

Sydney District Court

R v X

Fitness Proceedings under Division 6 of Part 1B of the *Crimes Act 1914 (Cth)*

Outline of submissions on behalf of X

Summary

1. For the reasons set out below, it is respectfully submitted that the Court may reach the following findings with respect to Ms L, pursuant to Division 6 of Part 1B of the *Crimes Act 1914 (Cth)*:
 - a. The accused is unfit to be tried.
 - b. There has been established a *prima facie* case that the accused committed the offence of ###.
 - c. The Court may be satisfied that, having regard to the bases set out in s 20BA(2), it is inappropriate to inflict punishment, or to inflict any punishment other than a nominal punishment, and dismiss the charge (**s 20BA(2) and (3)**). If not so satisfied, the Court must move on to consider whether, on the balance of probabilities, Ms L will become fit to be tried within 12 months (**s 20BA(4)**).
 - d. On the balance of probabilities, Ms L will not become fit to be tried within 12 months (**s20BA(4)**).
 - e. There is no evidence to suggest that appropriate or beneficial treatment would be available to the accused in a hospital setting (**s 20BC(1)**).
 - f. It is more appropriate to order the accused's conditional release from custody rather than to make an order for her detention (**s 20BC(2) and (5)**).
 - g. Proposed conditions for Ms L release.

Applicable law

2. In *Kesavarajah v R* (1994) 181 CLR 230 at 242-243 (per Mason CJ, Toohey and Gaudron JJ), the High Court determined that State law regulated the mode of determining whether a person was fit to stand trial and the *Crimes Act 1914 (Cth)* regulated the consequences that flowed from that finding for persons charged with Commonwealth offences.
3. Fitness is to be determined on the balance of probabilities. The question of fitness is to be determined by Judge alone (s 11(1) *Mental Health (Forensic Provisions) Act 1990 (NSW)* ('MH(FP)A'). An inquiry is to be conducted in a non-adversarial manner (s12(2) MH(FP)A), and the onus of proof does not rest on any particular party (s 12(3) MH(FP)A).
4. The criteria for assessing fitness set out by Smith J in *R v Presser* (1958) ALR 248 and applied in *Kesavarajah v The Queen* (1994) 181 CLR 230 are applicable to matters involving Commonwealth charges. They are as follows:
 - a. To understand the nature of the charge,
 - b. To plead to the charge and to exercise the right of challenge,

- c. To understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged,
 - d. To follow the course of the proceedings,
 - e. To understand the substantial effect of any evidence that may be given in support of the prosecution, and
 - f. To make a defence or answer the charge. Where the accused has counsel, he/she must be able to do this through counsel by giving any necessary instructions and letting them know what his version of facts is and, if necessary, telling the court what it is.
5. The anticipated length of the trial is a factor relevant to the determination: *Kesavarajah* at 245. The court may make the determination as to whether a *prima facie* case has been established by reference to documentary material such as a statement of facts and/ or brief of evidence: *R (Cth) v Sharrouf* [No. 2] [2008] NSWSC 1450 at [55]. It is also possible to dismiss the charge on the grounds that it is inappropriate to inflict any punishment on the accused at all: s. 20BA(2). Section 20BA(2) provides that where a court determines that there has been established a *prima facie* case that the person committed the offence, but the court is of the opinion that it is inappropriate to inflict any punishment, or to inflict any punishment other than a nominal punishment, the court must, by order, dismiss the charge and, if the person is in custody, order the release of the person from custody. In reaching that decision the Court is to have regard to:
- a. the character, antecedents, age, health or mental condition of the person; or
 - b. the extent (if any) to which the offence is of a trivial nature; or
 - c. the extent (if any) to which the offence was committed under extenuating circumstances.

The evidence

6. Dr R, psychiatrist, was retained by the accused to provide a psychiatric assessment. Dr R assessed the accused on #### and produced a report dated #####. Dr R's report made the following relevant observations:
- a.
 - b.
7. Dr R concluded:
- a.
 - b.

Prima facie case

8. The accused's accepts that the Statement of Facts accurately reflects the prosecution's evidence and that the evidence establishes a *prima facie* case that X committed the offence charged (s20B(3)) and that the Court considering whether a *prima facie* case has been established takes the Crown case at its highest: *Sharrouf* [No. 2] at [39].

Possible dismissal on the grounds that it is inappropriate to inflict any punishment (s20BA(2))

9. In light of X's age (47), lack of criminal antecedents, chronic schizophrenia and cognitive impairment, the Court may reach the conclusion that it is inappropriate to inflict any punishment on X, and dismiss the charge. If the Court concludes that the serious nature of the charge weighs against such a disposition, the Court must then determine whether the accused will become fit within 12 months.

Finding about fitness within 12 months (s20BA(4))

10. The accused is unlikely to become fit within 12 months.
11. Dr R is of the opinion that "*even if there was intervention to restore fitness on balance of probabilities this is not likely to restore fitness within a period of 12 months*" (at p #).
12. Further, that "*X has a long history of treatment resistant schizophrenia and the cognitive impairment resulting from the illness cannot be substantially reversed, even with optimal treatment. The intellectual impairment is not capable of being reversed*".

Findings about mental illness (s20BC(1))

13. There is no evidence to suggest that appropriate or beneficial treatment would be available to the accused in a hospital setting.
14. None of the professionals who have examined the accused in the course of these proceedings have recommended or averred to the availability of such treatment. On the contrary Dr R has recommended X be referred by a GP to a psychiatrist to optimise her treatment (p #). It is noted that such a referral has already been made.
15. X has not indicated her consent to hospital treatment to her legal representatives, nor can such consent properly be sought in circumstances where the availability and suitability of hospital treatment is unknown, and concerns exist as to X's capacity to give her informed consent to hospitalisation.

Appropriateness of ordering conditional release rather than detention (s20BC(2) and (5))

16. It submitted that it is more appropriate to order the accused's conditional release from custody rather than to make an order for her detention.
17. The availability of detention pursuant to s 20BC serves a protective, rather than a punitive purpose. There is no evidence that X presents a danger to the community. She has no criminal history, and has adhered to her bail conditions. Her condition is well managed in the community and she is compliant with treatment.
18. The interests of justice would not be served by detaining the accused in circumstances where there remains a live issue as to her culpability for the offence charged.
19. **[Set out possible defence and any problems with the Crown case.]**

Proposed conditions of release (s20BC(5) and (6))

20. It is proposed that the Court could release X subject to the following conditions:
 - a. To be of good behaviour.
 - b. To notify the registry of the Sydney District Court of any change of address within 7 days.

- c. To attend an appointment with her treating General Practitioner Dr D on and attend subsequent appointments as directed.
- d. To attend an appointment with Dr R, psychiatrist and attend subsequent appointments as directed.
- e. To receive such treatment and support for her mental illness and/or mental condition as considered appropriate by her treating doctors for such period as those medical practitioners consider necessary.
- f. To take medication as prescribed by her treating medical practitioners.

Dated: #####