SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Collaery (No 10)**
Citation:	**[2021] ACTSC 311**
Hearing Date:	3 December 2021
Decision Date:	7 December 2021
Before:	Mossop J
Decision:	See [35]
Catchwords:	**NATIONAL SECURITY** – JURISDICTION, PRACTICE AND PROCEDURE – Remittal following appeal – where Court of Appeal set aside primary decision subject to consideration of court only evidence – scope and consequences of the remittal – terms of remittal do not permit updating of court only evidence by the Attorney-General
Legislation Cited:	*Court Procedures Rules 2006* (ACT), pt 2.6, rr 4055, 5001 *Crimes (Sentence Administration) Act 2005* (ACT), ss 12, 17 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 8, 10, 31 *Supreme Court Act 1933 (*ACT), ss 37J, 37M
Cases Cited:	*Collaery v The Queen (No 2)* [2021] ACTCA 28 *House v The King* (1936) 55 CLR 499 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 *O'Rafferty v The Queen (No 2)* [2014] ACTCA 52; 10 ACTLR 278 *R v Collaery (No 7)* [2020] ACTSC 165
Parties:	The Queen (Crown) Bernard Collaery (Defendant)
Representation:	**Counsel** C Tran (Crown) C Ward SC (Defendant) J Kirk SC with T Glover (Attorney-General (Cth)) **Solicitors** Commonwealth Director of Public Prosecutions (Crown) Gilbert + Tobin (Defendant) Australian Government Solicitor (Attorney-General (Cth))
File Number:	SCC 195 of 2019

MOSSOP J:

Introduction

1. The procedural history of this matter is set out in the decision of the Court of Appeal: *Collaery v The Queen (No 2)* [2021] ACTCA 28 at [1]-[11]. The effect of the Court of Appeal's decision was to set aside the decision which I had earlier made in *R v Collaery (No 7)* [2020] ACTSC 165 (the primary decision) under s 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) and remit the matter to me. It is uncontroversial that I must comply with the order of remittal including any limitation on the scope of the remitted proceedings. The issue between the parties is now the consequences of the terms of that remittal order and whether the "court only" material referred to in the order of the Court of Appeal is limited to the material that was available at the time of the primary decision or whether it is open to the Attorney-General to seek to rely upon updated "court only" evidence. The reference to "court only" evidence is to affidavit evidence which the Attorney-General sought to have admitted into evidence on the basis that it would be provided only to the court and not to Mr Collaery or to the Director of Public Prosecutions (representing the Crown).

The decision of the Court of Appeal

2. The description of the decision of the Court of Appeal which follows does not include reference to matters which the Attorney-General has sought to have redacted or varied in the reasons of the Court of Appeal. The decision of Murrell CJ in relation to redactions is currently subject to an application for special leave to appeal to the High Court. For current purposes, the areas the subject of proposed redactions are not of significance and hence avoiding reference to them will not affect these reasons.

3. In considering the nature of the task of the court on appeal, the Court of Appeal found that the decision under s 31 of the NSI Act was to be reviewed for correctness, rather than on the basis that it was a discretion to be reviewed in accordance with *House v The King* (1936) 55 CLR 499. The Court of Appeal's reasons referred to Gageler J's explanation of the difference between those two concepts in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [49]. In that passage, his Honour referred to the dividing line between statutes which require a unique outcome and those which tolerate a range of outcomes, saying "[t]he resultant line is not bright; but it is tolerably clear and workable". The full extent of the Court of Appeal's reasoning on this issue was then as follows:

> 55. The task required by s 31(1) of the NSIA has features that suggest the exercise of a discretion, in that a court performing the task must determine what weight to give to disparate circumstances and principles in order to arrive at a conclusion. In the proper fulfilment of that task, different judges may give different weight to relevant circumstances or principles.
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> 56. On the other hand, there cannot be two correct answers to the task, one being to permit publication of the subject material and the other being to prohibit it. Contradictory answers cannot both be correct in the circumstances of a particular case. As a task imposed by s 31(1) does not allow for a choice between multiple correct outcomes, the decision is a unique-outcome decision, and the applicable standard of review is the correctness standard.

4. The reasons do not explain the basis for the premise underlying this last paragraph, namely, that there can be only one correct outcome. Acceptance of that premise makes

the result reached by the Court of Appeal inevitable. However, the quoted passages do not demonstrate, by reference to the terms of the statute, that the premise is correct. Nevertheless, in the absence of any appeal to the High Court, the law is as stated by the Court of Appeal.

