

GBF v THE QUEEN (B18/2020)

Court appealed from: Court of Appeal of the Supreme Court of Queensland
[2019] QCA 4

Date of judgment: 1 February 2019

Special leave granted: 15 April 2020

On 2 August 2016 the Appellant was convicted of three counts of rape and two counts of indecent treatment of a child under 16. Each count was a domestic violence offence. All of the counts were alleged to have occurred between December 2012 and August 2013, with the Complainant being the Appellant's half-sister. At the time of the offences the Appellant was aged between 33 and 34, while the Complainant was aged between 13 and 14. At his trial, the Appellant neither gave, nor called, evidence. On 4 August 2016 Judge Wall sentenced him to a total of nine years imprisonment.

Upon appeal the Appellant submitted, inter alia, that Judge Wall had misdirected the jury during the summing-up. That misdirection was said to concern the effect of a comment from Judge Wall to the jury that the *absence of evidence from the Appellant* might make it easier to convict. This was notwithstanding the fact that proper directions *were* given to the jury concerning the absence of evidence from the Appellant earlier on.

On 1 February 2019 the Court of Appeal (Morrison & Philippides JJA; Boddice J) unanimously dismissed the Appellant's appeal against conviction, but allowed an appeal against sentence in part. Their Honours noted that, while Judge Wall's words were unwise, neither the Prosecutor nor the Defence Counsel had sought any redirection or correction. The Court of Appeal noted that Judge Wall had previously made specific directions to the effect that the Appellant was presumed to be innocent and that no adverse inference was to be drawn from his failure to give evidence. They further found that Judge Wall had properly directed the jury that the prosecution bore the onus of proof, including that the Appellant was not operating under a mistake of fact. Furthermore, any comment that his Honour may have made in respect of the evidence was an observation that may be accepted or rejected by the jury.

Their Honours found that there was no real possibility that the jury may have misunderstood Judge Wall's direction. The Appellant was not therefore deprived of a real chance of acquittal as a consequence of Judge Wall's inappropriate comment. No miscarriage of justice had arisen.

The sole ground of appeal is:

- The Court of Appeal erred in finding that Judge Wall's statement to the jury that the absence of sworn evidence from the Appellant "might make it easier" to accept the Complainant's evidence, while wrong because it impacted both the right to silence and presumption of innocence, did not occasion a miscarriage of justice because no redirection was sought and because of other contradictory directions.