

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL**

Case Title: Collaery v The Queen

Citation: [2021] ACTCA 1

Hearing Date: 27 January 2021

Decision Date: 27 January 2021

Reasons Date: 9 February 2021

Before: Burns J

Decision: See [20]

Catchwords: **APPEAL** – application to vacate appeal dates – where new senior counsel volunteered to provide services to appellant pro bono – senior counsel not available to appear at listed appeal dates – failure of Attorney-General to amend certificate issued under s 26 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) to permit senior counsel to take instructions – consideration of impact on appellant

Legislation Cited: *Intelligence Services Act 2001 (Cth) s 39*
National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) ss 26, 27
Supreme Court Act 1933 (ACT) s 37J(1)(k)

Parties: Bernard Collaery (Appellant)
The Queen (Respondent)

Representation: **Counsel**
K Archer with C Flynn and K Harris (Appellant)
C Tran with D Johns (Respondent)
T Begbie (Attorney-General (Cth))

Solicitors
Gilbert & Tobin (Appellant)
Commonwealth Director of Public Prosecutions (Defendant)
Australian Government Solicitor (Attorney-General (Cth))

File Number: ACTCA 27 of 2020

Decision under appeal: Court/Tribunal: ACT Supreme Court
Before: Mossop J
Date of Decision: 26 June 2020
Case Title: R v Collaery (No 7)
Citation: [2020] ACTSC 165

BURNS J:

1. On 27 January 2021, exercising the jurisdiction of the Court of Appeal as a single judge pursuant to s 37J(1)(k) of the *Supreme Court Act 1933* (ACT), I vacated the date allocated for the hearing of this appeal, indicating that I would provide my reasons later. These are those reasons.

Background

2. The appellant, Bernard Collaery, is awaiting trial on four charges alleging breaches of s 39 of the *Intelligence Services Act 2001* (Cth), and one charge of conspiracy to breach s 39. Those charges are contained in an indictment dated 12 September 2019. The charges are based upon events alleged to have occurred between 1 December 2012 and 17 March 2014.
3. Between 25 and 29 May 2020 the primary judge conducted a hearing pursuant to s 27 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act). On 26 June 2020 his Honour pronounced orders and published reasons in effect determining that significant parts of the accused's trial would be closed to the public and that aspects of the evidence to be led at the trial could not be published. These orders were sought by the Attorney-General of the Commonwealth (the Attorney-General).
4. The appellant was represented at the hearing before the primary judge by P Boulton SC, C Ward SC and R Khalilzadeh. Both the Crown and the Attorney-General were represented by senior and junior counsel.
5. On 3 August 2020 the appellant filed a Notice of Appeal from the orders made by the primary judge. On 7 October 2020 this Court listed the appeal for hearing on 15 February 2021 with an estimate of two days.
6. On or about 23 December 2020 the appellant had a conversation with Mr Bret Walker SC at a social function. Mr Walker volunteered to provide his services pro bono to the appellant for the appeal. Mr Walker is an eminent senior counsel well suited by experience to assisting in the appeal, having formerly held the office of Independent National Security Legislation Monitor. On 23 December 2020 the appellant's solicitors sent an email to the Australian Government Solicitors' (AGS) office at 11:47am in the following terms:

Following on from our call this morning, the Defence requests that Bret Walker SC be added to the list of Defendant Legal Representatives and Collaery Legal Representatives, for the Attorney-General's certificate and for the purpose of the s 22 orders providing for Mr Collaery to give instructions.

For the purposes of handling classified material, following a security briefing, Mr Walker will be able to use Dr Christopher Ward's chambers and the safe installed in Dr Ward's office. We would appreciate confirmation that this arrangement is acceptable to the Attorney-General.

As you would appreciate, given the timing of the upcoming appeal, confirmation of Mr Walker's addition to the certificate and the security arrangements is an urgent matter. Please let us know as soon as possible if there are any issues with Mr Walker's addition.

