



Summary of Judgment

McDONALD [A PSEUDONYM] V THE QUEEN

[2016] VSCA 304

8 December 2016

The Court of Appeal, by majority (Redlich JA and Beale AJA), allowed an appeal, and ordered a permanent stay of an indictment involving a number of child sexual offence charges which were said to have occurred between 1982 and 1986. The applicant is 85 years old and suffers from advanced dementia.

The applicant had been found unfit to be tried by a jury, and was due to face an imminent 'special hearing'.¹ The applicant had applied to the trial judge for a permanent stay of the indictment, which was refused. The applicant then sought leave to appeal against that decision.

The majority considered that the combination of the lengthy delay since the offending occurred; the loss of evidence and witnesses; and the significant mental impairment of the applicant, meant that to proceed with a special hearing of the applicant would involve 'incurable, oppressive and unacceptable unfairness of such an order as to constitute an abuse of process'.²

The majority considered that while there is always a public interest in having a formal determination of guilt or innocence at a special hearing, it is also relevant to have regard to the likely outcome of the proceeding if the applicant were found guilty. The majority highlighted that given the applicant's mental impairment and age, that it was likely that even if he were found guilty, that he would be unconditionally released. In these circumstances, where there was no threat to the community, and general and specific deterrence were unlikely to be sentencing considerations, there was little public interest in the proceeding continuing.

¹ A 'special hearing' is a process under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, whereby a jury may make one of three findings: they may find the accused not guilty of the offence; not guilty because of his mental impairment; or that he committed the offence. If the jury is satisfied beyond reasonable doubt that an accused committed the offence, the judge must either declare that he is liable to supervision (which may either be custodial or non-custodial), or be released unconditionally.

² Reasons [48].

Justice Ferguson dissented. Her Honour considered that it was important to bear in mind that the legislature had established the special hearing procedure, to apply to people suffering from impairments such as the applicant's. Similarly, her Honour considered that the likelihood that, if convicted, the applicant would be released unconditionally, should not be given significant weight, and should not 'lessen the very important public interest in seeing charges for serious offences prosecuted and determined.'³

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.

³ Reasons [54].