HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

RODNEY NATHAN KING APPLICANT

AND

THE QUEEN RESPONDENT

King v The Queen
[2003] HCA 42
6 August 2003
P28/2001

ORDER

1. *Special leave to appeal granted.*

2. *Appeal dismissed.*

On appeal from the Supreme Court of Western Australia

Representation:

J A Sutherland for the applicant (instructed by McDonald & Sutherland)

S E Stone with C C Porter for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

King v The Queen

Criminal law – Burglary – Offence of committing an offence in the place of another person when in that place without that other person's consent – *Criminal Code* (WA), s 401(2) – Onus of proof – Onus on prosecution to prove beyond reasonable doubt absence of consent under s 401(2) – Where offence alleged to be committed was breach of restraining order – Where restraining order prohibited entry onto premises – Statutory provision for defence to offence of breach of restraining order if defendant proves on balance of probabilities existence of consent to be on premises – Whether provision relevant – Whether Court of Appeal erred in dismissing appeal from trial judge's jury direction that onus was on prosecution throughout to negative consent.

Criminal Code (WA), s 401(2).
Restraining Orders Act 1997 (WA), ss 61, 62.

1 GLEESON CJ. This is an application for special leave to appeal against a decision of the Court of Criminal Appeal of Western Australia. Following a trial in the District Court, the appellant was convicted of an offence against s 401(2) of the *Criminal Code* (WA) ("the Code") (described by Wheeler J in the Court of Criminal Appeal as "aggravated burglary and committing an offence (breach of restraining order)") and also of an offence of deprivation of liberty contrary to s 333 of the Code. It is the first that is presently relevant. The issue to be determined arises out of the compound nature of the offence as charged, and the interrelationship of its elements.

The facts

2 The prosecution case, accepted by the jury, was as follows. The applicant and the complainant, who were husband and wife, had separated. The applicant behaved aggressively towards the complainant, and on a number of occasions threatened to kill her. She obtained a restraining order. The terms of the order will be referred to below. In November 1998, the complainant and her children went to a women's refuge. Later, in mid-November, they moved into a house in Forrestfield without revealing their whereabouts to the applicant. At about 6.30 am on 21 November 1998 the applicant, having obtained the address from another source, went to the Forrestfield house. The complainant, before opening the door, asked who was there. The applicant said he was a neighbour. When the complainant opened the door, the applicant pushed his way in and knocked the complainant to the ground. He assaulted the complainant and held her captive for several hours. She finally escaped and rang the police. The applicant was arrested. When arrested, the applicant said that the complainant had invited him to come to the house to fix her car. However, there was evidence of a later telephone conversation in which the applicant told another person that he had obtained his wife's address from a third party. The applicant, who was unrepresented for most of the trial, gave no evidence.

3 It is convenient to mention, for the purpose of putting it to one side, what Wheeler J correctly identified as a red herring. In an interview with the police, the applicant said he had been advised, before 21 November 1998, that, although the restraining order prevented him from doing certain things, including approaching his wife, it would not be a breach of the order if he did those things with her consent. This led the trial judge to give directions to the jury about honest and reasonable mistake. The point seems to have been taken up at the request of the prosecution, speculating as to possible defences that might be raised by the applicant in address. As Wheeler J said, having regard to the evidence, including the two competing versions of how the applicant came to enter the complainant's premises on 21 November 1998, the subject was irrelevant. The applicant told the police that he had been invited to the premises by his wife for the purpose of repairing her car. The complainant denied she had invited the applicant to visit her. She said that when the applicant came to her door he pretended to be someone else. When she opened the door he forced his

way in. On either version, there was no room for anything that might have involved ambiguity, or that could have given rise to any mistaken belief on the applicant's part. On the complainant's version, the applicant was obviously not there with her consent. On his version, he was there with her consent and at her invitation. If the applicant had given evidence, it was only by telling a new story, inconsistent with what he had told the police, that any issue of honest and reasonable mistake could have arisen.

The restraining order

4 The restraining order, which was in force on the date of the alleged offence, was in the following terms:

> "Save as provided for in an order of the Family Court of Australia or the Family Court of Western Australia,
>
> The [applicant] shall not:
>
> be in possession of a firearm/firearms licence or obtain a firearms licence,
>
> commit or attempt to commit a violent personal offence, as defined in the Restraining Orders Act 1997, against the person protected,
>
> communicate or attempt to communicate by whatever means with the person protected by this order,
>
> enter upon any premises where the person protected lives or works or be within 100 metres of the nearest external boundary of such premises,
>
> approach within 100 metres of the person protected,
>
> cause or attempt to cause damage to the property of the person protected,
>
> behave in an intimidatory or offensive manner towards the person protected,
>
> behave in a manner that is likely to lead to a breach of the peace,
>
> cause or allow any other person to engage in conduct of the type referred to in the preceding paragraphs of this order."

5 On the complainant's evidence, the conduct of the applicant contravened a number of the terms of that order. However, as the trial was conducted, and as the prosecution case was left to the jury, the relevant term was that which prohibited the applicant from entering upon any premises where the complainant lived. That term overlapped to some extent with the term that followed. The trial judge directed the jury on the issue of consent. On that matter, he said the prosecution carried the onus of proof from beginning to end. He reminded them

that the defence case was that the applicant was there at his wife's invitation and with her consent. His directions on onus of proof meant that it was for the prosecution to satisfy the jury, beyond reasonable doubt, of the falsity of that case.

The charge

6 A breach of a violence restraining order is an offence against s 61(1) of the *Restraining Orders Act* 1997 (WA). It carries a maximum penalty of imprisonment for 18 months or a fine of $6,000. Proceedings for breach are dealt with in a Children's Court or a court of petty sessions (s 61(3)). Section 62 provides that, subject to a presently irrelevant qualification, it is a defence to a charge of breaching a restraining order for the person who is bound by the order to satisfy the court that the person acted with the consent of the person protected by the order.

7 The applicant was not charged with a contravention of s 61(1). No doubt the prosecuting authorities took the view that such a charge would not fully reflect the seriousness of his conduct. Indeed, the penalty that was ultimately imposed on him was substantially in excess of the maximum penalty provided by the *Restraining Orders Act*. The applicant was charged under s 401(2)(a) of the Code. That section provides that a person who commits an offence in the place of another person, when in that place without that other person's consent, is guilty of a crime. The maximum penalty depends upon whether the offence is committed in circumstances of aggravation. The indictment charged that the applicant, being in the place of the complainant without her consent, committed the offence of breach of a violence restraining order. It also alleged that the offence was committed in circumstances of aggravation, but that is presently immaterial. Thus, the crime alleged ("the punishable crime") was a contravention of s 401 of the Code, the contravention consisting of committing an offence ("the subsidiary offence") in the place of another person, when in that place without that other person's consent. To use a non-statutory expression, the punishable crime was a crime of home invasion involving the commission of a subsidiary offence. On the facts alleged by the complainant, there were a number of possible subsidiary offences that could have been identified. An obvious example is assault. The subsidiary offence chosen by the prosecution was breach of a restraining order. Once again, on the facts alleged by the complainant, a number of possible breaches of the restraining order could have been identified. As the case was conducted, and left to the jury, the breach was entering upon premises where the protected person lived. The alleged conduct which gave rise to the subsidiary offence (entering upon the complainant's premises in breach of a restraining order) was substantially the same as the conduct which constituted an element of the punishable crime (being in the place of another person without that other person's consent). In the circumstances of this case, the possible difference between entering upon and being in premises was immaterial.

The trial judge's directions

8 The trial judge in his summing-up identified the "central issue" as being whether the applicant "was ... in [the complainant's] place without her consent". On that issue, he said, the prosecution carried the onus of proof.

9 In the course of explaining the elements of the punishable crime, the trial judge dealt with the subsidiary offence very briefly. He did so after having told the jury that the prosecution, in order to prove the punishable crime, had to establish that the applicant was in the complainant's place without her consent. He went on:

> "[N]ow, the violence restraining order is exhibit 4 and the position is that it's clear and unequivocal in its terms and there's no issue but that Mr King was in the place of his wife in breach of that violence restraining order."

10 In context, having regard to what he had said immediately before, he clearly meant that there was no separate and independent issue of breach of the restraining order once the prosecution established absence of consent. His directions meant that, if the prosecution failed to establish absence of consent, the case must fail, but if the prosecution established absence of consent there was no separate issue as to breach of the restraining order.

11 The trial judge made no mention of s 62 of the *Restraining Orders Act*, or of any defence to a charge of breach of a restraining order provided by that section.

The decision of the Court of Criminal Appeal

12 Wheeler J, with whom Wallwork and Steytler JJ agreed, delivered the principal judgment with respect to the convictions.