As soon as Mr Walker's addition is confirmed we would like to arrange for his security briefing at the earliest opportunity.

7. By a separate email sent to AGS at 1:58pm that same day, the solicitors for the appellant advised that “[B]ret Walker SC will now lead the appeal for Mr Collaery, with Mr Ward SC, and regrettably, we have been advised that Mr Walker is unavailable on the current dates”. The appellant’s solicitors indicated that they intended to apply to the Court for the appeal date to be vacated and for the appeal to be listed at a later date.
8. At 2:13pm on 23 December 2020 a solicitor at AGS responded to the effect that the Commonwealth would wish to carefully consider the suggestion that the date for the appeal be varied and that it was unlikely that instructions would be received that day, or perhaps until after the new year.
9. At 3:24pm on 23 December 2020 a solicitor from the Commonwealth Director of Public Prosecutions advised the appellant’s solicitors that the Crown did not consent to the vacation of the appeal dates, and suggested that the matter be listed before the Court of Appeal Registrar in the first sitting week of 2021.
10. Against this background the appellant’s solicitors emailed the Registrar of the Court at 4:18pm on 23 December 2020 asking that the matter be listed “before the Court of Appeal Registrar or the duty judge” in the first week of January, and stating that an application and affidavit would be filed. The Senior Deputy Registrar replied at 4:38pm attaching a copy of the Notice to Practitioners regarding the listing of matters outside the law term. The Senior Deputy Registrar advised that consideration would be given to the appellant’s request once the appropriate application and supporting affidavit were filed.
11. On 24 December 2020 an application was filed seeking orders that the application be heard outside the term and that the date for the hearing of the appeal be vacated. The application was supported by an affidavit affirmed by the appellant’s solicitor annexing the email correspondence referred to above.
12. The application came before me as duty judge on 27 January 2021. On the hearing of the application, further email correspondence was tendered. On 22 January 2021 AGS emailed the solicitor for the appellant stating:

Relevant Commonwealth officials have been considering your request to add Bret Walker SC to the certificate. A guiding principle in these considerations is ensuring that access to the highly sensitive national security information disclosed in this proceeding is restricted to active and necessary participants in the proceeding.

We understand Mr Walker SC is proposed to be briefed to lead the appeal, but is presently unavailable for the listed dates of the appeal (15-16 February 2021).

We propose to await the outcome of your client’s application to vacate the hearing dates, which is presently listed on 27 January, before determining Mr Walker SC’s status under the certificate. Please let us know if Mr Walker SC is to play an active role regardless of his availability to appear for your client on 15-16 February. Having a clear picture of the expected involvement for Mr Walker SC will assist the Commonwealth to properly action this request.

13. By email to AGS at 6:12pm on the same date the appellant’s solicitor responded:

As we advised in late December, Mr Walker SC has been briefed to advise and appear for Mr Collaery in this matter. Unavailability on particular dates does not render him inactive in the matter.

The position taken by the Commonwealth is prejudicial to our client, both the unwarranted delay in responding to this request and the decision to decline to add a senior counsel briefed in the matter to the certificate without further information. This is unfair to our client in circumstances where the appeal is listed imminently and may still proceed on those dates.

We repeat our request for Mr Walker to be added to the certificate immediately.

14. By an email sent on 25 January 2021 at 5:33pm, effectively one working day before the application was listed before me, AGS responded to the appellant's solicitors as follows:

Thank you for clarifying that the appellant wishes to brief Mr Walker SC to advise and appear in this matter, regardless of whether or not the appellant's application to vacate the appeal dates is successful.

We confirm that Mr Walker SC is now approved, on the following basis, as a member of the Defendant's Legal Representatives for the purposes of the Attorney-General's certificate and the s 22 orders made in this proceeding (including the orders applying to the appeal).

Please provide Mr Walker SC with a copy of the Attorney-General's certificate and copies of the s 22 orders made in this proceeding and ensure he is familiar with the requirements of the certificate and orders.

