

09/70

HIGH COURT OF AUSTRALIA

GRAHAM v R

Barwick CJ, Kitto, Menzies, Owen and Walsh JJ

16 April 1970

JURISDICTION – COMMONWEALTH MATTER – DEFENDANT CHARGED WITH AN OFFENCE UNDER A NSW ACT IN RELATION TO AN INCIDENT WHICH OCCURRED ON A COMMONWEALTH NAVAL AIR STATION AT COWRA (NSW) – CHARGE FOUND PROVED AND SENTENCE IMPOSED – *INTER SE* QUESTION INVOLVED – MATTER MOVED INTO THE HIGH COURT – APPEAL ALLOWED – CONVICTION QUASHED: JUDICIARY ACT (CTH), S40A.

The appellant instituted an appeal to the New South Wales Court of Criminal Appeal against his conviction and sentence for an offence against s12 of the *Crimes Act* 1966 (NSW) 'for that he did break and enter a building of Her Majesty situate at the R.A.N. Air Station at Nowra and did steal certain firearms'. In the course of the hearing of the appeal, counsel for the appellant indicated that he would submit that the Naval Air Station at Nowra was a place acquired by the Commonwealth for public purposes in respect of which the Commonwealth had exclusive power to legislate by virtue of s52(i.) of the *Constitution* and, accordingly, that the *Crimes Act* (NSW) did not apply on the Station. The Court thereupon concluded that an *inter se* question had arisen and the matter was removed into the High Court under s40A of the *Judiciary Act*. The former Attorney-General considered that the Commonwealth should seek leave to intervene and that this was an appropriate case in which to brief the Solicitor-General.

HELD: Appeal allowed. Conviction quashed and the appellant discharged.

1. **There was no question that there was an *inter se* question involved.**
2. **If it was intended to allege in the indictment a building belonging to Her Majesty in right of the Commonwealth, there was no such offence.**
3. **Accordingly, the appeal was allowed the conviction quashed and the appellant discharged.**

THE COURT:

Mr Papayanni: If the Court pleases, I appear for the appellant in this matter. The appellant is also here in person to answer his bail.

BARWICK CJ: Very well.

Mr Papayanni: If the court pleases, the Solicitor-General will outline the position to the court.

BARWICK CJ: Thank you, Mr Papayanni. Yes, Mr Solicitor?

THE SOLICITOR-GENERAL: Your Honours, it may be convenient if I state the position. This is a criminal appeal removed under s40A of the *Judiciary Act*, as one of the grounds involves an *inter se* question. It was an appeal from a conviction and sentence of five years' penal servitude imposed on the 26 May 1969 at Nowra, following a plea of guilty.

There were several grounds of appeal. Ground 4, the ground of appeal filed on the 10 October 1969 is that the facts do not support at law that the ingredients of the offence alleged were made out. This was intended to raise the question whether the words "building belonging to Her Majesty" in s112 of the State *Crimes Act* those words were inserted with other words in 1924 by amendment – include "building belonging to Her Majesty in right of the Commonwealth". The words which were added to s112, which is the break, enter and steal section, in 1924 were the following words:

"Office, store, garage, pavilion, factory or workshop or any building belonging to His Majesty or to any government department or to any municipal or other public authority."

Those words were added in 1924. The prisoner was charged with breaking and entering and stealing from a building belonging to Her Majesty situated HMAS "Albatross", which in fact is a naval air station.

The position is that a number of authorities indicate that the presumption is against such a construction of a State statute. One of the principal authorities is the *Essendon Corporation v Criterion Theatres Ltd* [1947] HCA 15; 74 CLR 1; [1947] ALR 270. Sir John Latham spoke on this question at CLR pp9 to 11 and Sir Owen Dixon at CLR pp25 to 27.

In the present section and other sections the context rather supports the presumption – and we do not feel in a position to argue to the contrary. If the Court agrees with that situation the result would be that the offence under the *Crimes Act* is not made out, or from another point of view, that is if it was intended to allege in the indictment a building belonging to Her Majesty in right of the Commonwealth, there is no such offence. So that if that is right we would concede that on this ground, and on this ground alone, the appeal, should be upheld and the conviction and sentence set aside.

BARWICK CJ: There is no question that there was an *inter se* question involved?

THE SOLICITOR GENERAL: No question about it.

BARWICK CJ: The other grounds did raise the question of validity in operation of the State Act, having regard to the federal constitution.

THE SOLICITOR GENERAL: That is right, your Honour, similar question to *Worthing v Rowell & Muston Pty Ltd* [1970] HCA 19; (1970) 123 CLR 89.

BARWICK CJ: Very well, Mr Solicitor. Having regard to what you the Solicitor General has said, the appeal will be allowed. The conviction will be quashed and the appellant will be discharged.

WALSH J: There is no other matter which would require him to be kept in custody, is there?

Mr Papayanni: No. There were other sentences but they were vacated by the Court of Criminal Appeal in relation to this matter.

WALSH J: Yes thank you.

BARWICK CJ: This is the only matter on which he was on that he was granted bail by this Court?

Mr Papayanni: That is correct.

BARWICK CJ: He has surrendered to that bail and he can be discharged.

APPEARANCES: For the appellant Graham: Mr J Papayanni, counsel. Morgan, Ryan and Brock, solicitors. For the respondent The Queen: Mr HA Snelling QC, Solicitor-General for New South Wales with him Mr MH McLelland, counsel. Instructed by the Clerk of the Peace.