13 She considered that the trial judge was in error in failing to advert to s 62. She said:

> "The position in this trial, then, was that there was an accurate direction, in relation to the element of being in the place of Sandra King 'without her consent' that that element had to be proved beyond reasonable doubt before the jury could convict. By reason of the failure to advert to s 62(2) of the *Restraining Orders Act*, the jury was not also directed that in relation to the element of committing a breach of a violence restraining order, it would have been open to the applicant to prove to them on the balance of probabilities that he was in the place with her consent and that if he satisfied the jury in respect of that matter, that element would not have been proven. In law then, the issue of consent arose at two different

places in the indictment and the burden in relation to each was different. The jury was told only that the burden in relation to consent was on the Crown and was not told that there was an element in respect of which an issue of consent might arise where the onus would be upon the accused. The error of law is clear. The question which then arises is whether it is open to this Court to apply the proviso to s 689(1) of the *Criminal Code*."

14 Wheeler J concluded that it was a proper case for the application of the proviso. She said:

> "In this case, in the whole of the context of the trial, the issue of whether the Crown had proved lack of consent beyond reasonable doubt was squarely before the jury. It is not possible, as a matter of logic, to reach a view that a jury, which was necessarily satisfied beyond reasonable doubt that the applicant was in the place without Mrs King's consent, might nevertheless have been persuaded by him, upon the same facts that on the balance of probabilities, he did in fact have her consent. In the context of this particular indictment, the failure to put the potential defence pursuant to s 62 of the *Restraining Orders Act* could only have been, if anything, favourable to the applicant. The reason for saying this, is that there is plainly a potential for confusion when precisely the same factual issue falls to be determined by a jury at different points in the indictment applying a different onus of proof in respect of each. It would require a very careful direction in those circumstances to keep firmly in the forefront of the jury's mind the fact that the first of the elements was one in relation to which the accused person carried no burden at all. In this case, once the issue of consent was determined adversely to the accused beyond reasonable doubt, the finding in relation to breach of the restraining order necessarily must have flown from that."

The appeal to this Court

15 In this Court, the applicant contends that the Court of Criminal Appeal was correct to identify error on the part of the trial judge, but incorrect to conclude that there was no miscarriage of justice. The respondent originally supported the whole of the reasoning of the Court of Criminal Appeal but, under pressure of argument, resiled from an acceptance of error on the part of the trial judge.

16 The written submissions for the applicant make the following criticism of the directions of the trial judge:

> "Specifically, he failed to instruct the jury that a person bound by a restraining order can raise the defence of acting with the consent of the person protected by the order, he instructed the jury that there was no

burden upon the Applicant and he instructed the jury that the Applicant was in breach of the order."

17 It is unusual for an accused at a criminal trial to complain that the trial judge failed to tell the jury that the accused carried the onus of proof on a certain issue, and to complain that the judge said that the prosecution bore the onus on that issue. The reason for such an unusual complaint in the present case is connected with the applicant's failure to give evidence at the trial, and with what the trial judge told the applicant as to his position in that regard. Consistently with what he later told the jury, the trial judge told the applicant, when informing him, at the conclusion of the prosecution case, of the courses open to him, that he had a right to silence, that he did not have to prove anything, and that the Crown had to prove everything. This Court is invited to infer that, if the applicant had been told that there was an issue on which he carried an onus of proof, he would have chosen to give evidence. Why we should infer that is not entirely clear; nor is it clear what we are asked to infer as to the evidence he would have given. We were not expressly invited to infer that he would give an account of how he came to enter the premises that was materially different from the account he had given to the police. At all events, that, it is said, is a matter that was overlooked by the Court of Criminal Appeal. The failure to tell the jury, and the applicant, that there was an issue on which the applicant carried the onus of proof is said to have given rise to a miscarriage of justice because it affected the way the applicant conducted his defence. The proceedings, it is said, were "fundamentally flawed".

18 The underlying assumption is that there was an issue on which the applicant carried the onus of proof. It is an assumption I do not accept. In the submissions on behalf of the applicant in this Court, the suggested issue was expressed indirectly and in terms of a "defence" under s 62 of the *Restraining Orders Act*, rather than directly as an issue of fact. Juries decide issues of fact, not questions of law. It may be appropriate to explain to a jury the legal reason why a particular issue of fact arises for decision, and the legal consequences of a decision on that issue, but what is to be decided by the jury is an issue of fact. In this case, the trial judge told the jury that the central issue of fact in the case was whether the applicant was in the complainant's house without her consent. Wheeler J said "the same factual issue" arose, or would have arisen, under s 62. That cannot be an issue on which both the prosecution and the defence bore the onus of proof. If, by reason of the nature of a given offence, a fact must be established by the prosecution as one of the elements of the offence, then it makes no sense to say that the accused carries the onus of negativing the same fact. In adversarial litigation, both parties cannot bear the ultimate onus of proving or disproving a single fact. The point of an onus of proof is to identify the party who is obliged to establish a fact, and who will bear the legal consequences of failure to do so. There are cases in which an onus may shift; and there is a difference between a legal onus and an evidentiary onus. We are not concerned with questions of that kind. The onus cannot, at one and the same time, be upon both parties in relation to one and the same factual issue.

Wheeler J recognised the logical problem in her reasoning dealing with the proviso. However, that reasoning, taken to its logical conclusion, means, not that there was no miscarriage of justice, but that there was no error.

19 I am prepared to accept that, where, for the purposes of a charge under s 401(2) of the Code, the subsidiary offence is breach of a violence restraining order, an accused person in an appropriate case could seek to make out a defence of consent under s 62 of the *Restraining Orders Act*. It is true that s 62 refers to "a defence to a charge of breaching a restraining order", and that, where a breach of a restraining order is a subsidiary offence for the purposes of s 401(2) of the Code, there is no charge of breaching a restraining order. But that raises a question of construction of s 401, and, in particular, of the meaning of "offence". In a case where s 401(2) picks up s 61 of the *Restraining Orders Act* as a subsidiary offence, does it also import s 62 as a source of a potential defence? I cannot see why not. Justice requires that it should, and the concept of an "offence" is sufficiently flexible to embrace a reference to a defence provided by the statute that creates the subsidiary offence.

20 The question may be largely theoretical, because an element of the punishable crime created by s 401(2) is that the accused is in the place of another person without that other person's consent. If that element must be established in proof of the punishable crime, then there may be few circumstances in which the conduct that potentially constitutes the subsidiary offence is engaged in with the consent of the other person.

21 Even if s 62 is at least theoretically capable of applying in the case of a charge of a contravention of s 401(2), there may be cases of alleged beaches of restraining order, and alleged contraventions of s 401(2) involving breaches of a restraining order as a subsidiary offence, where there is no room for s 62, with its onus on an accused, to operate. There may be no occasion for an accused person to seek to rely on s 62, in answer to a charge under s 61, where the alleged breach of the terms of a restraining order is necessarily inconsistent with consent of the person protected by the order. Much will depend upon the terms of a particular order. The order in question in the present case, for example, prohibited the applicant from committing a violent personal offence against the complainant, from behaving in an intimidatory manner towards the complainant, and from behaving in a manner likely to lead to a breach of the peace. It is difficult to see how conduct could be shown to contravene those terms of the order unless it occurred without the consent of the complainant (assuming no third party was involved). There may well be other terms of a restraining order that, either expressly or by necessary implication, involve absence of consent. In that event, there may be no work for s 62 to perform. The party alleging breach, in order to establish a breach under s 61, will have to prove a fact which is necessarily inconsistent with consent. However, some, perhaps most, or all, of the terms of a particular restraining order may not be such that breach is necessarily

inconsistent with consent. In that case, s 62 creates a potential defence of consent (with the onus on the defendant). So, if the present applicant had been charged under s 61 with a breach of the restraining order, the breach being having possession of a firearm, it would be a defence if he could prove that the complainant requested him to bring a firearm to protect her from serious danger. But if a term of an order were expressed in such a way as to make it necessary, in order to prove breach, to establish a fact inconsistent with consent, then s 62 would not come into play.

22 In the present case, the language of s 401(2) of the Code required the prosecution to establish, as an element of the punishable crime, that the applicant was in the complainant's place without the complainant's consent. The restraining order prohibited the applicant from entering upon the complainant's premises. There were two competing versions as to how the applicant came to be there. The applicant said the complainant asked him to visit her. The complainant denied that. What work was there for s 62 to do? If the prosecution could not satisfy the jury beyond reasonable doubt that the applicant entered upon the complainant's premises without her consent, then the applicant was entitled to be acquitted. The judge so directed the jury. If the prosecution could satisfy the jury of that fact, that was an end to any possible "defence" under s 62.

