)(b) without s 79(1)(a) would have the effect of applying only one part of an integral part of the State legislative scheme. To do so would give a different legal operation to the scheme by the court abolishing a pathway – an inquiry under s 79(1)(a) – that the legislature has said should be available (at [157], [168]-[169]).

Justice Edelman also observed that if s 79(1)(b) is picked up and applied without s 79(1)(a), this severance would create an inequality between the Executive and the Supreme Court, as the only power available to the Supreme Court would be referral to the Court of Criminal Appeal, while the Executive retained the additional power to direct an inquiry. This was another reason why his Honour concluded that s 79(1)(b) could not be picked up and applied without s 79(1)(a) (at [252]-[256]). BN

ENDNOTES

- 1 *Application of Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry* [2020] NSWSC 1356.
- 2 *Huynh v Attorney-General (NSW)* (2021) 107 NSWLR 75.