

BBH v. THE QUEEN (B76/2010)

Court appealed from: Court of Appeal of the Supreme Court of Queensland
[2007] QCA 348

Date of judgment: 19 October 2007

Date referred: 13 May 2011

This application for special leave to appeal was referred to an enlarged Full Court for hearing as on appeal.

After a trial by jury, the applicant was convicted of one count of maintaining an unlawful sexual relationship with a child under 16 years of age who was his daughter and under his care, four counts of indecent treatment of a child under 16 years of age who was his daughter and under his care, and four counts of sodomy of a child under 16 years of age who was his daughter and under his care. He was found not guilty on three counts of indecent treatment. He was sentenced to 10 years' imprisonment on each count, to be served concurrently. The trial judge admitted evidence from the complainant's brother ("W") who gave evidence that when he, the complainant and the applicant were on a camping holiday he returned to the campsite to find the complainant undressed from the waist down and bent over with the applicant's hand on her waist and his face close to her bottom. W agreed that the incident could have been consistent with the applicant examining the complainant for a bee sting or ant bite. The complainant gave no evidence about this incident.

The Court of Appeal dismissed the applicant's appeal against conviction. Keane JA (as his Honour then was) gave the judgment of the Court, with which Holmes JA and Lyons J agreed. The applicant contended that the evidence of W should not have been admitted because it was equivocal, and that the trial judge had not given an adequate warning as to the use that could be made of that evidence. Keane JA rejected this argument, finding that W's evidence was relevant to the issue of whether there was a sexual attraction on the part of the applicant toward the complainant and therefore to the relationship between the applicant and the complainant and to the context in which the particular charged offences occurred. His Honour also held that W's evidence tended to establish the maintaining offence, and that the trial judge's direction was sufficient to ensure that the jury understood that they could not act on W's evidence unless they were satisfied that the incident did occur and that it did not have an innocent explanation.

The grounds of appeal in the draft notice of appeal include:

- Whether the Court of Appeal erred when it held that evidence of an event, the source of which was a witness who proffered an innocent explanation for that event, could be used in proof of an unnatural relationship between the applicant and the complainant, who gave no evidence about any such event;
- In *HML v. The Queen* [2008], differing views were expressed about the effect of this Court's decision in *Pfennig v. The Queen*. Does the test for admissibility proposed in *Pfennig* apply to evidence of discreditable conduct? If so, is such a test necessary? Does it have any "real practical application"?