5. The consequence for a trial judge is that interlocutory decisions under s 31 relevant to the management of a criminal case may routinely be the subject of appeals to the Court of Appeal for review on the basis of the correctness standard. This has a tendency to increase fragmentation and delay of criminal proceedings, as this case demonstrates.

6. Having found that its task was to review the decision by reference to the correctness standard, the court then considered and dismissed an application by Mr Collaery to lead further evidence on the appeal. That was material which had been obtained by Mr Collaery pursuant to subpoena after the primary decision.

7. The Court of Appeal then considered the questions identified by Mr Collaery arising out of intermediate conclusions in the primary decision. Having considered those matters, the court came to its consideration of the outcome of the appeal. The court concluded:

> Nevertheless, we are satisfied that the primary judge erred in his Honour's conclusion. Although it is strictly unnecessary to identify how that error came about by, for example, identifying error in the intermediate factual determinations made by the primary judge, it is likely that his Honour gave too much weight to the risk of prejudice to national security and too little weight to the interests of the administration of justice in the circumstances of this case.

8. That conclusion was explained in the following paragraphs which may be summarised as follows:

    (a) There was a respectable argument that the "neither confirm nor deny" policy has continuing application to the "Identified Matters" (being, the six specific matters Mr Collaery sought public disclosure of).

    (b) It was implicit in the findings of the primary judge that it may be that no risk to national security would materialise.

    (c) The risk of damage to public confidence in the administration of justice where proceedings or parts of proceedings are held in closed court is very real, particularly so in the case of criminal prosecutions.

    (d) The Parliament has made the court the gatekeeper who determines whether proceedings should be held in closed court.

    (e) Public confidence springs from the general adherence to the open court principle and the public accepts that a few matters must be heard in closed court because it is confident that courts are committed to the open court principle and will only close the court for cogent reasons.

    (f) The open court principle stands as a bulwark against the possibility of political prosecutions by allowing public scrutiny and assessment of the actions of the Crown and the Attorney-General by reference to the evidence adduced in a criminal trial.

    (g) Convictions on the charges against Mr Collaery may raise questions of his fitness to practice as a lawyer and affect his professional dealings. The significance of the conviction for those who deal with him may be affected by

what is disclosed during the course of the proceedings about the circumstances in which his statements were made and his motivation for making them.

9. The court concluded:

> The provisions of s 31(7) of the NSIA make it plain that the matters to which we have referred will not, in all cases, be determinative of what orders should be made under s 31, and that they must be weighed against any identified risk to national security. However, in this case we are satisfied that the interests of the proper administration of justice clearly outweigh any risk of prejudice to national security.

10. Of relevance to the present issue is what the court said under the heading "Orders" at the end of its judgment. That was as follows:

> **Orders**
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> 127. The appeal is allowed.
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> 128. In the proceedings below, the Attorney-General sought to rely on "court only" material that had not been provided to the appellant because of its sensitivity. The appellant said that the primary judge should not receive the material. The primary judge did not feel compelled to address the admissibility and possible effect of the material because, without reference to it, his Honour was satisfied that the order under s 31(4) of the NSIA should prohibit publication of information concerning the Identified Matters.
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> 129. Subject only to the primary judge's consideration of the admissibility and effect of the "court only" material, the order made by the primary judge should be set aside. Pursuant to s 31(4) of the NSIA there should be an order that is limited to protecting from disclosure the highlighted parts of the brief that, ultimately, the appellant conceded should not be disclosed. The final form of that order is a matter for the primary judge after his Honour has heard further submissions from the parties.
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> 130. The matter is remitted to the primary judge to consider the admissibility of the "court only" material and, if it is admissible, the effect of that material on the s 31(4) order.

The orders of the Court of Appeal

11. The bench sheet recording the orders of the Court of Appeal was annexed to the written submissions provided by the Crown. The bench sheet recording the orders and notes made on 6 October 2021 at the time that the Court of Appeal's decision was made is, relevantly, as follows:

> HH makes the following orders, directions and notations:
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> 1. The appeal is allowed.
>
> 2. The matter is remitted to the primary judge to determine in accordance with the judgment and consider the admissibility of the "court only" material and, if it is admissible, the effect of that material on the s 31(4) order.
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> 3. The parties are directed to contact my associates by **4:00PM** on **Wednesday 13 October 2021** to inform the Court if there will be an application made to redact any parts of the judgment.
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> **Notes (other than Orders):**
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> - In the proceedings below, the Attorney-General sought to rely on "court only" material that had not been provided to the appellant because of its sensitivity. The primary judge did not feel compelled to address the admissibility and possible effect of the material because, without reference to it, his Honour was satisfied to [sic] that the order under s 31(4) of the NSIA should prohibit publication of the information concerning the Identified Matters.

