OKS v THE STATE OF WESTERN AUSTRALIA (P62/2018)

Court appealed from:	Court of Appeal of the Supreme Court of Western Australia [2018] WASCA 48
Date of judgment:	11 April 2018
Special leave granted:	16 November 2018

This is an appeal on conviction, relating to an offence of indecently dealing with a child under the age of 13 years allegedly committed by the Appellant in March 1997.

The Appellant and the female complainant's mother commenced a relationship in early 1997 when the complainant was approximately 10 years old. The Appellant lived in the family home with the complainant's mother, grandmother and three siblings.

In 2016, some 20 years later, the Appellant was charged with three counts of indecently dealing with the complainant contrary to s 320(4) of the *Criminal Code Act Compilation Act 1913 (WA)* ('the Code') and one count of attempting to indecently deal with the complainant, contrary to s 320(4) of the Code. At the time of the alleged offending the complainant was approximately 10 or 11 years old and the Appellant was aged between 45 and 47 years. At the time of trial the Appellant was 65 years old and the complainant 29 years old.

The matter was heard before a Judge and jury in the District Court of Western Australia. The Appellant's case at trial was that he did not do any of the acts the subject of any of the counts on the indictment, and further that the complainant was an unreliable witness. The complainant admitted, or it was alleged at trial, that she had told lies.

In the summing up, Deputy Chief Judge Stevenson directed the jury "*not to follow a process of reasoning that just because [the complainant] is shown to have told a lie, or admitted she told a lie, that all of her evidence is in fact dishonest and cannot be relied upon*" ('the impugned direction').

Before the jury retired to consider its verdict, Stevenson DCJ discharged the jury from returning verdicts in relation to counts three and four, being one count of indecently dealing with the complainant and one count of attempting to indecently deal with the complainant. The Appellant was then found guilty of count one and acquitted of count two. He was sentenced to a term of imprisonment for two years and three months.

The Appellant subsequently appealed his conviction to the Court of Appeal of the Supreme Court of Western Australia, arguing that the trial judge made a wrong decision on a question of law by directing the jury as above.

S 30(3) of the *Criminal Appeals Act 2004* (WA) ('the Criminal Appeals Act') provides that:

(3) The Court of Appeal must allow the appeal if in its opinion:
   (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or
   (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
   (c) there was a miscarriage of justice.

Pursuant to s 30(4) of the Criminal Appeals Act even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred ('the proviso').

The Court of Appeal found that the trial Judge intruded impermissibly on the function of the jury by erroneously giving them a direction that prohibited them from engaging in a process of reasoning, favourable to the Appellant, in relation to fact-finding about the complainant's honesty and reliability. It held that although under s 30(3)(b) the impugned direction was erroneous in law, a misdirection and a departure from trial according to law, it did not occasion a substantial miscarriage of justice as the Appellant was not denied a chance of acquittal on count one that was fairly open to him. The Court of Appeal dismissed the appeal.

The Appellant appealed to the High Court. The Appellant argues that given the nature and effect of the impugned direction, it was not open for the Court of Appeal to conclude that the Appellant was proved beyond reasonable doubt to be guilty of count one. He contends that the Court of Appeal failed to undertake its own independent assessment of the evidence (or alternatively failed to give adequate reasons). The Appellant further argues that the impugned direction should not have enlivened the proviso in s 30(4) allowing the Court of Appeal to reach a conclusion that no substantial miscarriage of justice had occurred.

The Respondent argues that the Court of Appeal was correct in holding that it was open to it to conclude that the Appellant had been proved beyond a reasonable doubt guilty of count one. The Respondent refers to a number of Facebook messages, texts and recorded phone calls as the basis for this argument, as they demonstrated a lack of denial by the Appellant of any wrongdoing, as well as containing allusions to sexual contact between the Appellant and the complainant. (The defence case was that there was a denial that anything happened in the Facebook message and the complainant was then cross-examined to that effect.) The Respondent also argues that the context of the impugned direction needs be taken into account in determining whether the error of law found by the Court of

Appeal constitutes a substantial miscarriage of justice for the purposes of application of the proviso - which the Respondent submits it does not.

The grounds of appeal include:

1. The Court of Appeal of the Supreme Court of Western Australia erred in law in its application of the proviso under section 30(4) of the *Criminal Appeals Act 2004* (WA) in relation to an error made by the trial Judge at first instance, delivering an impugned direction that constituted a wrong decision on a question of law.