SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Collaery (No 3)**
Citation:	**[2019] ACTSC 332**
Hearing Date:	26 November 2019
Decision Date:	27 November 2019
Before:	Mossop J
Decision:	See [32]
Catchwords:	**CRIMINAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Application to delay commencement of a s 27 *National Security Information (Criminal and Civil Proceedings)* Act 2004 (Cth) hearing – hearing date listed many months prior – Attorney-General seeking further time to respond to affidavit evidence of accused – further applications required – s 27 hearing delayed
Legislation Cited:	*Criminal Code 1995* (Cth), s 11.5 *Intelligence Services Act 2001* (Cth), s 39 *National Security Information (Criminal and Civil Proceedings)* Act 2004 (Cth), ss 19, 22, 26, 27, 29(3)
Parties:	The Queen (Crown) Bernard Collaery (Accused)
Representation:	**Counsel** C Tran (Crown) C Ward SC (Accused) T Begbie (Attorney-General (Cth)) **Solicitors** Commonwealth Director of Public Prosecutions (Crown) Gilbert + Tobin (Accused) Australian Government Solicitor (Attorney-General (Cth))
File Number:	SCC 195 of 2019

MOSSOP J:

Introduction

1. These proceedings involve four counts alleging a breach of s 39 of the *Intelligence Services Act 2001* (Cth) and one count alleging a conspiracy to breach that provision contrary to s 11.5 of the *Criminal Code 1995* (Cth). As a result of the issue by the

Attorney-General of a certificate under s 26 of the *National Security Information (Criminal and Civil Proceedings)* Act 2004 (Cth) (NSI Act), a hearing under s 27 of the NSI Act has been listed for three days commencing on 11 December 2019, the last three days of the court term. That listing was made many months ago. The delay in having the s 27 hearing listed appears to have been in order to accommodate the availability of counsel, a factor which, in my view, might have been given too much weight.

2. The timetable that was put in place for the preparation of the hearing involved the Attorney-General putting on his evidence, the accused putting on his and an opportunity for the Attorney-General to put on evidence in reply. The original timetable permitted the Attorney-General one month to put on evidence, the accused five weeks to put on evidence and the Attorney-General two weeks to put on evidence in reply. On 9 October 2019 the timetable was amended following the making of some orders under s 22 of the NSI Act, permitting the accused until 13 November to file and serve his material and allowing the Attorney-General nine days until 22 November 2019 to file and serve evidence in reply. At that stage counsel for the Attorney-General acquiesced to the shortening of the period for evidence in reply but indicated that, depending upon what evidence was filed by the accused, if it was necessary to do so an application to extend the time for evidence in reply would be made.

3. The Attorney-General filed affidavits of three deponents in accordance with that timetable. Two affidavits included material subject to confidentiality orders made under s 22 of the NSI Act.

Affidavit material filed

4. On 13 November 2019 the accused filed eight affidavits. A ninth affidavit was filed on 18 November 2019. Those affidavits included affidavits from:

    (a) Xanana Gusmao, a former president and prime minister of Timor-Leste;

    (b) Jose Ramos-Horta, a former president and prime minister of Timor-Leste;

    (c) Gareth Evans, a former Australian foreign minister;

    (d) Christopher Barrie, a former chief of the Australian Defence Force; and

    (e) John McCarthy, a career diplomat who held a number of ambassadorial positions including ambassador to Indonesia between 1997 and 2000.

5. As I understand it, those affidavits are intended to directly challenge the assertion in the s 26 certificate and the evidence filed on behalf of the Attorney-General that there would be a risk of prejudice to Australia's national security if the information referred to in the s 26 certificate was disclosed publicly during the course of the substantive criminal proceedings.

6. Counsel for the Attorney-General accepted that it was open to an accused person to put on evidence of this nature for the purposes of a s 27 hearing.

7. Given the nature of the matters in contest and the eminence of the deponents of the affidavits and the sensitivities associated with any decision to challenge their evidence or cross-examine them upon their evidence, the Attorney-General seeks more than nine days in order to respond to that evidence.

8. A further affidavit, apparently directed to the extent of disclosure in the media of information that the Attorney-General asserts should not be disclosed, contained a schedule of 137 pages describing 726 such media articles. The affidavit indicates that those media articles comprising at least 1600 pages are proposed to be tendered at the hearing. Those 1600 pages of articles are not included in the affidavit. The Attorney-General wishes to be able to identify each of those articles and determine whether the source of the information in those articles was the allegedly unauthorised disclosure of the information the subject of the charges in these proceedings, or whether there was some independent source of that information which put it into the public domain.

9. There is another affidavit recounting some history of the treaty dealings between Australia and other countries in relation to maritime boundaries with Timor-Leste. While it is not clear at this stage how that evidence will be of significance for the purposes of the s 27 hearing, the Attorney-General wishes to be able to address its substance.