We appreciate that, by reason of his previous roles, Mr Walker SC may already be familiar with the treatment of classified material within the Commonwealth. However, prior to Mr Walker SC being granted access to the national security information in this proceeding, he will still need to undergo a practical security briefing to ensure he is made aware of the specific practical requirements to ensure the secure storage and handling of the information in this proceeding. This briefing can be arranged promptly, subject to Mr Walker SC's availability. Could you please let us know some windows of time when Mr Walker SC is available this week, so we can make arrangements for this briefing to occur?

The s 26 Certificate

15. The primary judge succinctly summarised the effect of the operation of the NSI Act, and in particular s 26, as follows at [15]:

Where the Act applies, a significant part of the regime set out in the Act involves requiring the prosecutor, the defendant or a defendant's legal representative to give notice to the Attorney-General if the person knows or believes that national security information will be disclosed in the proceeding: s 24. Where notice has been given, the Attorney-General may issue a certificate in relation to that information: s 26(2)(b). Such a certificate may only be issued if "the Attorney-General considers that the disclosure is likely to prejudice national security": s 26(1)(c). Where a certificate is issued, it is an offence for a person who has been given a certificate to disclose information in contravention of the certificate: s 43. After a certificate has been issued it is then necessary for the court to hold a hearing to decide what orders should be made in relation to the information the subject of the certificate: s 27(3). Orders must then be made by the court under s 31. When those orders are made then the s 26 certificate ceases to have effect: s 26(5). By this regime it is possible to protect security sensitive information required to be disclosed in federal criminal proceedings up until the point where the court decides what orders should be made in relation to that information.

16. As the primary judge observed, on 18 September 2019 the Attorney-General issued a certificate under s 26 of the NSI Act identifying certain material in the prosecution brief as sensitive and prescribing the circumstances in which that information could be disclosed. It was common ground in the hearing of the present application that before Mr Walker could take instructions from the appellant or have access to the Crown brief of evidence, the Attorney-General had to amend the s 26 certificate to permit disclosure of the sensitive information to Mr Walker. This the Attorney-General apparently did not do until on or about 25 January 2021.

Consideration

17. The power reposed in the Attorney-General by the NSI Act effectively enables the Attorney-General to veto an election by an accused person to instruct a particular

lawyer in proceedings to which the NSI Act applies. Because of the extraordinary nature of this power it becomes the Attorney-General to exercise it with the greatest efficiency that the particular case permits, and strictly for the purposes for which the power was given. The power to refuse to include a lawyer nominated by an accused person should not be exercised in order to gain a forensic advantage. Nor is it any part of the role of the Attorney-General to base his or her decision on whether he or she thinks that it is necessary for the accused to instruct that particular lawyer. The email from AGS to the appellant's solicitors on 22 January 2021 (see [12] above) carries a disturbing suggestion that those who represented and advised the Attorney-General perceived that their satisfaction at the necessity for Mr Walker to be briefed by the appellant was in some way relevant. It clearly was not.

18. Counsel will often appear in court on behalf of an accused person, but it is obvious that this is only one of many roles that counsel may assume. Even if counsel cannot appear in court on a particular day, they may nevertheless provide advice to the client, draft submissions and converse with those counsel who will be appearing. It is for the client to form a judgement whether briefing particular counsel will add value to the defence.
19. If this had been a simple case of a late decision to brief Mr Walker in circumstances where he was unavailable on the dates allocated for the appeal, I would have refused the application to vacate the appeal dates. The failure of the Attorney-General to act upon the request that the s 26 certificate be amended to permit Mr Walker to have access to the brief and to take instructions from 23 December 2020 until 25 January 2021 meant that any benefit to the appellant in briefing Mr Walker with regard to the appeal in this Court was likely to be significantly reduced if not lost entirely. I consider this to be unfair on the appellant.
20. For this reason I acceded to the appellant's application to vacate the appeal date.

I certify that the preceding twenty [20] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate:

Date: