

= Dietrich v The Queen =

Dietrich v The Queen is an important legal case , stemming from an incident that took place on 17 December 1986 , that was decided in the High Court of Australia on 13 November 1992 . It concerned the nature of the right to a fair trial , and under what circumstances indigent defendants ( defendants who cannot afford legal representation ) should be provided with legal aid by the state . The case determined that although there is no absolute right to have publicly funded counsel , in most circumstances a judge should grant any request for an adjournment or stay when an accused is unrepresented . It is an important case in Australian criminal law , and also in Australian constitutional law , since it is one of a number of cases in which some members of the High Court have found implied human rights in the Australian Constitution .

= = Background to the case = =

On 17 December 1986 , the accused , a career criminal named Olaf Dietrich ( born 1952 ) , flew from Bangkok , Thailand , to Melbourne Airport . He had imported at least seventy grams of heroin , which he concealed within condoms that he had swallowed . He was arrested the next morning by the Australian Federal Police , who searched his flat and found one of the condoms in the kitchen , and some heroin in a plastic bag under a rug in another room . He was taken into custody , and passed the remainder of the condoms during the night at the hospital in Pentridge Prison . Dietrich alleged that the drugs had been planted by the police .

Dietrich was tried in the County Court of Victoria in 1988 for a trafficking offence under the Customs Act 1901 and certain less serious charges . During the lengthy trial the accused had no legal representation . Although he had applied to the Legal Aid Commission of Victoria for assistance , they said that they would only help him if he pleaded guilty , an option which Dietrich did not want to take . He applied to the Supreme Court of Victoria for legal assistance , but was again turned down . Although Dietrich was acquitted of the fourth charge ? regarding the possession of a quantity of heroin separate to that which was involved in the first three charges ? he was convicted of the principal charge in the County Court . Dietrich brought an appeal in the Supreme Court , but that court refused to hear his appeal . He then sought leave to appeal to the High Court of Australia .

= = Arguments = =

In his High Court appeal Dietrich was represented by David Grace , QC . The main argument advanced on Dietrich 's behalf was that his trial was a miscarriage of justice , since he did not have legal representation . He argued that he should have been provided with counsel at public expense , given the seriousness of the crime with which he was charged . Alternatively , he argued that the judge should have stayed or adjourned the trial until he was able to obtain counsel himself . His argument was based on the common law tradition that an accused is entitled to a fair trial .

= = = The right to a fair trial = = =

Dietrich suggested three different sources in law for the right to counsel that he asserted . The first was section 397 of the Victorian Crimes Act 1958 , ( now repealed ) , which provided that " every accused person shall be admitted after the close of the case for the prosecution to make full answer and defence thereto by legal practitioner " . However , the court found that this provision only means that an accused is entitled to counsel paid for by themselves or someone else , and not counsel provided by the state .

The second source that Dietrich proposed was Australia 's obligations under international law , particularly under the United Nations International Covenant on Civil and Political Rights ( ICCPR ) , to which Australia is a signatory . Article 14 ( 3 ) of the Covenant provides that an accused should have legal assistance provided for them " in any case where the interests of justice so require " . Article 6 of the European Convention of Human Rights , to which Australia is not a party , also

guarantees that defendants should be provided with legal aid " when the interests of justice so require " .

Australia has not incorporated the ICCPR into its domestic law with any specific legislation , unlike some other international treaties , such as World Heritage treaties ( see Commonwealth v Tasmania ) . However , Dietrich argued that the common law of Australia should be developed in accordance with the principles in the ICCPR , as well as other international treaties to which Australia is a party . This is the approach used in the United Kingdom , in relation to decisions of the European Court of Human Rights , for example . But the court pointed out that this practice was usually done in relation to interpreting legislation , and in this case the court was being asked " to declare that a right which has hitherto never been recognised should now be taken to exist . "

The third source that Dietrich suggested was a group of similar cases in other common law countries such as the United States and Canada . In the United States , the right to counsel was guaranteed in the Sixth Amendment to the United States Constitution , part of the United States Bill of Rights . The Amendment says that " In all criminal prosecutions , the accused shall enjoy the right ... to have the Assistance of Counsel for his defence . " However , this did not necessarily mean that counsel had to be provided by the state .

In the case of Powell v. Alabama in 1932 , the United States Supreme Court held that the court must provide counsel to defendants in capital trials , that is trials where capital punishment was a possible sentence , if the defendants were too poor to afford their own counsel . In Johnson v. Zerbst ( 1938 ) , the Supreme Court expanded this principle to cover all federal trials , and in Gideon v. Wainwright ( 1963 ) the Court held that under the Fourteenth Amendment , the principle also applied to State courts . More recently , the Supreme Court has recognised the right of people to have counsel at other stages of criminal investigations . For example , the court has affirmed the right of indigent defendants to have counsel provided for them in interrogation after they have been arrested ( Miranda v. Arizona ) , and for line @-@ ups ( United States v. Wade ) .

In Canada , Section Ten of the Canadian Charter of Rights and Freedoms guarantees the right " to retain and instruct counsel without delay and to be informed of that right " , and Canadian case law has found that as a corollary of this right , there is a right to legal aid .

Although it is common for Australian courts to acknowledge developments in other common law countries , including the United States and Canada , the law in those countries on the right to counsel were based on particular provisions of the Constitutions or Bills of Rights of those countries . Australia did not , and still does not , have any such provisions of rights in either the Constitution or in legislation . In taking this into account , it was argued by the court that :

" In this respect , our constitutional law differs from the constitutional law of some of the great common law countries which , by incorporating a Bill of Rights in their Constitutions , have empowered their Courts to construe broadly expressed guarantees of individual rights to include a right to counsel . Having no comparable constitutional foundation , the Courts of this country cannot translate the rights declared by the Courts of those other countries into the municipal law of Australia . "

The High Court also examined a number of related propositions . In particular , they pointed out that when interpreting the legislation which established legal aid services , Australian courts did not recognise an absolute right to counsel in all circumstances , and thus the State does not need to provide counsel for the duration of the trial . The court also raised the question of what a right to counsel would actually mean in practice : that is , would a right to counsel at public expense entitle a person to counsel of a certain degree of experience ? Furthermore , the court suggested that having a right to representation would necessarily imply that a trial conducted without the accused being legally represented would necessarily be unfair , an idea which has been rejected by the Australian courts . The accused must have lost a " real chance of acquittal " before a trial can be regarded as unfair . Essentially , Australian common law recognised a right to a fair trial , but the question of whether the lack of representation caused an unfair trial had to be based on the particular circumstances of each case .

= = = Miscarriage of justice = = =

Dietrich 's other argument was that the trial judge should have used discretionary powers and granted an adjournment until Dietrich was able to provide counsel himself , and that the failure to do so caused a miscarriage of justice . Dietrich had asked the trial judge for an adjournment during the trial , but the judge said that since more than a year had passed since the offence occurred , it was in the interests of the community that the matter be dealt with promptly .

The High Court said that the trial judge did not seem to be aware that he had the authority to adjourn the trial . Another factor which complicated the case was that although the jury found Dietrich guilty of importing the heroin in the condoms , they found him not guilty of owning the heroin which had been hidden in a plastic bag . For the High Court , this uncertainty meant that it was possible that Dietrich could also have been acquitted of the other charges , if he had been legally represented :

" Central to this conclusion is the not guilty verdict returned by the jury on count four . The evidence against the applicant appears strong on all counts but , in circumstances where the jury found him not guilty on one count , how can this Court conclude that , even with the benefit of counsel , the applicant did not have any prospect of acquittal on count one , of which he was then deprived by being forced to trial unrepresented ? "

Significantly , the possibility that Dietrich may have been acquitted differentiates this case from the unsuccessful 1979 *McInnis v R.* appeal . *McInnis* , like Dietrich , had appealed to the High Court against his conviction , arguing that the failure to adjourn the proceedings while *McInnis* sought legal representation resulted in a miscarriage of justice . However , the majority in the *McInnis* appeal found that *McInnis* was very unlikely to have been acquitted , even with full representation . This was clearly not the case with Dietrich .

= = Judgment = =

The majority in the High Court decided that although there was no right at common law to have publicly provided legal representation in all cases , in some cases representation is appropriate to ensure a fair trial . Although judges no longer have the power to appoint counsel for an accused , since that function has been largely taken over by legal aid agencies , a trial judge should use their power to adjourn a case if it is in the interests of fairness that an accused have representation , which would encourage the legal aid agencies to provide counsel .

Two of the judges , Justice Deane and Justice Gaudron , went further and suggested that the right to representation in some circumstances is founded in the Constitution . They said that Chapter Three of the Constitution , which represents the Judicature with the notion of separation of powers , and vests judicial power exclusively in the courts , requires that judicial process and fairness be observed .

Another two judges , Justice Brennan and Justice Dawson , dissented , Justice Brennan arguing that it would not be proper for judges to use their power to adjourn trials to put pressure on the various legal aid agencies to change their decisions .

As a result of the majority decision , the court ordered that the application to appeal be granted , that the conviction be quashed , and that there be a new trial .

= = Consequences = =

The case reinvigorated debate about who should be provided with legal aid , and raised the possibility that those charged with serious offences could escape conviction if legal aid was not provided . This placed pressure on the legal aid authorities to fund these cases , and fears emerged that they would need to pull funds from other cases to meet the new demands , especially when faced with " complex criminal cases " which may entail high costs over extended periods of time . Although there are no precise figures about the effect of the decision on legal aid budgets , a Senate inquiry agreed that the decision had the potential to divert legal aid funding towards criminal cases at the expense of civil or family law matters . Among the solutions to these problems were proposals

for the state legal aid commissions to maintain " emergency funds " that could be used in major criminal cases ; the South Australian Criminal Law ( Legal Representation ) Act 2002 , which was designed to allow the courts to seize a defendant 's assets to prevent false claims under the Dietrich principle ; and the introduction of legislation in the Parliament of Victoria amending the Crimes Act 1958 to allow judges to directly order that legal aid funding be granted , rather than to simply order a stay .

= = = Olaf Dietrich = = =

Although the High Court ordered that the verdict of the original conviction be overturned and that a retrial be conducted , there was never any retrial since Dietrich had already served his sentence . Dietrich was released on parole in July 1990 , and he subsequently changed his name by deed poll to Hugo Rich .

In 1995 he was convicted of three armed robberies and jailed for 13 years . Upon appeal two of those convictions were quashed and retrials were ordered , while a third was upheld . Only one of these counts was retried , and once again a guilty verdict was returned . In 2001 he was eligible for day leave , and he gained media attention by leaving the decision as to whether or not he should be allowed to do so up to the readers of the Herald Sun . A poll conducted by that newspaper returned a convincing " no " .

After his release in October 2004 , he once again faced court for firearms charges and , later , for the murder of security guard Erwin Kastenberger during an armed robbery in Blackburn North , Victoria on 8 March 2005 . He was found guilty of the murder of Erwin Kastenberger in the Supreme Court of Victoria on 12 June 2009 , and he was subsequently jailed for life with a non @-@ parole period of 30 years .