- Subject only to the primary judge's consideration of the admissibility and effect of the "court only" material, the order made by the primary judge should be set aside. Pursuant to section 31(4) of the NSI [sic] there should be an order that is limited to protecting from disclosure the highlighted parts of the brief that, ultimately, the appellant conceded should not be disclosed. The final form of that order is a matter for the primary judge after his Honour has heard further submissions from the parties

12. The terms of the notes reflect the terms of [128] and [129] of the reasons set out above. Although recording that "HH" (Her Honour) made the orders, orders 1 and 2 are the orders of the Court constituted by three judges (Murrell CJ, Burns and Wigney JJ) delivered pursuant to s 37M of the *Supreme Court Act 1933* (ACT) and order 3 appears to be an order made by Murrell CJ when sitting as a single judge constituting the Court of Appeal under s 37J of the Act.

13. No party provided a copy of any perfected orders of the Court of Appeal. No perfected order is on the court file for the Court of Appeal proceedings. An enquiry of the Registrar of the court did not disclose that there were any perfected orders. Undoubtedly, the process of filing and entry of the orders would have made clear which judges made which orders.

14. The provisions of the *Court Procedures Rules 2006* (ACT) relating to filing and entry of orders in civil proceedings are only picked up and applied in relation to appeals in civil proceedings: see r 5001 which picks up pt 2.16 (Judgments and other orders). In criminal proceedings, the relevant orders are often drawn up in the registry because they are incorporated into documents such as warrants for imprisonment or warrants for remand: *Crimes (Sentence Administration) Act 2005* (ACT) ss 12, 17. Where that is not done in the registry, it is open to a party to file a draft judgment and have it entered by the Registrar: *Court Procedures Rules*, r 4055. Rule 4055 does not apply in criminal appeals because the "criminal proceedings" referred to in the rule are defined to exclude an "appellate proceeding": Dictionary, "criminal proceeding". So far as proceedings of the Court of Appeal are concerned, the court has recognised the need to have orders perfected in order to finalise them and put them beyond reopening: *O'Rafferty v The Queen (No 2)* [2014] ACTCA 52; 10 ACTLR 278.

15. The parties approached the present application on the assumption that it was not open to any party to reopen the Court of Appeal orders so as to clarify them. The closest that any party came to that was the identification that it may be possible to make an application under the slip rule. In the circumstances where the parties have not given consideration to the requirements to perfect the orders of the Court of Appeal and have proceeded on the assumption that an order simply recorded on a bench sheet cannot be reopened, I was not assisted by any submissions addressing the consequences of the absence of a perfected order. As a matter of principle, it would appear to me that in an appeal in a criminal case which does not result in the making or amendment of a document such as a warrant for detention in the registry of the court, the order of the court is not put beyond reopening except where it is perfected upon an application by a party in the same way as occurs, where it is necessary, at first instance pursuant to r 4055. Notwithstanding this, the balance of these reasons proceed on the basis that the assumption made by the parties was correct, but they should not be taken in any way as precluding the making of an application directly to the Court of Appeal if that is a course which is available.

Summary of submissions

16. The submission put on behalf of the Attorney-General was that the orders of the Court of Appeal should be interpreted so as to refer to the class of "court only" material, rather than

to the specific material that had been identified at the May 2020 hearing before me. Counsel pointed to the fact that a number of the deponents of the affidavits making up the court only evidence were no longer Commonwealth officers. He pointed to the desirability of the court having up-to-date information before it in order to decide what orders should be made under s 31(4). He pointed to obvious examples where the passage of time would make it appropriate that updated information be put before the court.

17. The submissions made on behalf of the Crown supported the interpretation contended for by the Attorney-General. The submissions emphasised the desirability of the judge with carriage of the matter being in a position to appropriately manage the proceedings and that would include taking into account up-to-date information about the risks to national security arising from disclosure of information.

18. The submissions put on behalf of Mr Collaery emphasised the use of the definite article in the court's reasons at [129] and in the order made ("the 'court only' material"). The submission was that the order of the court was clear in that it referred to the material already in existence and previously identified to the parties and the court. He referred to the possibility that the Attorney-General would be required, in addition to updating the court only evidence, to also update the confidential and open evidence and that this in turn would require that the defendant have an opportunity to properly respond to that evidence. He submitted that it would be unfair for the court to consider a changed environment only by reference to court only material to which Mr Collaery and the witnesses that he called would not have an opportunity to respond. He submitted that this process of perpetual updating would be oppressive, inconsistent with the finality of litigation, the proper administration of justice and the maintenance of public confidence in the judicial system.