23 It was no part of the prosecution case that, even if the applicant, as he claimed, had visited the complainant at her request, he was in breach of the restraining order merely by entering upon her premises. No such case was left to the jury. No one suggested that the applicant entered the house with consent, but that such consent was later withdrawn. The prosecution case was that the applicant was not invited to the premises, that he learned of the address from a third party, that he gained entry by pretending he was someone else, and that he forced his way into, and remained upon, the premises without the complainant's consent. It was in that context that the trial judge told the jury that the central issue was whether the complainant consented to the applicant's visit, that the prosecution carried the onus of proof on that issue, and that, once that issue was resolved in favour of the prosecution, there was no separate and independent issue as to breach of the restraining order.

24 In that forensic context, there was no issue of fact on which the applicant carried an onus of proof. As Wheeler J acknowledged, in the circumstances of the case, there was no material difference between the factual content of the element of the punishable crime which the prosecution was required to prove and the factual content of the putative defence to what would otherwise be the subsidiary offence. The judge was right to tell the applicant, and the jury, that the applicant was not required to prove anything.

25 The elements of the punishable crime as charged were such that the prosecution was obliged to establish beyond reasonable doubt that the applicant was in the complainant's place without her consent. The case as particularised,

and as supported in evidence, and as left to the jury, was that the applicant entered the premises without the complainant's consent and remained there without her consent. The jurors were told that, if the prosecution could not satisfy them of that, the case must fail. In that context, it would have been erroneous for the judge to tell the jury that there was an issue of consent on which the applicant carried an onus.

Conclusion

26 Special leave to appeal should be granted and the appeal should be dismissed.

27 GUMMOW, CALLINAN AND HEYDON JJ. This is an application for special leave to appeal against the dismissal by the Court of Criminal Appeal of Western Australia of an appeal against convictions. It raises questions as to the proper construction of some provisions of the *Criminal Code* of Western Australia ("the Code"), and their relationship with another enactment creating an offence the commission of which (but not the availability or otherwise of a statutory defence to which) is an element of Code offences.

The facts

28 The applicant was tried and convicted by a jury in the District Court of Western Australia (Nisbet DCJ) on two counts as follows:

> "(1) On 21 November 1998 at Forrestfield RODNEY NATHAN KING being in the place of SANDRA KING without her consent, being a place ordinarily used for human habitation, committed the offence of breach of a violence restraining order number 1998 000447 (AR)
>
> AND THAT RODNEY NATHAN KING detained SANDRA KING [contrary to s 401(2)(a) of the Code]
>
> AND THAT immediately before the commission of the offence RODNEY NATHAN KING knew or ought to have known that there was another person in the place.
>
> (2) AND FURTHER that on 21 November 1998 at Perth RODNEY NATHAN KING unlawfully detained SANDRA KING [contrary to s 333 of the Code]."

29 The applicant and the complainant who were separated at the time of the offences had by then been married for about 13 years. There were three children of the marriage aged 8, 5 and 3. By arrangement, the applicant had moved out of the matrimonial home although he returned to it from time to time to see the children while the complainant was at work. After a period however, she obtained a Violence Restraining Order which was served on the applicant on 9 October 1998. Between that date and 8 November 1998, despite the order, the complainant met the applicant on a number of occasions to enable him to spend time with their children. He remained aggressive towards the complainant and made many threats to her, including to kill her. On 8 November 1998 she sought refuge with the children at a women's refuge. On 13 November, she moved to a house in Forrestfield without revealing her whereabouts to the applicant. On 21 November 1998, having found out the complainant's address at Forrestfield, the applicant drove to it between 6.30 and 7.00 am. He knocked on the door to the house. Before she opened it to him, the complainant asked who was there. He replied, "It's just a neighbour". She unlocked the door. The applicant pushed

it open, and, in doing so, knocked her to the ground. She screamed and became hysterical. The applicant pulled her to her feet and slapped her. She ran from the house still screaming but soon returned because her children were there.

30 The applicant took the complainant into the kitchen and sat her on a chair in a corner. He told her not to move. He told the children that she was a ghost, that she was going to burn, and that they would smell her burning. When his back was turned, she ran into another room to call the police but he stopped her and forced her to return to the kitchen. That forced return became the basis of count 2, deprivation of liberty.

31 Thereafter, the complainant offered to go to the shops to buy some milk but the applicant rejected the offer, saying that he did not trust her. He himself took her and the children in his car to two garages to buy milk and cigarettes. When he left the car, he told her to stay there. Later he drove her and the children to Hamilton Hill to collect his wages before returning to Forrestfield. Some time after 1.00 pm, the applicant left the house in order to attend to one of the children, who had fallen from his bicycle. The complainant then rang an emergency number to seek police assistance. Police officers responded and arrested the applicant. The applicant told the police officers who interviewed him that he had been at the complainant's residence at her request for him to assist her to fix her car.

32 The applicant was bound at the material time by the Violence Restraining Order which imposed many restrictions on him:

> "The [applicant] shall not:
>
> be in possession of a firearm/firearms licence or obtain a firearms licence,
>
> commit or attempt to commit a violent personal offence, as defined in the Restraining Orders Act 1997, against the person protected,
>
> communicate or attempt to communicate by whatever means with the person protected by this order,
>
> enter upon any premises where the person protected lives or works or be within 100 metres of the nearest external boundary of such premises,
>
> approach within 100 metres of the person protected,
>
> cause or attempt to cause damage to the property of the person protected,
>
> behave in an intimidatory or offensive manner towards the person protected,

behave in a manner that is likely to lead to a breach of the peace,

cause or allow any other person to engage in conduct of the type referred to in the preceding paragraphs of this order."

33 It is convenient at this point to set out the relevant statutory provisions. Section 333 of the Code provides as follows:

"**333 Deprivation of liberty**

Any person who unlawfully detains another person is guilty of a crime and is liable to imprisonment for 10 years."

34 Section 401 of the Code relevantly states:

"**401 Burglary**

(1) A person who enters or is in the place of another person, without that other person's consent, with intent to commit an offence in that place is guilty of a crime and is liable –

(a) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years;

(b) if the place is ordinarily used for human habitation but the offence is not committed in circumstances of aggravation, to imprisonment for 18 years; or

(c) in any other case, to imprisonment for 14 years.

Summary conviction penalty for an offence to which paragraph (b) or (c) applies:

(a) in a case to which paragraph (b) applies: imprisonment for 3 years or a fine of $12 000; or

(b) in a case to which paragraph (c) applies: imprisonment for 2 years or a fine of $8000.

(2) A person who commits an offence in the place of another person, when in that place without that other person's consent, is guilty of a crime and is liable –

(a) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years;

(b) if the place is ordinarily used for human habitation but the offence is not committed in circumstances of aggravation, to imprisonment for 18 years; or

(c) in any other case, to imprisonment for 14 years.

Summary conviction penalty for an offence to which paragraph (b) or (c) applies (subject to subsection (3)):

(a) in a case to which paragraph (b) applies: imprisonment for 3 years or a fine of $12 000; or

(b) in a case to which paragraph (c) applies: imprisonment for 2 years or a fine of $8000."

35 Sections 61 and 62 of the *Restraining Orders Act* 1997 (WA), which are also relevant, provide as follows:

"**61 Breach of a restraining order**

(1) A person who is bound by a violence restraining order and who breaches that order commits an offence.

Penalty:

(a) if the duration of the order is 72 hours or less, $2000 or imprisonment for 6 months; or

(b) otherwise, $6000 or imprisonment for 18 months.

(2) A person who is bound by a misconduct restraining order and who breaches that order commits an offence.

Penalty: $1000.

(3) Proceedings for a breach of a restraining order are to be brought –

(a) if the alleged offender is a child, in the Children's Court; or

(b) otherwise, in a court of petty sessions.

62 Consent as a defence

(1) Subject to subsection (2), it is a defence to a charge of breaching a restraining order for the person who is bound by the order to satisfy the court that the person acted with the consent, as defined in

section 319(2)(a)[1] of *The Criminal Code*, of the person protected by the order.

(2) The defence set out in subsection (1) is not available in respect of a breach of a restraining order if the person protected by the order is a child or a person for whom a guardian has been appointed under the *Guardianship and Administration Act 1990*.

(3) If a person charged with breaching a restraining order establishes a defence under subsection (1), the court hearing the charge may cancel the order."

The trial

36 In the course of the prosecutor's opening this was said to the jury:

"The accused says, to the police anyway, that she invited him over and obviously, if that's right, then she did consent and because of the way the rules of law work, the accused doesn't have to prove that she consented. The Crown has to prove that she didn't."

