

SHORT PARTICULARS OF CASES
APPEALS
PERTH CIRCUIT - OCTOBER 2007

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MAHMOOD v. STATE OF WESTERN AUSTRALIA (P39/2007)

Court appealed from: Court of Appeal, Supreme Court of
Western Australia

Date of judgment: 15 May 2007

Date of grant of special leave: 31 August 2007

The appellant, Dlashad Hamad Mahmood, and the victim, Chnar Dabag, his wife, owned a restaurant in Perth. On Sunday 4 July 2004 the appellant telephoned an ambulance after, he claimed, finding his wife with her throat slit in a laneway at the rear of the restaurant. The knife used was never found. The appellant denied murdering his wife.

At his trial, the jury was shown only an excerpt from a video recording of a “walk through” conducted by the police at the scene of the murder, where the appellant re-enacted his claim to have discovered the victim’s body. The appellant was calm throughout this excerpt, but very distressed at other parts of the video recording which were not shown to the jury, and there was evidence of his evident distress at the time of the murder. In closing submissions, the prosecutor described the appellant’s demeanour to the jury as “cold and calculating” and the trial judge (Jenkins J) refused an application by defence counsel to re-open the defence case to introduce other excerpts of the “walk through” video in which the appellant is shown to be distressed. Also at the trial, evidence was given by a blood spatter expert in relation to the blood found at the scene, including a bloodstain in the appellant’s pocket. In closing submissions, the prosecutor invited the jury to infer that the murder weapon had been in the appellant’s pocket, although this was never put to the expert witness. On 25 February 2006 the appellant was found guilty of wilful murder and sentenced to life imprisonment with eligibility for parole after 18 years.

The appellant’s appeal against conviction to the Court of Appeal was dismissed. The Court (Roberts-Smith, McLure and Buss JJA) held that, although the comment by the prosecutor in closing submissions concerning the appellant’s appearance as “cold and calculating” was unfair and should not have been made, the direction by the trial judge, and the admission of other evidence of the appellant’s distress, rendered the comment no more than peripheral and no miscarriage of justice resulted from the trial judge’s refusal to re-open the trial. The Court also concluded that the prosecutor’s failure to put to the blood spatter witness the inference he invited the jury to draw that the murder weapon had been in the appellant’s pocket, although unfair, did not result in a miscarriage of justice. The Court held that a *Jones v Dunkel* direction, as a general rule, should not be given in a criminal trial and that the trial judge had not erred in failing to give such a direction.

The grounds of appeal include:

- The principles which should apply to an application to re-open a case after closing submissions involving unfair conduct by the prosecutor, where there is no practical impediment to allowing defence counsel to re-open the defence case to correct the unfairness of the prosecutor;

- Whether the trial judge erred in failing to give a *Jones v Dunkel* direction in relation to the evidence of the blood spatter witness.

A.K. v. STATE OF WESTERN AUSTRALIA (P27/2007)

Court appealed from: Court of Appeal, Supreme Court of
Western Australia

Date of judgment: 17 November 2006

Date of grant of special leave: 15 June 2007

The appellant, who was 13 years of age at the time of offending, was tried before a judge sitting alone (Wisbey J) and convicted of three counts of indecently dealing with a child between the ages of 13 and 16 years. On 6 July 2005 he was sentenced to an intensive youth supervision order for a period of six months. As a consequence of this conviction, the appellant is classified as a reportable offender under the *Community Protection (Offender Registration) Act 2004 (WA)* and is subject to reporting conditions for 7½ years from the date of sentence. The appellant appealed against the conviction. The offences occurred when the complainant and the appellant, together with two other children, were sleeping together in a large mattress on the floor of the premises, and the complainant was awakened in the dark and indecently dealt with by the appellant. Wisbey J concluded that the complainant was a truthful witness and that it was possible for the complainant to identify the appellant by touch.

The Court of Appeal (Roberts-Smith and Pullin JJA; Buss JA dissenting) dismissed the appeal. Pullin JA gave the principal judgment of the Court. All three judges found that the trial judge failed to give adequate reasons as to why he believed the prosecution had proved the identity of the offender, but the majority applied the proviso in section 30(4) of the *Criminal Appeals Act 2004 (WA)* that no substantial miscarriage of justice had occurred. Buss JA would have allowed the appeal on this ground, and concluded that the evidence before the trial judge was not sufficiently reliable to identify the offender.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in applying the proviso, having found that the trial judge failed to provide adequate reasons for his conclusion that the prosecution had proved the identity of the appellant as the offender;
- Whether the majority of the Court of Appeal erred in concluding that the evidence was sufficient to prove the appellant guilty beyond reasonable doubt, and whether the verdict was unreasonable and could not be supported by the evidence.

AYLES v. THE QUEEN (A40/2007)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia

Date of judgment: 8 March 2007

Date special leave granted: 8 August 2007

The appellant was charged with a number of sexual offences relating to a young boy ("T"). Count 1 of the information charged him with indecent assault contrary to s70(1)(c) of the *Criminal Law Consolidation Act 1935 (SA)* (the Act) and the particulars were that he "between 24 October 1971 and 2 May 1972 indecently assaulted T".

T was born in 1959. The appellant was an Anglican priest and 26 years old in 1971. When T's parents learned of the sexual relationship in 1975, they reported it to the church authorities; however the matter was not reported to the police until many years later.

The trial by judge alone took place in 2006. In her judgment, Simpson DCJ amended count 1 of the information to refer to s69(1)(b)(iii) of the Act and amended the particulars to read "between 24 October 1971 and 31 October 1973". Her Honour then found the appellant guilty of the charge on count 1. The appellant had pleaded guilty to 2 counts (relating to a different period of time) as well as not guilty to a number of other counts on the information. He was found not guilty on those other counts. A sentence of 4 years' imprisonment with a non-parole period of 2 years was imposed.

The appellant appealed to the Court of Criminal Appeal both against conviction and sentence. On conviction, he submitted that the trial judge did not have the power pursuant to s281(2) of the Act to amend the information. It was contended that the trial judge made the amendment without any application being made by the prosecutor. Since the Director of Public Prosecutions is responsible for the conduct of the prosecution, the trial judge had stepped into an area that is the Director's responsibility. It was further submitted that the effect of the amendment was to substitute a new charge which the trial judge could not do. It was submitted that if the power to amend exists, it was exercised unfairly because the appellant was deprived of the opportunity to make submissions on the exercise of that power, giving rise to a miscarriage of justice. The Court (Doyle CJ, Gray & David JJ) dismissed the appeal against conviction, finding that the trial judge did have the power to make the order she made and that in the circumstances in which the order was made there was no injustice to the appellant.

The grounds of appeal include:

- Whether the court below erred in law in holding that the trial judge had power pursuant to section 281 of the *Criminal Law Consolidation Act 1935* to amend the charge in count 1 of the indictment;

- Whether the court below erred in law in holding that the trial judge had power to amend count 1 of the charge on the indictment because the power to lay the charge lies with the Director of Public Prosecutions under section 7 of the *Director of Public Prosecutions Act 1991*.