Transcript of argument in the Court of Appeal

19. Some light is shed upon the formulation of the orders by what occurred during the course of argument on the Court of Appeal. The hearing in the Court of Appeal occurred on 17 and 18 May 2021. On 18 May 2021 as a result of a question from the bench, Mr Kirk SC, who appeared for the Attorney-General, said that if the primary judge's decision was overturned then the matter should be remitted. One of the reasons for that was the fact that the primary decision had been reached without regard to the court only material which the Attorney-General wished to rely upon. He then said:

> There is - I forget how many, but a set of further affidavits which was considered on careful consideration too sensitive by those who instruct me, even within the confines of a closed court room to provide to the other side. There was a bit of a debate, you will well appreciate below, as to whether or not the court should receive that material - to put it in context because you can well understand why the court might not receive it, but to put it in context, it is far from unprecedented.
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> …
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> But for that reason, if your Honours ultimately upheld the appeal [our] respectful submission as to the appropriate order would be to send it back so that argument can be had and further consideration given to whether the evidence is received, and if so, what significance [it] has and so forth … (Transcript 89-90)

20. Similarly, during the course of the submissions of Mr Begbie QC, who appeared with Mr Kirk, Mr Begbie made reference to there being "a big question about the closed court evidence" and made reference to the cases in a public interest immunity context. He submitted:

> … your Honours probably know that in the public interest immunity context there is good law to the effect that, if the government has more to say about a topic, they ought to be given the opportunity to do that … And so we would say that would be the course that your Honours will adopt as opposed to seeking to finally determine now what the actual national security position was on the 31(7) balance. (Transcript 149)

21. Mr Walker SC, who appeared for Mr Collaery, submitted that regard should not be had to the existence of court only material because of the absence of a notice of contention filed by the Attorney-General seeking to support the decision on an alternate basis. He submitted that the court only evidence was not pressed before the primary judge. Following a question from the bench, he corrected his submission, withdrawing the submission that it was not pressed but identifying that it was proffered but the primary judge did not take it. He submitted that in the absence of a notice of contention, it was not a proper case for remitter. He submitted that if it had been raised on appeal, then he would have submitted that the court should not receive it and that Mr Collaery would wish to consider the position in relation to Chapter III of the *Constitution* (Cth).

22. Mr Kirk responded to this point by pointing out that the written submissions filed five months prior to the appeal hearing made reference to court only material. He submitted that it was not a matter for a notice of contention but that if the court upheld the appeal, the issue should go back to be determined and that Mr Collaery could make any Chapter III submissions at that point.

The underlying problem

23. Underlying the issue that now arises between the parties is that the appeal took in excess of a year to decide. The primary decision was made on 26 June 2020, the notice of appeal was filed on 3 August 2020 and the Court of Appeal gave its decision on 6 October 2021. That delay of over a year was contributed to by the failure of any party to apply to have the appeal expedited and the issues referred to in *Collaery v The Queen* [2021] ACTCA 1.

24. Much has happened within that year which, having regard to material in the public domain, may legitimately be argued to alter the environment in which any decision under s 31 has to be made both in relation to:

    (a) Australia's international relations (which, by reason of the definitions in ss 8 and 10 of the NSI Act is the relevant component of Australia's "national security"); and

    (b) matters which would reflect upon public confidence in the proper administration of justice (a matter upon which the Court of Appeal placed particular emphasis).

25. No doubt there would be additional material not in the public domain which may be pointed to by the parties as being relevant to these issues. The Court of Appeal did not indicate that it had taken any matters arising since May 2020 into account.

26. In the context of the orders of the Court of Appeal, the passage of time creates a tension. Given that the court has to make a decision fairly on the basis of the evidence before it and not on the basis of its own perception of Australia's national security and international relations, how can that exercise be properly undertaken if the effect of the orders of the Court of Appeal is to freeze in time the evidence that can be considered and hence exclude from consideration everything that has happened since May 2020? On the other hand, if evidence is not frozen in time, how can it be updated without restarting the whole of the evidentiary process in a manner that would let all parties lead evidence and contest the significance of that evidence for the ultimate s 31(4) issue?

Decision

27. In my view, the terms of the order of the Court of Appeal are clear when understood in the context in which they were made. The use of the definite article prior to "court only" in the order of the court indicates that it was a reference to the existing court only material, rather than to any court only material or court only material as a general subject matter. Such an interpretation makes sense in the context of the Court of Appeal's decision which was to overturn the primary decision but allow the Attorney-General to have addressed the issue which was left unaddressed in the primary decision and in the decision of the Court of Appeal.