37 At the end of the prosecution case the trial judge said this to the applicant who was then unrepresented:

"Mr King, last night I explained to you in the absence of the jury that at this stage of the trial you have the right to continue with your right to silence, which you have enjoyed from the beginning of the trial process right up to this stage, and you may now, if you wish, elect to go into evidence or not. It's your right to remain silent if you wish.

It's your right not to give evidence. You don't have to prove anything. There is no burden of proof on you in this trial. The Crown has to prove each and every element of the two offences it alleges against you beyond reasonable doubt. It says, by closing its case, that that stage of the trial has been reached. So the matter is now for you to decide, to exercise

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1 Section 319(2)(a) relevantly provides:

"(a) **'consent'** means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means."

your right to give evidence if you chose [sic], or not, if you chose [sic]. It's a matter for you. What – have you made a decision about this?"

38 The applicant responded by saying that he would "go last to the jury", meaning that he would not adduce or call evidence, and would take the opportunity of making the last address to the jury.

39 In his directions to the jury the trial judge said:

"Strictly, the burden of proof is on the prosecution from the beginning of the criminal trial process to the end. It never shifts to the accused person, to any accused person. No accused person has to prove anything."

40 Later his Honour said this:

" ... the position is that it's clear and unequivocal in its terms and there's no issue but that Mr King was in the place of his wife in breach of that violence restraining order. He says, in his video record of interview to the police, that he thought that if he was invited he wouldn't be in breach of the order. Now, that is what is properly called an opinion of law. He is saying what his opinion was as to the effect of a court order. That's a matter of law. If he was mistaken as to a question of law then, frankly, that does not afford him any defence.

I will say it again: the court order and its meaning and its effect is a matter of law and if he mistakenly believed that he would not be committing a breach of a violence restraining order if he went into those premises at his wife's invitation, then that mistake affords him no defence."

The Court of Criminal Appeal

41 The applicant appealed to the Court of Criminal Appeal of Western Australia (Wallwork, Steytler and Wheeler JJ) against both of his convictions and sentence. The leading judgment with respect to the convictions was given by Wheeler J with whom the other members of the Court agreed. The only relevant ground of appeal was that the trial judge had erred, by failing, with respect to s 62 of the *Restraining Orders Act*, to direct the jury that the applicant might have, under that section a defence, if he could establish or had established on the balance of probabilities, that the complainant had consented to his presence at her residence. Her Honour was of the clear view that the ground was made out. No one at the trial, she said, had adverted as the parties should have, to s 62(1) of the

Restraining Orders Act. Her Honour's reasons are substantially stated in the following passage[2]:

> "His Honour's direction was plainly wrong in law. Leaving aside the question of mistake, which seems to be a red herring first raised by the prosecution in speculating what the defence might be and later taken up in a number of points, it plainly would have been open to the applicant, as a matter of law, to satisfy the jury that he acted with the consent of Mrs King, she being the person protected by the order. If so, s 62(2) would have applied. The evidence that he acted with her consent, which was before the court, was his statement to the police during the course of the videotaped record of interview that she had invited him to help fix her car."

42 Some remarks which were made by her Honour in dealing with the appeal against sentence (as to which Steytler J dissented) are also relevant to the way in which the trial judge approached the issue of consent, which was, as has already appeared, the only real issue in the case. Her Honour said[3]:

> "In this case, in the whole of the context of the trial, the issue of whether the Crown had proved lack of consent beyond reasonable doubt was squarely before the jury. It is not possible, as a matter of logic, to reach a view that a jury, which was necessarily satisfied beyond reasonable doubt that the applicant was in the place without Mrs King's consent, might nevertheless have been persuaded by him, upon the same facts that on the balance of probabilities, he did in fact have her consent. In the context of this particular indictment, the failure to put the potential defence pursuant to s 62 of the *Restraining Orders Act* could only have been, if anything, favourable to the applicant. The reason for saying this, is that there is plainly a potential for confusion when precisely the same factual issue falls to be determined by a jury at different points in the indictment applying a different onus of proof in respect of each. It would require a very careful direction in those circumstances to keep firmly in the forefront of the jury's mind the fact that the first of the elements was one in relation to which the accused person carried no burden at all. In this case, once the issue of consent was determined adversely to the accused beyond reasonable doubt, the finding in relation to breach of the restraining order necessarily must have [flowed] from that."

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2 *King v The Queen* [2001] WASCA 198 at [30].

3 *King v The Queen* [2001] WASCA 198 at [40].

43 In the event however her Honour was of the view that the error that she had identified had not occasioned any substantial miscarriage of justice.[4]

The application to this Court

44 The applicant seeks special leave to appeal to this Court against conviction upon the same ground as he argued in the Court of Criminal Appeal:

> "The Court of Criminal Appeal erred in law in dismissing the Appellant's appeal against conviction by applying the proviso to section 689(1) [of the] Criminal Code.
>
> Particulars
>
> (a) The trial was fundamentally flawed because the learned trial Judge failed correctly to explain the law concerning one of the elements (namely "committed the offence of breach of restraining order") of the charge of aggravated burglary and having done so he failed to leave that element to the jury.
>
> (b) The Appellant lost a chance which was fairly open to him of being acquitted as a consequence of that failure."

45 The application was argued fully as if on an appeal.

46 Before dealing with the applicant's arguments some further reference should be made to the Violence Restraining Order and the respects in which the

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4 The relevant section of the Code is:

"**689 Determination of appeals in ordinary cases**

(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

applicant was, or could have been in breach of it. If, as seems unlikely, there was any basis for a belief by the applicant that the complainant consented to his presence on the premises on his first arrival there, that belief could not have persisted following the excursion to buy milk and cigarettes and the re-entry of the applicant upon the complainant's residence with the complainant still under his restraint. There was evidence of further breaches: of the commission of actual violence, intimidatory behaviour and breaches of the peace. There was therefore abundant evidence to establish both of the offences charged.

47 In our opinion what might appear at first sight to be a paradox, that on the one hand the respondent has the onus of proof beyond reasonable doubt throughout, including of negativing consent, but on the other, because the commission of an offence under s 61 of the *Restraining Orders Act*, was an element of the offence charged, there was an onus upon the applicant to prove consent on the balance of probabilities, can be resolved by the reconciliation of the relevant provisions of the Code and the *Restraining Orders Act* as a matter of statutory construction.

48 Section 62(1) of the *Restraining Orders Act* states that "... it is a defence to a charge of breaching a restraining order ...". The charge to which s 62 refers is a charge under s 61 of the Act, and not otherwise. The applicant was not charged with the offence for which s 61 provides. He was charged with different offences altogether from an offence under the *Restraining Orders Act*. Accordingly, no occasion arose for him to seek to rely on a defence under s 62, a defence, it might be said, which would impose an onerous obligation upon him with which he would not be burdened in defending charges under the Code. The commission of an offence under s 61 of the *Restraining Orders Act* was an element of the first count under s 401 of the Code, with which he was charged: the presence or absence of a special statutory defence to a charge under s 62 was not.

49 An analogy may be drawn between this case and two other cases in this Court. In *Meyer Heine Pty Ltd v China Navigation Co Ltd*[5] the respondent was sued under the *Australian Industries Preservation Act* 1906 (Cth) which provided, by s 4(3), that it was a defence to a charge of an offence under that Act, that the relevant activity was not to the detriment of the public and was not unreasonable, the onus of proving which on the balance of probabilities lay on the defendant. That case shows that what may provide a defence to one category of proceedings (criminal or quasi criminal) might not necessarily provide a defence to civil proceedings founded upon the same enactment. Similarly, in

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5 (1966) 115 CLR 10 at 26-27 per Kitto J.

Sovar v Henry Lane Pty Limited[6] it was held that proof of a matter by a defendant which would provide a defence to quasi-criminal proceedings under the *Factories, Shops and Industries Act* 1962 (NSW) would not of itself defeat a civil claim for breach of statutory duty under that Act.

50 It follows that the trial judge did not misdirect the jury as contended, and made no error in not drawing to the attention of the applicant, that he could, if he wished, call or adduce evidence with a view to establishing, on the balance of probabilities, that he had received the consent of his wife when he entered her premises.

51 The trial judge repeatedly made it clear to the jury that consent or otherwise was the central issue in the trial, and that it was for the respondent throughout to negative it.

52 The reconciliation of the statutory provisions in this way also ensures the "coherence of the [criminal] law"[7]. It means that the occasion for confusing directions as to onuses will be avoided. It reinforces the elementary principle of the criminal law that unless express statutory provision to the contrary be made, the onus lies upon the Crown throughout, to negative defences sufficiently raised. It also means that the provisions of Ch 5 of the Code relating to criminal responsibility can freely operate without the intrusion of other irrelevant matters such as the availability or otherwise of a limited defence under other enactments.