10. Counsel for the Attorney-General has indicated that these matters will not be able to be completed by the date in the current orders or, most likely, by 9 December and seeks to avoid the situation where the Attorney-General is precluded from leading evidence in reply by reason of the expiry of the period allowed for that evidence.

11. He also points to three other matters relevant to whether the s 27 hearing can proceed as scheduled.

12. First, the fact that a request had been made by the accused to permit the giving of access to one of the confidential affidavits filed by the Attorney-General to witnesses proposed to be called by the accused for the purposes of the s 27 hearing. Now that the identity of three of those witnesses is known, each being a former senior official of the Commonwealth government, the Attorney-General is considering whether it would be appropriate to permit them access to the confidential parts of those affidavits so as to permit them to provide further or revised opinions on matters covered in their affidavits in light of the additional confidential material. Counsel indicated that a decision on whether to allow such access would be made on 28 November 2019 or shortly thereafter. If such access was granted then he indicated that it would be likely that further affidavits would be put on by one or more of the witnesses and that the Attorney-General would wish to be in a position to determine what evidence to put on in reply in light of the final expression of opinion by those witnesses.

13. Second, he indicated that the Attorney-General proposed to put on a “court only” affidavit and that if such a course was opposed then it would be necessary for the court to make a ruling for the purposes of s 29(3) of the NSI Act. The details of this affidavit were not fully explained to me. I assume that it is an affidavit which would be put on in reply to the affidavits filed by the accused and hence not a matter which the Attorney-General should have addressed earlier.

14. Third, he submitted that the criminal proceedings were in their early pre-trial stage and preparation for the substantive criminal hearing would not be delayed by any delay in the s 27 hearing. That was because the issue of the extent to which the proceedings were conducted in open or closed court would not affect the substantive preparation for the hearing or the determination of any pre-trial applications.

15. Counsel for the Commonwealth Director of Public Prosecutions indicated that the Director's preference was for the s 27 hearing to proceed on the dates on which it was listed. However, he did indicate that so far as the Director was concerned the parties could continue with the preparation of the matter for hearing in parallel with the determination of the issues required in the s 27 hearing. He indicated that in any event the trial was unlikely to be able to occur prior to 1 May 2020.

16. Senior counsel for the accused submitted that the hearing date should not be vacated and the s 27 hearing should proceed as scheduled. He submitted that the accused had filed his evidence on time and that the only complaint of the Attorney-General was that the accused's evidence was good evidence. He submitted that the evidence should not have come as a surprise to the Attorney-General and that nothing in the affidavits required that the Attorney-General be allowed more time to respond.

17. He indicated that the accused certainly did not stand in the way of the Attorney-General permitting wider access to one of the confidential affidavits so as to allow the accused's former government witnesses to provide opinions based upon it. He accepted that if access was given immediately then it would be necessary for those witnesses to provide any further or revised opinions in a very short period.

18. He also indicated for the first time that the accused took the position that there was nothing in that affidavit which warranted any part of it being treated as confidential. The present status of the affidavit is that it has been disclosed to the accused and his lawyers but subject to confidentiality orders. The accused wishes to bring an application said to be available to him under s 19 of the NSI Act to require the removal of any confidentiality restrictions upon that affidavit. He indicated that it was intended to file such an application this week and to seek to have it determined by the court next week, prior to the scheduled s 27 hearing.

19. Further, he submitted that if the court was to receive any affidavit on a confidential basis then that was an unusual course and required a formal application on the Attorney-General's part in order to permit that course to be followed.

20. As to the conduct of the s 27 hearing, he indicated that cross-examination of the deponents of affidavits filed by the Attorney-General would be likely to be substantial. He also indicated that if required for cross-examination, an application would be made so as to permit either Mr Ramos-Horta or Mr Gusmao to give evidence by video link from a place outside Australia.

Consideration and decision

21. Any decision about what to do must be in the context that dates for a substantial interlocutory application have been set for several months. The vacation of those dates will involve some waste of the court's time and hence misallocation of its resources having regard to the overall workload of the court. Any delay to the s 27 hearing carries with it an increased cost of the proceedings to the parties and a real risk of delaying the substantive hearing. It is of particular significance that the proceedings are criminal proceedings in which a person faces serious charges and, unlike in many criminal cases, the government is not, one way or another, paying the legal costs on all sides. It is of fundamental importance that the accused get a fair trial within a reasonable time. Any delay in the resolution of the s 27 issue is therefore, prima facie, and undesirable course.

22. In my view for the reasons that follow, the evidentiary position faced by the Attorney-General and the number of issues necessary to be resolved prior to the orderly conduct of a s 27 hearing means that it cannot proceed on the dates which have been fixed.

