VERSI v THE QUEEN (S296/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 206

Date of judgment: 14 November 2013

Date referred to Full Court: 11 April 2014

In June 2011 Mr Peter Versi was charged with offences involving sexual misconduct against his step-daughter, "SD2", in the 1980s. On 31 August 2011 a jury found Mr Versi guilty on two of the four charges. Both offences occurred when SD2 was about 12 years old. The first was an act of indecency by Mr Versi having SD2 rub medicinal cream on his genitals (count 2), the second was sexual intercourse with a child under his authority (count 3).

Evidence ruled admissible in the trial included that of SD1, who had been a step-daughter of Mr Versi's during his previous marriage. SD1 gave evidence of an incident which she alleged occurred when she was about 13 years old (approximately seven years prior to the events giving rise to counts 2 and 3). On that occasion, she followed instructions given by Mr Versi which he said would help ease a hernia in his groin. That involved SD1 holding Mr Versi's erect penis while he moved his hips. Judge Taylor admitted SD1's evidence as coincidence evidence in respect of count 2. His Honour then instructed the jury that they must not use SD1's evidence in considering any of the other three counts. The prosecution suggested to the jury that it consider count 2 first and, after any finding of guilt on that count, that it then consider the other counts on the basis that Mr Versi had an active sexual interest in SD2. Judge Taylor later directed the jury that, if it found Mr Versi guilty on any of the counts, it could proceed to find that Mr Versi had a sexual interest in SD2 on which he had acted, a finding which in turn it could use as tendency evidence in relation to any of the other counts.

After receiving the jury's verdicts, on 29 March 2012 Judge Taylor sentenced Mr Versi to imprisonment for two and a half years, with a non-parole period of a year and a half. Mr Versi appealed against his conviction, on grounds that included a challenge to the admission of SD1's evidence. That was on the basis that its probative value in relation to count 2 was outweighed by its prejudicial effect on the jury's consideration of the evidence relating to the other counts.

On 14 November 2013 the Court of Criminal Appeal ("CCA") (Basten JA, Adams & Latham JJ) unanimously dismissed Mr Versi's appeal. Their Honours held that although Judge Taylor had incorrectly directed the jury to assess SD1's evidence in isolation before making use of it in deciding upon count 2, that error had not given rise to a miscarriage of justice. This was because the evidence of SD2 (in respect of count 2) and that of SD1 was mutually corroborative. The CCA found that there was nothing to suggest that the jury, in finding Mr Versi guilty on count 3, had made use of SD1's evidence contrary to Judge Taylor's direction not to use it directly in relation to counts 1, 3 or 4.

On 11 April 2014 Justices Kiefel and Keane referred this matter into an enlarged bench to be argued as if it were an appeal.

The questions of law said to justify the grant of special leave to appeal are:

- Was SD1's evidence inadmissible by virtue of ss 98(1), 137 or 101(2) of the *Evidence Act* 1995 (NSW)?

- Was SD1's evidence treated improperly once admitted, by being given undue weight and by then being used to support a finding of guilt on a count for which it was not admitted?

- If the answer to either of the above questions is "yes", was there a miscarriage of justice?