53 It follows that an appeal would fail and no occasion for the application of the proviso would arise.

54 The point of principle is an important one. We would grant special leave to appeal but dismiss the appeal.

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6 (1967) 116 CLR 397 at 406-407 per Kitto J, 410-411 per Taylor J, 416 per Windeyer J.

7 *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

55 KIRBY J. This application for special leave to appeal was referred to the Court as it is now constituted to be heard as on the return of an appeal. That course was adopted because of concerns felt by a panel of the Court before whom the application originally came[8]. It appeared to the panel that points relevant to the correctness of the applicant's conviction and sentence might not be sufficiently elucidated by the applicant himself. At the time, he was not legally represented. Prior to the return of the application before us, arrangements were made for the applicant to be represented by counsel. His counsel indicated that the point about the applicant's sentence was abandoned. That left the point relevant to the correctness of the applicant's conviction.

The facts and the course of the trial

56 The background facts concerning the trial and conviction of Mr Rodney King ("the applicant") are set out in other reasons[9]. Also appearing there are the relevant provisions of the statutes that govern the case. Those provisions include the terms of ss 61 and 62 of the *Restraining Orders Act* 1997 (WA)[10] ("the Act") and ss 333 and 401(2) of the *Criminal Code* (WA) providing the statutory offences of deprivation of liberty and burglary with which the applicant was charged[11]. The provisions of s 689 of the Criminal Code, governing criminal appeals and containing the proviso are in standard terms. They too are set out in other reasons[12]. I will not repeat any of this material.

57 I will, however, say a little more about the course of the applicant's trial, which took place in the District Court of Western Australia before the trial judge (Nisbet DCJ) and a jury. At the commencement of the trial, the applicant was represented by counsel. Counsel informed the trial judge that he had only been instructed late, that certain necessary subpoenas had not been issued and that the applicant wished additional witnesses to be called.

58 The first witness in the trial was the applicant's wife. At the end of her testimony in chief, the applicant's counsel commenced his cross-examination. However, a point was soon reached when the applicant intervened and dismissed his counsel on the stated basis that he was insufficiently aware of the details of

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8 Gaudron and Gummow JJ on 25 October 2002.

9 Reasons of Gleeson CJ at [2]-[14]. Reasons of Gummow, Callinan and Heydon JJ ("the joint reasons") at [28]-[32], [36]-[43].

10 The joint reasons at [35].

11 The joint reasons at [33]-[34].

12 The joint reasons at [43], fn 4.

the case to be able to put the applicant's version of events properly to the wife and to the court. Counsel withdrew. This left the trial judge in the difficult position of continuing the trial with the applicant unrepresented.

59 The applicant's cross-examination of the wife extended over two days. In the absence of the jury, the trial judge explained to the applicant the basic rules which the course of the trial would follow. Specifically, he told him that, at a certain point, it would be necessary for him to decide whether he would elect to give evidence. He explained that if he did not, he would have the last address to the jury.

60 In accordance with this advice, at the close of the prosecution case, the trial judge returned to the question of whether the applicant would "elect to go into evidence or not". He reminded the applicant that it was his right to remain silent if he wished. He again explained the order of addresses to the jury. He pointed out that "[t]he Crown has to prove each and every element of the two offences it alleges against you beyond reasonable doubt". He made no reference to any suggested significance of the provisions of the Act, as they might bear on the elements of the offences contained in the indictment. Nor did he elaborate the way in which any failure by the applicant to give evidence concerning the issue of consent, that he alleged his wife had given to his visit to her new place of residence, might affect the establishment of the relevant count. As it was, if the applicant gave no evidence on the issue of the wife's consent and invitation, he was left with the antagonistic sworn and tested evidence of the wife and of other prosecution witnesses ranged against his own unsworn assertions in the police record of interview (tendered in the prosecution case); his questions of the wife and statements to be made in his address to the jury.

61 In the absence of the jury, the trial judge told the applicant:

> "… I do want to stress that it is the Crown's job to prove each and every element of these two offences beyond reasonable doubt. … You don't have to prove anything. The Crown has to prove everything. So you have a right to silence. You have a right to remain silent. You enjoy that right now and you do not have to go into evidence, but if you want the jury to consider your story the only way you can give it to them is by getting a witness to agree with it in response to a question … and that becomes part of the evidence before the court, or by producing some document or thing that supports your story, that then goes into evidence and a witness agrees with it, or by calling evidence yourself."

62 Following an extensive discussion with the trial judge, the applicant ultimately elected not to give sworn evidence. As had been explained to him, that election obtained for him the advantage of the last address to the jury.

The trial judge's instructions to the jury

63 Following the close of addresses by the prosecutor and the applicant, the trial judge instructed the jury on the applicable law. When addressing the elements of the offence against s 401(2) of the Criminal Code, the trial judge gave the jury directions on the onus and standard of proof. He told them, in conventional terms, that the burden was on the prosecution "from the beginning of the criminal trial process to the end" and required proof beyond reasonable doubt. He went on to say:

> "It never shifts to the accused person, to any accused person. No accused person has to prove anything."

64 The trial judge repeated this instruction when he came to explain to the jury the elements of the offence against s 401(2) of the Criminal Code, one of which was that the accused was "in the place of another person … without that other person's consent"[13]. On that question the trial judge reminded the jury that the prosecutor, in her opening address, had said that this was the issue that would mostly occupy the attention of the jury. The trial judge pointed out that "as the case has unfolded [it] has become the central issue here; that is, was [the applicant] in [the wife's] place without her consent?" On this matter, the prosecutor had accepted that it was for the prosecution to prove that the wife did not consent. Correctly, the trial judge confirmed that such was the law.

65 It was at this point that the trial judge introduced, as relevant to the need for the prosecution to establish that the applicant had committed "an offence"[14], a reference to this alleged breach of the restraining order.

66 By s 61(1) of the Act, it is provided that a person, bound by such an order and who breaches it, "commits an offence". It was because this was the "offence" upon which the prosecution relied to establish for the purposes of s 401(2) of the Criminal Code that the applicant had committed "an *offence* in the place of another person", that it was necessary for the trial judge to explain to the jury the significance of the breach of the restraining order. The order was itself an exhibit in the trial. The trial judge said:

> "… [T]he position is that it's clear and unequivocal in its terms and there's no issue but that [the applicant] was in the place of his wife in breach of that violence restraining order. He says, in his video record of interview to the police, that he thought that if he was invited he wouldn't be in

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13 Criminal Code, s 401(2).

14 Criminal Code, s 401(2).

> breach of the order. Now, that is what is properly called an opinion of law. … If he was mistaken as to a question of law then … that does not afford him any defence.
>
> I will say it again: the court order and its meaning and its effect is a matter of law and if he mistakenly believed that he would not be committing a breach of a violence restraining order if he went into those premises at his wife's invitation, then that mistake affords him no defence. I'll come back to the question of consent and mistake directly but I want you to be clear on that. A mistake of the legal effect of the violence restraining order is not a defence."

67 The trial judge proceeded to give directions to the jury on that element of the offence against the Criminal Code that involved being in another's place "without that other person's consent". In this regard he referred to the applicant's recorded interview with the police. There followed separate directions concerning the second count of the indictment. There were no relevant requests for redirection. The jury, after a retirement of an hour, found the applicant guilty of both offences. He was convicted and sentenced to an effective eight years imprisonment, seven years taking into account time that he had spent in custody, back dated to the date he went into custody. The applicant sought leave to appeal against his conviction and his sentence[15]. His application duly came before the Court of Criminal Appeal of Western Australia.

The decision of the Court of Criminal Appeal

68 The Court of Criminal Appeal was unanimous on the conviction appeal. The reasons of the Court on that issue were given by Wheeler J[16].

69 Her Honour pointed out that, during the trial, no one had adverted to s 62(1) of the Act. After setting out the terms of that sub-section, Wheeler J concluded that the direction of the trial judge concerning the applicant's opinion about the effect of the court order was "plainly wrong in law"[17]. She went on:

> "… [I]t plainly would have been open to the applicant, as a matter of law, to satisfy the jury that he acted with the consent of [the wife], she being the person protected by the order. If so, s 62(2) would have applied. The evidence that he acted with her consent, which was before the court, was

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15 *King v The Queen* [2001] WASCA 198 at [20].

16 Wallwork J agreeing at [1] and Steytler J agreeing at [3].

17 [2001] WASCA 198 at [30].

> his statement to the police during the course of the videotaped record of interview that she had invited him to help fix her car."

70 After reviewing the trial judge's directions on the issues of consent and mistake (the latter of which Wheeler J regarded as a "red herring")[18], her Honour continued[19]:

> "By reason of the failure to advert to s 62(2) of the [Act], the jury was not also directed that in relation to the element of committing a breach of a violence restraining order, it would have been open to the applicant to prove to them on the balance of probabilities that he was in the place with her consent and that if he satisfied the jury in respect of that matter, that element would not have been proven."

