HUGHES v THE QUEEN (S226/2016)

Court appealed from: New South Wales Court of Criminal Appeal
[2015] NSWCCA 330

Date of judgment: 21 December 2015

Special leave granted: 2 September 2016

In 2014 Mr Robert Hughes stood trial in the District Court of New South Wales on 11 charges of having sexual intercourse with, and committing acts of indecency on, five girls under the age of 16. The alleged offences occurred between 1984 and 1990.

In its case against Mr Hughes, the Crown served notice on him under s 97(1) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") that it intended to adduce evidence against him in seeking to prove that Mr Hughes had a tendency to act in a particular way and to have a particular state of mind, namely:

(i) To having a sexual interest in female children under 16 years of age;

(ii) To use his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;

(iii) To use his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;

(iv) To use his working relationship with females to utilise an opportunity to engage in sexual activities;

(v) To engage in sexual conduct with females aged under 16 years of age …

The witnesses whom the Crown proposed to call to give tendency evidence were the five complainants, plus six others who had either worked with Mr Hughes or had known him through social or familial connections. The Crown sought that each complainant's testimony be admitted as tendency evidence in relation to the charges in respect of each other complainant, and that the testimony of the six other witnesses be admitted as tendency evidence in relation to all of the charges.

Prior to the trial, Mr Hughes challenged the admissibility of the tendency evidence. On 14 February 2014 Judge Zahra held that the tendency evidence was admissible in relation to each of the charges, after finding that it would have "significant probative value" as required by s 97(1) of the Evidence Act. His Honour found that the proposed evidence was capable of demonstrating that Mr Hughes had at various times acted upon a sexual attraction to young female children.

At the conclusion of the trial, the jury found Mr Hughes guilty on 10 of the 11 charges. Judge Zahra then sentenced Mr Hughes to imprisonment for ten years and nine months with a non-parole period of six years.

Mr Hughes appealed against his conviction, on grounds which included that the tendency evidence should not have been admitted. He submitted that several of the alleged tendencies could pertain to only some of the charges, and that the various circumstances and types of conduct described in the tendency evidence were not sufficiently similar as to have significant probative value.

The Court of Criminal Appeal ("the CCA") (Beazley P, Schmidt & Button JJ) unanimously dismissed Mr Hughes's appeal. Their Honours described the Crown's case as having alleged that Mr Hughes had the two essential tendencies of a sexual interest in female children and engaging in sexual conduct with them. Those tendencies were exhibited in the different contexts of Mr Hughes's social and familial relationships, his work environment and his daughter's relationship with her friends. The CCA found that, despite obvious dissimilarities in the circumstances, there was a commonality of occasions on which young females were present and Mr Hughes had used those occasions for the purpose of engaging in sexual activities. Their Honours also found that the alleged conduct, notwithstanding dissimilarities, was sexual in nature and had occurred opportunistically on occasions when young females were in the company of Mr Hughes. The CCA held that, for tendency evidence to be admissible under s 97 of the Evidence Act, it need not exhibit an "underlying unity" or a "pattern of conduct". Their Honours then found that Judge Zahra had correctly assessed the tendency evidence as having significant probative value.

The grounds of appeal are:

- The New South Wales Court of Criminal Appeal erred in:

  (i) finding that the tendency evidence had significant probative value as required by s 97 of the Evidence Act;

  (ii) finding that the trial judge did not err in finding that the tendency evidence had significant probative value as required by s 97 of the Evidence Act;

  in circumstances where the alleged acts relied upon as tendency evidence were dissimilar in nature, context and circumstance.

- The New South Wales Court of Criminal Appeal erred in:

  (i) holding that an "underlying unity" or "pattern of conduct" need not be established for tendency evidence to have significant probative value as required by s 97 of the Evidence Act;

  (ii) rejecting the approach adopted by the Victorian Court of Appeal in *Velkoski v R* [2014] VSCA 121 which requires an assessment of the degree of similarity when considering whether the proposed tendency evidence has significant probative value.