JOHNSON v THE QUEEN (A9/2018)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2015] SASCFC 170

Date of judgment: 24 November 2015

Special leave granted: 16 February 2018

In 2015 the appellant (then 61 years old) was tried before a jury on five charges of historical sexual offences against his sister, VW (who was aged 58 at the time of the trial). The charges were essentially as follows:

- Count 1 – indecent assault, when VW was aged 7-8;
- Count 2 – carnal knowledge, when VW was aged 14;
- Count 3 – persistent sexual exploitation, when VW was aged 15-16;
- Count 4 – rape, when VW was aged 25-26; and
- Count 5 – rape, when VW was aged 27.

VW's testimony included allegations of various uncharged acts of assault by the appellant against her, which included incidents when VW was aged about 3 to 6 years. Those alleged acts were relied upon by the prosecution in relation to count 1 in aid of rebutting the presumption of *doli incapax*, which arose because the appellant's age at the time was no more than 10. In relation to count 3, which required at least two specific acts for the offence to be made out, VW testified that the appellant abused her almost weekly for approximately two years and that there was nothing to differentiate one assault from another. The trial judge, Judge Beazley, warned the jury against impermissible propensity reasoning and instructed the jury as to the limited potential relevance of the uncharged acts (in the event that the jury were satisfied that any of those alleged acts had occurred).

The jury found the appellant guilty on all counts. Judge Beazley then sentenced him to imprisonment for 8 years and 3 months, with a non-parole period of 3 years.

The appellant appealed against his conviction, on grounds which included that all verdicts were unreasonable and that the trial had miscarried due to the lack of a separate trial on count 1. He contended that evidence led in relation to the question of *doli incapax* was prejudicial and that it was also irrelevant to the other counts.

The Court of Criminal Appeal ("the CCA") (Sulan, Peek & Stanley JJ) unanimously allowed the appeal in part. Their Honours found that the evidence relating to count 1 was not capable of rebutting the presumption of *doli incapax*. The jury should have had a reasonable doubt as to the appellant's understanding, at 10 years old, that what he was doing with VW was seriously wrong in the sense that it attracted criminal responsibility. The CCA then set aside the verdict of guilty on count 1 and entered an acquittal. Their Honours also acquitted the appellant on count 3, finding that it was not possible on the

evidence for the jury to identify and agree upon any particular alleged acts as the two or more required to found the commission of the charged offence.

The CCA also held however that the verdicts on counts 2, 4 and 5 were not unreasonable. Their Honours considered that the evidence relevant to count 1 remained admissible on the other counts, principally as "relationship evidence", and that the jury could not have had reasonable doubt as to the appellant's guilt on counts 2, 4 and 5. The CCA also held that there was no miscarriage of justice on account of the appellant's acquittal on count 3, since that acquittal was on a matter of law, not because the evidence of relevant facts was suspect.

The grounds of appeal include:

- The CCA erred by failing to find that it followed from the fact that a verdict of acquittal should have been entered in relation to count 1 that the joinder of count 1 together with counts 2, 4 and 5 caused a miscarriage of justice, in that:

  (a) the evidence led in relation to count 1, including with a view to rebutting the presumption of *doli incapax*, was not properly admissible with respect to counts 2, 4 and 5;

  (b) alternatively, if that evidence might have been admissible as evidence of uncharged acts and admissible with respect to counts 2, 4 and 5, there was nevertheless prejudice to the appellant, resulting in a miscarriage of justice, arising from the fact that:

    (i) that was not the basis on which the evidence was led nor upon which the jury were instructed;

    (ii) having returned a verdict of guilty in relation to count 1, the jury necessarily treated the evidence in relation to it as having a status or effect which, according to the CCA's findings, it could not properly bear; and

    (iii) the jury's verdict on count 1 necessarily involved a rejection beyond reasonable doubt of the appellant's sworn account.