71 It is clear that, for Wheeler J, the issue of consent "arose at two different places in the indictment". It arose in the provision in s 401(2) of the Criminal Code (which states explicitly, as an element of the offence, that the person is in the place of another "without that other person's consent"). But it also arose in an indirect way in relation to the "offence" which it was alleged the applicant had committed in that place. That "offence", being the offence provided under the Act[20] of breach of a restraining order, contained within its provisions the possibility of a defence of consent. Her Honour observed[21]:

> "The jury was told only that the burden in relation to consent was on the Crown and was not told that there was an element in respect of which an issue of consent might arise where the onus would be upon the accused. The error of law is clear."

72 A misdirection of law being established, the only issue for the Court of Criminal Appeal was whether, notwithstanding the misdirection, the case was one calling for the application of the "proviso"[22].

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18 [2001] WASCA 198 at [30].

19 [2001] WASCA 198 at [36].

20 The Act, s 61(1).

21 [2001] WASCA 198 at [36].

22 Criminal Code, s 689(1).

73 In the opinion of Wheeler J, with whom the other judges agreed, the proviso applied[23]. In support of that conclusion, Wheeler J relied on two essential considerations. The first was the implied satisfaction of the jury that the prosecution had proved lack of consent as an express ingredient of the offence, and had done so beyond reasonable doubt. In her Honour's view, this necessarily satisfied the other way that consent was raised in the form of the potential reliance of the applicant on the defence provided by s 62 of the Act[24]:

> "In this case, once the issue of consent was determined adversely to the accused beyond reasonable doubt, the finding in relation to breach of the restraining order necessarily must have [flowed] from that."

74 Secondly, Wheeler J concluded that the evidence in relation to the wife's lack of consent was, in any event, "overwhelming"[25]. She referred to the sworn testimony of the wife, to the evidence of a neighbour who had seen the wife apparently distressed soon after the applicant's arrival at her place of residence; a tape recorded telephone conversation with the applicant and the admissions made by the applicant in the videotaped record of interview with police. On this basis Wheeler J concluded that no substantial miscarriage of justice had occurred. This conclusion sustained dismissal of the applicant's challenge to the conviction[26]. The other judges of the Court of Criminal Appeal agreed. Accordingly, the appeal against conviction was dismissed.

75 On the return of the application before this Court, both parties in their written submissions accepted the accuracy of the conclusion of the Court of Criminal Appeal. They accepted that, in the respect identified by Wheeler J, the trial judge had misdirected the jury on an element of the "offence" alleged and, that therefore the issue was whether the proviso was properly applied or not. However, during argument in this Court, the application took a different turn.

The issues

76 *The applicant's sentence*: In the original application for special leave the applicant sought to challenge his sentence of seven (effectively eight) years imprisonment. In the Court of Criminal Appeal, Steytler J dissented in the

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23 cf *Krakouer v The Queen* (1998) 194 CLR 202 at 212 [23]-[24] as cited by Wheeler J. See [2001] WASCA 198 at [37]-[38].

24 [2001] WASCA 198 at [40].

25 [2001] WASCA 198 at [44].

26 [2001] WASCA 198 at [46].

appeal against sentence. He did so on the basis of the limited backdating of the custodial sentence ordered by the trial judge and the refusal to provide for parole. The majority disagreed and confirmed the sentence. With respect, the sentence does appear appealably excessive having regard to the circumstances of the statutory "burglary", the "offence" nominated by the prosecution, the maximum punishment applicable for that "offence" against the Act, the total duration of the criminality and the circumstances described in the evidence. However, because that issue was expressly withdrawn when the application was returned before this Court as presently constituted, I must put it out of consideration. In particular, I must be careful not to allow my concern about the applicant's sentence to affect my approach to the issues he raises in his continuing challenge to his conviction.

77 *The applicant's conviction*: Upon that challenge, the following issues arise:

(1) Did the trial judge err in the direction he gave the jury concerning the elements of the offence in s 401(2) of the Criminal Code?

(2) If so, did the Court of Criminal Appeal err in its conclusion that once lack of "consent", as an express element of the crime, was found by the jury to have been proved beyond reasonable doubt, it necessarily followed that the "offence" of breach of the violence restraining order under s 61(1) of the Act was established, notwithstanding the defence provided to such "offence" in s 62(1) of the Act?

(3) Did the Court of Criminal Appeal err in failing to conclude that a wrong direction on a question of law by the trial judge or error in the conduct of the trial occasioned relevant procedural unfairness to the applicant amounting to a miscarriage of justice?

(4) Having regard to the answers to the foregoing, did the Court of Criminal Appeal err in holding that the case was one for the application of the proviso to s 689(1) of the Criminal Code? Or was the proviso inapplicable in the circumstances either on the ground that (a) the conduct of the trial was fundamentally flawed; or (b) otherwise a substantial miscarriage of justice had occurred obliging the retrial of the applicant?

<u>The trial judge's error of law</u>

78 It is elementary that a judge, presiding in a jury trial, must instruct the jury accurately on the elements of the offence or offences with which the accused is charged. If the offence is provided by statute, this involves informing the jury of the provisions of the applicable statute and explaining the elements of the offence by reference to the evidence and, where appropriate, the arguments of the parties. Explaining those elements is a central function of the judge. A mistake in doing so is not necessarily fatal to the lawfulness of a trial and the safety of a

conviction[27]. Yet it commonly will be so for the jury has no other source of accurate instruction about the law which they are to apply to the facts as they find them.

79 This Court was told that in Western Australia, unlike other Australian States, the practice is not observed of providing the jury with written instructions on critical matters of law, that set out, or refer to, the provisions of applicable legislation. The provision of such written instructions may be useful, where they exist, in curing minor verbal infelicities in the trial judge's oral directions[28]. None were provided here.

80 I am prepared to accept that the trial judge's directions to the jury, on the meaning of that element of the offence in s 401(2) of the Criminal Code that refers to "without that other person's consent", were accurate and sufficient. But, that left it for the trial judge to explain that a further precondition to the jury's verdict of guilty of such an offence was that the prosecution was obliged to prove beyond reasonable doubt that the applicant had committed "an offence" in the "place" of his wife, which was "ordinarily used for human habitation". So far as the "place" and "human habitation" were concerned, the trial judge correctly instructed the jury that those elements had been proved by the evidence and were not in contest. But that left the need for accurate instruction about the "offence" which the prosecution had identified and on which it relied.

81 It was clear from the start of the trial that the applicant's real dispute about his guilt of the offence against s 401(2) of the Criminal Code concerned his allegation of the wife's consent and whether what he had done was "an offence" in the circumstances. He said that he had been invited to the place by the wife in order to repair her car. He did not give sworn evidence of this; but it was clear that this was his defence. So much was indicated by what he said in the recorded interview with police admitted into evidence; by his questioning of the wife; and by his oral exchanges with the judge that inferentially reflected what he would have said to the jury in his address (which was not recorded).

82 These considerations made it important that the trial judge should explain the elements of the "offence" in question and all of them. Although there were other potential "offences" which the prosecution could have nominated to constitute that component of the charge in the first count of the indictment, the trial proceeded on the footing that the relevant "offence" was one against s 61(1) of the Act. The applicant did not contest that he was bound by a violence restraining order made under the Act. His contest related to whether he had

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27 *Krakouer v The Queen* (1998) 194 CLR 202.

28 cf *Heron v The Queen* (2003) 77 ALJR 908 at 916-917 [49]; 197 ALR 81 at 93.

breached that order and, if there was a "technical" breach, whether the specific invitation of the wife and/or the course of their conduct after the order was made, amounted to a defence to the "offence" by reference to the terms of s 62(1) of the Act. In the way the trial proceeded, the alleged course of the parties' conduct fell away because the applicant asserted that he had a specific invitation and therefore the wife's express consent.

83 A preliminary question is presented as to whether it was sufficient for the prosecution to show that the applicant was in breach of the order under the Act, so that any defence that he might have, pursuant to s 62(1), would not deprive that breach of amounting to the commission of an "offence", sufficient (without more) to sustain that element in s 401(2) of the Criminal Code. Because the applicant had elected to dismiss his counsel, the trial judge had no assistance on the meaning of "offence"; nor was adequate assistance on this question given by the prosecutor. I am very conscious of the difficulties which the trial judge faced in the circumstances.