28. The desirability, so far as the administration of justice is concerned, of having the evidence updated is not a sufficient reason to interpret the order of the Court of Appeal differently. The parties did not point to any part of the transcript which referred to the need to update the evidence relevant to the s 31 issue. The reasons of the Court of Appeal do not disclose any consideration of the effect of any change in international relations (or other aspects of national security as defined) upon the balancing exercise required by s 31. The parties before the Court of Appeal had accepted that upon an appeal by way of rehearing it was open to put forward further evidence. As pointed out above, Mr Collaery's application to adduce further evidence on appeal was rejected. There was no attempt to update any of the material before the Court of Appeal so as to take into account the change in Australia's international relations or national security since the primary decision. The position is, almost certainly, that the Court of Appeal did not give consideration to events that had occurred subsequent to the primary decision because the parties had not sought to put evidence of those events before the Court of Appeal. Similarly, because it was not raised at the hearing before the Court of Appeal, in making orders of remittal the Court of Appeal does not appear to have contemplated the possibility that updating evidence might be necessary or appropriate. In those circumstances, there is no reason to read the orders in a way that does not give effect to the use of the definite article.

29. If the court only material is admitted, there is no doubt that the exercise compelled by the orders of the Court of Appeal will be an unusual one. It will involve me weighing the significance of court only material against the Court of Appeal's opinion as to the correct outcome of the balancing exercise in s 31 of the NSI Act in circumstances where that opinion was different to my own. It will involve doing so without regard to many matters in the public domain which have occurred since May 2020 and, most likely, many matters not in the public domain, which might otherwise have been relevant to that balancing exercise.

30. Adopting the approach to the terms of the Court of Appeal's orders which I have outlined is not to say that there is no capacity to ensure under the NSI Act that orders under s 31 properly address current circumstances relevant to the disclosure or nondisclosure of national security information. Although, having regard to the context in which the orders were made, the Court of Appeal's order does not contemplate updated evidence, that does not alter the fact that an order under s 31 is an interlocutory order. Although only limited submissions were made as to the interpretation of the relevant provisions, all parties appeared to recognise that orders made under s 31 might be revisited if circumstances were shown to have changed in a way that warranted their alteration. The point made on behalf of Mr Collaery was that this should be done as part of a hearing at which all aspects of the evidence may be adduced and tested and not confined in a way which limits the exercise to consideration of only the Attorney-General's court only evidence.

31. In my view, the orders of the Court of Appeal, which bind the court upon a remittal, require the court to proceed to consider whether to admit court only evidence and, if admitted, to reach a conclusion in relation to the terms of the s 31(4) order in light of that material and the reasons given by the Court of Appeal. If the position is that such an order is not appropriate because it is based upon evidence which is now outdated, it would then be open to the Attorney-General to apply for an order in different terms in order to accommodate current circumstances. That would require specific consideration to be given by the Attorney-General to whether or not the change in circumstances was such as to make it appropriate to seek more restrictive orders than those which were made. That is distinct from the situation which exists currently which is that the Attorney-General sought orders permitting updated information without identifying whether that information made it more or less likely that orders such as had been sought would be made.

Request for perfected orders

32. At 4:57pm yesterday, after these reasons had been prepared, the Registrar received a request from the solicitors for the Attorney-General for the perfected orders of the Court of Appeal. This request arose as a result of the registry of the High Court, which was dealing with the Attorney-General's application for special leave in relation to the redactions of the Court of Appeal reasons, asking for perfected orders. Having regard to what I have said in these reasons about the significance of perfection of the court orders, I requested that the Registrar defer the entry of the orders until 10am on Wednesday, 8 December 2021 in order that the parties be in a position to consider these reasons and make any application to the Court of Appeal before the orders were perfected.

Orders

33. Having regard to the conclusion that I have reached, it will be appropriate to make such directions as are necessary to permit the court to consider whether to admit the court only material and, if admitted, what order under s 31(4) of the NSI Act should be made. The making of those directions will provide an appropriate vehicle for any party to challenge the correctness of the conclusion that I have reached.

34. As pointed out above (at [15]), nothing in these reasons should be taken as impeding any entitlement of a party to make an application to the Court of Appeal.

35. The orders of the Court are:

    1. The proceedings are adjourned to 10am on Wednesday, 8 December 2021 for directions.

    2. The Attorney-General is to notify my chambers by email by 4pm today if she contends that any part of these reasons should be redacted prior to their publication on the internet.

I certify that the preceding thirty-five [35] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 7 December 2021