23. First, I accept the submission by counsel for the Attorney-General that the extent of the evidence to which he would be required to respond was not reasonably anticipated by him and that had it been so anticipated then a different timetable would have been put in place. While there was no obligation upon the accused to give notice of the evidence to be called other than as required by the directions made by the court, it is less than ideal that the matter proceed in circumstances where the Attorney-General has been procedurally wrongfooted.

24. Second, I accept the submission by counsel for the Attorney-General that the eminence of the witnesses to be called by the accused and the possible diplomatic sensitivities associated with any decision to cross-examine them complicates the process of determining how to respond to that evidence. I accept the submission by senior counsel for the accused that the Attorney-General is not entitled to complain because the evidence is good evidence. However, it is desirable that careful and earnest consideration be given by the Attorney-General as to how to respond to it.

25. Third, it is clear from the approach to evidence taken by the accused that he perceives the issue as to whether or not the whole of the proceedings are to be conducted in public to be a very significant one. At the moment there are 12 witnesses and the likelihood is that a substantial number of them will need to be cross-examined to a greater or lesser extent. It may be that the number of witnesses increases when the evidence in reply is put on by the Attorney-General. The number of witnesses appears to be inconsistent with the estimate made by the parties of the required length of the hearing when the matter was originally listed. Had the full nature of the evidence and the scope of the contest been made clear to the Registrar then it is likely that the orders made in relation to the hearing would have been different. It is not possible to accurately estimate the length of the hearing at this stage. That will be substantially determined by the length of cross-examination of the Attorney-General's witnesses and whether and to what extent the Attorney-General chooses to cross-examine deponents of the affidavits filed by the accused.

26. Fourth, there is the real prospect of two applications which will need to be determined prior to the s 27 hearing, namely, the foreshadowed application by the accused in relation to whether or not one of the Attorney-General's affidavits remains subject to confidentiality orders and the determination of whether it is appropriate for the court to receive any affidavit on a "court only" basis for the purposes of the s 27 hearing. These applications have the potential to be of some substance and require more than brief consideration before a determination can be made.

27. Fifth, the possible amendment to the confidentiality regime so as to allow some of the witnesses to be called by the accused to consider the confidential parts of one of the affidavits filed by the Attorney-General gives rise to the likelihood of the need for further evidence to be put on by the accused, leaving little or no time for the Attorney-General to put on evidence in reply.

28. Sixth, preparation for the substantive hearing is not obviously impeded by a delay in the holding of the s 27 hearing. It is not a case in which the Attorney-General has asserted that evidence in the criminal proceedings should be denied to the accused or

to the jury or that summaries of evidence should be substituted. Rather, the issue between the parties appears to be only whether or not the proceedings are conducted wholly or only partly in public. Although there is some potential for a relationship between that issue and the conduct of pre-trial applications, it is not clear to me at this stage that the preparation for the substantive hearing should be put on hold pending the s 27 hearing. It is of significance that the hearing has been estimated by the accused at six weeks, that no date for the hearing has been set and that having regard to other listings in the court it is unlikely that the proceedings could be listed prior to May 2020.

29. Seventh, if the s 27 hearing does not proceed on the date fixed then at least some of the time set aside will be able to be used for the hearing of the contested applications referred to in the fourth point referred to above, minimising any waste of available court hearing time.

30. Eighth, while there is certainly some attraction in attempting to make use of the listed dates to commence the s 27 hearing, to do so in circumstances where the evidence was not finalised is likely to cause the hearing to run into difficulties. Given the nature of the issues that are in contest it is, in my view, important that the evidence-in-chief is finalised, that parties have made decisions about which witnesses are to be cross-examined and that any other preliminary issues that affect the orderly running of the hearing be identified and, if appropriate, resolved prior to the conduct of that hearing.

31. For those reasons I will direct that the hearing under s 27 not proceed on the date fixed and I will hear the parties as to what directions should be made in relation to the applications that need to be determined prior to the s 27 hearing, the listing of the s 27 hearing as soon as practicable and directions that need to be made so as to ensure that the hearing will proceed on the date upon which it is fixed.

Orders

32. The orders that I will make are:

    1. I direct that the solicitors for the parties confer as to the directions that should be made in relation to any applications that need to be determined prior to the s 27 hearing, the length of the s 27 hearing (including their best assessment of which deponents are likely to be required for cross-examination and, if so, the likely length of the cross-examination), the date for the s 27 hearing and any directions that need to be made to ensure that the hearing will proceed on the date upon which it is fixed.

    2. I list the matter for directions on Monday, 2 December 2019 at 9.30am.

I certify that the preceding thirty-two [32] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 28 November 2019