84 A majority of this Court[29] has now concluded that, where s 401(2) of the Criminal Code refers to an "offence", and where the "offence" relied upon is (as here) a breach of s 61(1) of the Act, the defence available to the accused by s 62 of the Act is not incorporated into the reference to the "offence" in s 401(2) of the Criminal Code. I accept that this is an arguable interpretation of the interaction of the Criminal Code and the Act. Adopting it has certain advantages. It recognises the differentiation within the Act between the "offence" in s 61(1) and the "defence" provided by s 62 of the Act. It recognises that a breach of a restraining order is, on the face of things, a criminal wrongdoing and an "offence" which normally warrants punishment. It avoids the need to give the jury for this purpose potentially confusing instructions to the effect that the onus of establishing any defence under s 62 of the Act would be on the accused according to the civil standard and not the criminal standard. It reaffirms the normal rule of criminal trials that the accused need prove nothing and that the burden of proof of all elements of an offence remains on the prosecution throughout.

85 Despite these attractions, this is not, in my view, the correct or preferable construction of the two statutes as they interact in such a case. It is not the appropriate way to resolve the apparent paradox presented by their intersection. In this I agree with the approach of the Court of Criminal Appeal.

86 As a matter of principle, the correct interpretation of the Act, in the context of s 401(2) of the Criminal Code, necessitates reading the two provisions together to decide whether the relevant "offence" has been committed. This

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29 The joint reasons at [47]-[54]; cf reasons of Gleeson CJ at [19]-[22].

follows from the fact that the commission of an "offence" is a precondition to the establishment of the very serious crime postulated by s 401(2) of the Criminal Code. Were an accused to have a watertight defence of consent, as contemplated by s 62(1) of the Act, the inculpating ingredient of an "offence", as mentioned in s 401(2), would not then be established. Indeed, if the person bound by the order under the Act could satisfy the decision-maker that he or she had acted with the consent of the person protected by the order, an issue might arise as to whether a "breach" of the order had been committed at all so as to constitute an "offence" against s 401(2). In a particular case the establishment of the defence could negative the "offence" and show that there was no true "breach" of the order. Alternatively, it could show that any "breach" was purely technical and such as to fall short of the kind of "offence" contemplated in s 401(2).

87 Any other reading of the requirement of s 401(2) of the Criminal Code to establish the commission of an "offence", where the "offence" propounded is a breach of a violence restraining order under the Act, would be artificial in the circumstances. It would ignore the obvious purpose of s 401(2) of the Criminal Code. That is to attach very serious consequences to the commission of an "offence" in another person's place. If, for example, a husband, bound by such a restraining order, received an urgent request by a wife, protected by such an order, to come to the aid of a sick or injured child, it is inconceivable that s 401(2) would be read as providing that the husband committed the serious "offence" against the Criminal Code postulated simply by entering the place of the wife in response to her invitation (ie acting with her consent). To the extent that there is any doubt concerning the importation of the defence in s 62 of the Act into the notion of the "offence" referred to in s 401(2) of the Criminal Code where a breach of s 61(1) of the Act is the "offence" relied upon, I would resolve that doubt by holding that the "offence" contemplated is the one envisaged by reading ss 61 and 62 of the Act together. The alternative view now favoured by the majority leaves it open to punish an accused, at the option of the prosecutor, for an aggravated "offence" based on a breach of the Act while depriving the accused of the defence which Parliament has explicitly enacted with respect to that "offence" in the Act. It would require much clearer statutory language than appears in the intersecting legislation to drive me to such a construction.

88 It could not be said that the issue of the wife's consent, as an exculpation of the "offence" element in the charge under s 401(2) was a minor or uncontested issue in the trial of the applicant. On the contrary, as the trial judge correctly told the jury, the critical question raised by the applicant in the trial was that of the wife's consent. This made it important that the element of the "offence" be accurately explained to the jury. This, in turn, made it important that the ingredients of the "offence", as provided by the Act, be correctly described. The jury should have been told that, where a breach of a restraining order was shown (as for example conduct in contravention of the terms of the order), the applicant would have a defence to such an offence against the Act if he had proved, on the

balance of probabilities, that he was acting with the consent of the person protected by the order, in this case the wife.

89 Although the applicant obliquely raised this issue at the trial, the trial judge, addressing the "red herring" of honest and reasonable mistake, instructed the jury as a matter of law that the applicant's belief of the existence of consent was no defence to the commission of an offence. So far as the "offence" against the Act was concerned, this was an incorrect statement of law. The Court of Criminal Appeal was correct to so conclude.

90 It follows that the Court of Criminal Appeal was right in its opinion that an error of law had occurred in the trial judge's directions to the jury on the ingredients of the offence in the first count of the indictment. The respondent initially accepted that there had been such a misdirection. However, in this Court, following questions and comments from the Court, the prosecutor sought to withdraw that concession. In my view, the prosecutor's first thoughts were right. The initial concession was correctly made. An error of law having been established in the explanation to the jury of an element of the offence, the applicant has demonstrated a basis for intervention to require a new trial.

The two ingredients of consent

91 Notwithstanding the established error, the Court of Criminal Appeal decided to apply the proviso. The decision in that regard belonged to the Court of Criminal Appeal in accordance with the Criminal Code. Given the role of that Court and the functions of this Court, we should not attempt, without good reason, to second guess decisions of a court of criminal appeal on such questions[30].

92 Correctly, the Court of Criminal Appeal pointed to the strong evidentiary case against the applicant. But another consideration weighed heavily with that Court. This was the suggestion that, once lack of consent as an element of the offence against the Criminal Code was proved beyond reasonable doubt (as by inference it was by virtue of the jury's verdict of guilty), it necessarily followed that the "offence" constituted by breach of the restraining order was also established so that the presence of consent as a defence to that offence could equally be taken to have been excluded by the jury's verdict. In a sense, the latter consent was more clearly shown because upon it the applicant himself had carried the burden of persuasion.

93 Potentially, there is a logical flaw in this reasoning. There were two ingredients to the offence charged in respect of which consent had to be

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30 *Postiglione v The Queen* (1997) 189 CLR 295 at 337.

considered. One was the *explicit* reference to "consent" in the terms of s 401(2) of the Criminal Code (which refers in terms to being present in a place "without that other person's consent"). The other was the *implicit* reference to consent as a defence to the "offence" which the prosecution had propounded as the "offence" committed by the applicant at the wife's place, being his alleged breach of the order under the Act. The two ingredients are not exactly the same. The explicit reference to "consent" refers to entering or being in the "place". The implicit element of lack of consent refers to the breach of the restraining order under the Act. Whilst the two issues are very similar and the relevant evidence will often overlap, they are distinct, being concerned with two successive ingredients in the "offence" provided by the Criminal Code and relating to conduct, potentially at different points of time.

94 However, although there was an error on the part of the trial judge the question remains whether, in the circumstances, the error was merely technical. In the way the applicant's trial was conducted, did it deprive the applicant of the possibility of an acquittal? Did it result in no miscarriage of justice so that the Court of Criminal Appeal was authorised to dismiss the appeal by invoking the proviso?

The suggested departure from procedural fairness

95 To answer these questions it is necessary to return to the conduct of the trial. Because the applicant was unrepresented for the greater part of the trial, it was the duty of the trial judge to provide him with such information and advice concerning his rights as was necessary to put him in a position where he could make "an effective choice whether he should exercise those rights"[31]. This is so, although the dismissal of counsel followed the applicant's own decision. Whilst making it clear that the judge is not advising an accused on how rights should be exercised or the case conducted, the judge must assume the difficult task of ensuring that the accused is made aware of the important choices that have to be made. Such choices are informed by practical and forensic circumstances, not simply legal principles.

96 In this case the trial judge certainly attempted to explain the decisions that the applicant faced. However, in this Court the applicant argued that because of the incorrect view that the prosecutor, and subsequently the trial judge himself, expressed about the elements of the offence in the first count, he was not afforded an effective choice on the most critical decision he had to make. This concerned whether he should give oral evidence. On the basis of the trial judge's advice that the burden of establishing *all relevant facts* rested on the prosecution alone, the applicant's decision not to give evidence was, so it was said, a rational

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31 *R v Gidley* [1984] 3 NSWLR 168 at 181.

one. But once it was accepted that, to determine the existence or otherwise of the ingredient of an "offence" against the Act, it was relevant for the jury to take into account any evidence that the applicant might have given on the issue of his defence to such a postulated "offence", the decision took on a different complexion.

97 Had the applicant been informed accurately concerning the elements of the charge he faced on the first count (and the significance in that connection of his failure to give evidence in relation to a defence to the propounded "offence") counsel argued before this Court that the applicant might well have elected to give evidence. Had he given evidence, it was possible that his testimony would have persuaded the jury that the wife had indeed given her consent to his visit to her place. In default of such evidence, the jury were obliged to proceed upon little more than the record of his unsworn interview with the police. Because that interview was controlled by police questioning, and did not follow a course designed to favour the applicant's interests, it could scarcely be equated to the potential worth, in a jury's eyes, of the applicant's sworn version of events.

