COLLINS (HASS) v. THE QUEEN[1]

High Court — application for special leave to appeal — Whether applicant has a right to personally present his application before the High Court — Judiciary Act 1903-1973 (Cth) ss. 78, 86 — High Court Rules 0.70 rr. 2 and 32.

In *Collins (Hass)* v. *The Queen* a High Court of five held that an applicant for special leave to appeal did not have a fundamental right. Hass was seeking special leave to appeal against his conviction for armed robbery and desired to present his application personally. As explained by his counsel, Mr Bennett Q.C., during argument "it is a man who is disillusioned with the legal advice he had before and who now takes the view that he wishes to present his own case to the Court". The High Court held, however, that he was validly barred from doing so by the Rules of Court made pursuant to section 86 of the Judiciary Act 1903-1973 (Cth). Order 70 rule 2(6) of the Rules provides that

> An application for leave or special leave to appeal shall be made to a Full Court by counsel.

In addition Order 70 rule 32(2) provides that

> An appellant who is in custody is not entitled to be present on the hearing of his appeal, or of his application for leave to appeal, without the leave of the Court or a Justice.

It was submitted on behalf of the applicant that those two rules were in conflict with section 78 of the Judiciary Act 1903-1973 (Cth) which provides that

> In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by the laws and rules regulating the practice of those Courts respectively are permitted to appear therein.

This section seems to be an unequivocal *legislative* guarantee that a party in such a court may, at his option, appear personally or by counsel. Such a right accords with basic notions of fairness and justice. However, as Atkin L.J. observed in *G.M.C.* v. *Spackman*,[2] "Convenience and justice are often not on speaking terms".[3] The High Court bypassed the inconvenient effect of section 78 by unconvincing reasoning which denies that section 78 gives *any* right to an applicant for leave to be heard—either personally or by counsel.

McTiernan J. held that section 78 only provides a rule of practice and as such is subject to the Court's power in section 86 to make rules for practice and procedure.[4] It is, indeed, a strange notion that the legislature's statement on such a subject matter should be taken, not as

---

[1] (1975) 8 A.L.R. 150. High Court of Australia; Barwick C.J., McTiernan, Stephen, Mason and Jacobs JJ.

[2] [1943] A.C. 627.

[3] *Id.* 638.

[4] (1975) 8 A.L.R. 150, 152.

an expression of right, but as a mere suggestion. It is also strange that the general delegated power in section 86 to make rules "for carrying into effect the provisions of this Act" should support a rule overriding a specific section. It seems to follow from His Honour's assertion that "The court is master of its own practice"[5] that sovereignty of Parliament is a myth.

The other four Justices, Barwick C.J., Stephen, Mason and Jacobs JJ. in a joint judgment held that an applicant for special leave was not a "party" within the meaning of section 78:

> First, until the grant of leave or special leave, there are no proceedings *inter partes* before the court.[6]

The elaboration given to this point fails to clarify it. It seems that their Honours mean both that an applicant is not a party because when he moves the Court he is not taking action against another party and that an application is not a proceeding before the Court. This ignores the reality that the application is part of the party-against-party proceeding —the proof by the prosecution of the defendant's guilt; a reality reflected in Order 70 rule 32(2) which speaks of an *appellant* being present at the hearing of his application for special leave.

Even if we confine ourselves to the application, it is a proceeding. The High Court Procedure Act 1903-1973 (Cth) shows that there can be "proceedings" other than party-against-party actions. Section 2 defines "matter" to include "any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter". The Rules themselves say that an application for special leave "shall be made to a Full Court".[7] Furthermore the applicant must be regarded as a party to the motion he moves, even if he is the only party. Compare the status of an applicant to a court for the construction of a will or for appointment as a guardian of an orphan. Nor should this judgment draw any support from the fact that section 78 speaks of "parties" not "a party". There is nothing in the context to displace section 23(b) of the Acts Interpretation Act 1901-1973 (Cth) which provides

> In any Act, unless the contrary intention appears—. . .
> (b) Words in the singular shall include the plural, and words in the plural shall include the singular.

The other reason given for their Honours' construction was

> Secondly, the application must exhibit features which attract the court's discretion in granting leave or special leave.[8]

With respect, the fact of a discretion does not deprive the application of its character as a judicial proceeding. Courts can have discretions, for example, when approached for equitable remedies[9] and even for some of

---

[5] *Ibid.*
[6] *Id.* 151.
[7] 0.70 r. 2(6).
[8] (1975) 8 A.L.R. 150, 151.
[9] *Glynn* v. *Keele University* [1971] 1 W.L.R. 487; *Dyson* v. *Attorney-General* [1911] 1 K.B. 410.

the prerogative writs[10] and yet still be involved in judicial proceedings. This point merely begs the question by assuming that there are no proceedings and no parties until leave is granted and the appeal is commenced.

Of course, if the applicant had shown that he was a "party" within the meaning of section 78 he would then have faced the questions of

(a) whether section 79 or section 80 of the Judiciary Act 1903-1973 (Cth) could pick up section 44 of the Prisons Act 1952-1971 (N.S.W.) to bring him before the Court to exercise his right;[11] and

(b) the meaning of the phrase "Court exercising federal jurisdiction" where it appears in sections 78, 79 and 80.[12]

These two general and already much vexed issues have not been clarified by the joint judgment which could be taken to mean that a court is not exercising "federal jurisdiction" unless it is entertaining a party-against-party action.

There is no justification for the result in this case. During argument, McTiernan J. in particular expressed concern at the possibility of applicants abusing a right to appear by misbehaving in court. Mr Bennett Q.C. answered that a right to appear is not an absolute right to be present, but rather a right to present the case—such a right would not include a right to misbehave. It is commented in the joint judgment that "legal aid appears to be readily available".[13] However, it is not a question of whether or not an applicant is adequately represented by a lawyer. It is a question of what constitutes a fair hearing. Here was a man with more faith in his own powers of advocacy and diligence than those of lawyers. This judgment reinforces the legal system's reputation as a system mystified by the lawyers for the lawyers. T. E. F. Hughes Q.C. who appeared for the applicant at an earlier abortive hearing made his contribution by referring to the applicant as being "consumed by a burning desire" to represent himself. Moreover the reasoning of both the joint judgment and the judgment of McTiernan J. is that section 78 does not even guarantee an applicant representation by counsel. At present the Rules require the application to be made by counsel, but the Court makes the Rules.

Natural justice has been offended in the matter of a man's liberty.

GARY A. RUMBLE*

---

[10] *R.* v. *Aston University Senate; ex parte Roffey* [1969] 2 Q.B. 538; *R.* v. *Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust.) Ltd* (1949) 78 C.L.R. 389.

[11] See generally Nygh, *Conflict of Laws in Australia* (2nd ed. 1971) 777-787 and *John Robertson & Co. Ltd* v. *Ferguson Transformers Pty Ltd* (1973) 129 C.L.R. 65.

[12] Lane, *The Australian Federal System* (1972) 388-391.

[13] (1975) 8 A.L.R. 150, 152.

* B.A./LL.B. (A.N.U.); Editor 1974.