



HIGH COURT CASE STUDY



AUSTRALIAN CONSTITUTION CENTRE

The powers of State Courts

Kable v Director of Prosecutions NSW (1996)

Facts of the case

Convicted of manslaughter of his wife in 1990, Gregory Wayne Kable had been sentenced to a minimum of four years jail. While in prison he wrote threatening letters to the relatives of his deceased wife who had custody of his children.

Community concern about his pending release caused the NSW Parliament to seek to enact a general law allowing judges to order the preventive detention of offenders who posed a risk of serious violence to the community. It was amended in the upper House so that it only applied to Kable and not to other dangerous offenders.

In February 1995 a Justice of the NSW Supreme Court ordered that Kable was to stay in jail for a further six months. The Court was satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence and that

it was appropriate for the protection of particular persons or the community that he be held in custody.

Kable exercised his right of appeal and went all the way to the High Court

Issues considered by the court

Kable argued that the Act required a court to exercise non-judicial power and that this breached the separation of powers. Kable also argued that the Act gave the NSW court power which was incompatible with Chapter III of the Constitution.

Decision

Chapter III of the Constitution allows federal jurisdiction to be vested by the Commonwealth Parliament in State courts. But State courts must remain fit bodies to receive and exercise federal jurisdiction. They must not exercise powers that are incompatible with their integrity, independence and impartiality.

The power to order the detention of a person for what he might do, rather than punishing him for what he had done, was an incompatible one.

Chief Justice Brennan's court in session Source: High Court of Australia



Background to the case

On 23 February 1995, Levine J ordered under the authority of the *Community Protection Act* that Kable be detained for six months.

The Principle of the Separation of Powers applies at the federal level, but State courts must also retain their independence. Former Solicitor-General of Australia, Sir Maurice Byers, represented Kable in his appeal to the High Court of Australia.

In *Kable*, Justices Toohey, Gaudron, McHugh and Gummow formed the majority. Brennan CJ and Dawson J were the dissenters. Kirby J did not sit on the case as he had sat on a previous iteration of the case in the NSW Supreme Court.

Did you know?

- A law directed at a specific person is called '*ad hominem*' ('against the man').
- Before *Kable*, it was thought States had unrestricted power with respect to their courts.
- The *Community Protection Act* threatened the independence and impartiality of the Supreme Court of NSW.
- The *Community Protection Act* authorised the continuation of imprisonment after the completion of the sentence.



Chief Justice Brennan.
Source: High Court of Australia

A court cartoonist sketches Sir Maurice Byers in action
Source: © Geoff Pryor, National Library of Australia