98 In short, the applicant's case was that his failure to give evidence was influenced by the trial judge's mis-statement of the law relevant to the "offence" ingredient of the charge. The trial judge's mistaken appreciation of the point and statements about the elements of the offence to the applicant not only caused the jury to fail to consider all of the relevant legal issues appropriately. It also potentially misled the applicant as to the manner in which he should conduct his own defence. Because, at the time, he was unrepresented this defect, in the course that the proceedings took, could not be regarded as insignificant. It involved a miscarriage of justice and required a retrial.

99 So went the case for the applicant. For a time I was persuaded by it. Influential upon my initial impression was a feeling that the trial judge's explanation about the applicant's right to silence and his entitlement to the last address, whilst technically impeccable, may in the context have misled the applicant concerning the realities of his trial. Most modern juries know that an accused is entitled to give evidence. If he or she fails to do so, some juries may respond adversely to the omission to state on oath the accused's version of events and to submit to cross-examination, with the risks that that entails. In the ordinary course, these are the considerations that counsel would have explained to the applicant. They were not explained, or explained fully, by the trial judge. This may have led the applicant into a false confidence about the course he then embarked upon. It is impossible to say whether, had the applicant been accurately, fully and privately advised, he would have given evidence and, if he did, what impact that evidence might have had on the jury. No affidavit of any such suggested evidence was proffered to the Court of Criminal Appeal. So where does this leave the conclusion of that Court that the proper outcome in the appeal was the application of the proviso?

Application of the proviso to the case

100 *No radical or fundamental error*: The applicant primarily contended that the mistakes that had occurred at his trial constituted a failure in the trial process of the kind that could be described as "[e]rrors … so radical or fundamental that by their very nature they exclude the application of the proviso"[32]. On that footing, he submitted that the proviso did not apply to save proceedings that had so significantly miscarried[33]. This suggested category, demanding a retrial of significantly flawed criminal proceedings resulting in a conviction, has frequently been mentioned in the cases[34]. However, rarely, has it been the foundation of appellate orders[35]. That this is so is scarcely surprising. Normally, as in this case, the statute that gives jurisdiction and power to a court of criminal appeal is the same statute that contains the legislative instruction for the disposition of criminal appeals where a legal error at trial is shown. That instruction includes the requirements of the proviso. On the face of things, therefore, the proviso governs all cases where error is demonstrated: whether such error is fundamental or non-fundamental.

101 Supposing that a category of "radical or fundamental" error exists that, in some way, relieves a court of criminal appeal from applying the saving requirements of the proviso, the applicant's case is certainly not to be so classified. In difficult circumstances, without full assistance from both parties, the trial judge attempted to perform the duties cast upon him when the accused became unrepresented. A mistake occurred in his instruction of the jury. Yet the prosecution case was far from a weak one. Evidence relevant to consent, and material for the applicant pertinent to that issue, had been placed before the jury. All that was apparently omitted was any sworn evidence which the applicant might have elected to give. He might, or might not, have given such evidence had he been accurately informed of the possible significance of evidence addressed to one of the ingredients of the offence with which he was charged: namely, whether he had a defence to the suggested "offence" of being in the

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32 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373.

33 *R v Henderson* [1966] VR 41 at 43; *Couper* (1985) 18 A Crim R 1 at 7-8; *Wilde v The Queen* (1988) 164 CLR 365 at 373 citing *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148; *Green v The Queen* (1997) 191 CLR 334 at 371 per McHugh J.

34 See eg *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Glennon v The Queen* (1994) 179 CLR 1 at 9; *Heron v The Queen* (2003) 77 ALJR 908 at 915 [41]; 197 ALR 81 at 91.

35 cf *Stanton v The Queen* (2003) 77 ALJR 1151 at 1163-1164 [72]; 198 ALR 41 at 58 per Gummow and Callinan JJ (in dissent).

wife's place contrary to the order made under the Act. What follows from this possibility? Does it require a retrial in this case?

102 *No relevant miscarriage of justice*: The Court of Criminal Appeal decided the appeal by the application of the proviso according to its terms.[36] The application to this Court must be approached in accordance with the ordinary principles governing matters involving an invocation of the proviso notwithstanding a misdirection of law in the course of the trial[37].

103 I accept that special vigilance is appropriate in a case like this where the applicant was unrepresented at a time when critical decisions about the adequacy and correctness of the trial judge's directions to the jury had to be made. I also accept that the correct explanation to the jury of the elements of the offence is extremely important. Where there is a mistake in the trial judge's directions in this regard it is less likely that the proviso will be applied than in other cases. Recent observations suggest that, as a general rule, the proviso may be applied less commonly today than was previously the case[38]. This may be the result of an appreciation by appellate courts that, to some extent at least, the mere fact that a prisoner demonstrates that a legal error has occurred in the instruction to the jury establishes that a miscarriage of justice of a particular kind has happened[39].

104 Neither in this Court nor in the Court of Criminal Appeal was a complaint made that the trial judge did not invite the applicant's attention to the practical, as distinct from, the legal, consequences of giving no evidence before the jury. In these circumstances I must put the anxiety that I feel about the trial judge's explanations to the applicant in that regard to one side. In this way, the decision comes down to whether the failure of the trial judge to explain to the applicant the possible relevance of the ingredients of the "offence", and the significance in

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36 Criminal Code, s 689(1).

37 *Zoneff v The Queen* (2000) 200 CLR 234 at 246 [26]; cf 267-268 [85]-[89]; *Conway v The Queen* (2002) 209 CLR 203 at 220 [38], 232 [80]; *Heron v The Queen* (2003) 77 ALJR 908 at 915-917 [43]-[52]; 197 ALR 81 at 91-94.

38 *Whittaker* (1993) 68 A Crim R 476 at 484; *Gilbert v The Queen* (2000) 201 CLR 414 at 438 [86]; *Doggett v The Queen* (2001) 208 CLR 343 at 384-385 [153].

39 *Driscoll v The Queen* (1977) 137 CLR 517 at 524; *Domican v The Queen* (1992) 173 CLR 555 at 565-567; *Green v The Queen* (1997) 191 CLR 334 at 346, 371-372; *KBT v The Queen* (1997) 191 CLR 417 at 423-424; *Farrell v The Queen* (1998) 194 CLR 286 at 293-294, 326; *Festa v The Queen* (2001) 208 CLR 593 at 655 [203], 661-662 [228].

that regard of the defence provided by s 62 of the Act, might possibly have deprived the applicant of the necessary impetus to give evidence about the invitation that he said his wife had given him, with the consequences that such sworn evidence might have had for the jury's deliberations and their verdict on the first count.

105 In judging that question in a practical context it is relevant to take into consideration that, in this case, the applicant's defence to the "offence" against the Act was not, in substance, different from his defence to the "offence" against s 401(1) of the Criminal Code. In fact, it was the same. And it was very simple. He did not dispute the application of the order under the Act. Instead, he said, relevantly, that he was excused from the apparent breach of the order because the wife had invited him to her new place of residence to repair her car. That, he said, answered s 401(1) of the Criminal Code. It rendered that provision inapplicable for two reasons. The prosecution could not prove that the applicant was there "without [the wife's] consent". It could also not prove that he committed an "offence", namely breach of the Act, when regard was had to the defence available to him under s 62.

106 Because the applicant's defence was already before the jury in the form of his statement to the police, his questioning of the wife and, inferentially, his address to the jury, and was rejected by the jury in convicting the applicant, it cannot be said that the jury did not consider and decide the point in this case. It is true that the applicant did not give evidence, as he might have done. However, that was the result of an election that he made following advice from the trial judge which, so far as it went, was legally accurate. To a very large extent, the difficulties which the applicant faced, real and practical as they were, followed his dismissal of his counsel and his attempt thereafter, without legal assistance, to represent himself. The evidence sustaining the absence of consent was strong. It was by no means confined to the evidence of the wife.

107 Given, therefore, the commonality of the answer which the applicant gave to the elements of the first count of the indictment and the adverse decision of the jury on that contest in respect of the issue of "consent", I am unconvinced that, had the jury been properly instructed on the element of the "offence" involved in the charge presented by the first count, a different result might have ensued. Nor am I convinced that explanation of that element by the trial judge might have made the difference to propel the applicant into the witness box where the other pressing circumstances of his trial had failed to do so.

108 It was therefore open to the Court of Criminal Appeal to apply the proviso and to confirm the applicant's conviction notwithstanding the error of law that arose in the instruction of the jury. Upon the issues argued in this application, no error has been shown to entitle this Court to disturb the order of the Court of Criminal Appeal.

Order

109 Special leave should be granted but the appeal should be dismissed.