



HIGH COURT OF AUSTRALIA

Public Information Officer

26 March 2008

AK v THE STATE OF WESTERN AUSTRALIA

The High Court of Australia today ordered a retrial for a boy charged with indecently dealing with a child after the trial judge sitting without a jury gave insufficient reasons for his decision to convict.

In February 2002, AK, then aged 13, allegedly dealt indecently with his 15-year-old female cousin as they slept on a double mattress with his brother, R, aged 14, and her sister, aged 16. AK's family had visited the cousin's family in Geraldton, Western Australia, when the two families decided to travel to Tardun and spend the night in a caravan. During the night AK allegedly touched his cousin's breasts and vagina and placed her hand on his penis. In March 2003, the cousin became pregnant and subsequently had an abortion. She told other family members and the police that AK was the father.

In 2004, AK was charged in the WA Children's Court with three counts of indecent dealing with a child aged between 13 and 16. These charges related to the alleged incident of February 2002. He was also charged with rape and indecent assault of the cousin in early 2003. In cross-examination of the cousin, an issue of identification was raised and the suggestion was put to her that R could have been the one who touched her in 2002. She was adamant it was AK, not R, but could not say how in the darkness she knew. After a trial in July 2005 before Judge Henry Wisbey sitting alone, AK was convicted of the counts of indecent dealing but acquitted of the other two charges. He was sentenced to a six-month intensive youth supervision order and is subject to seven-and-a-half years of reporting conditions. AK, now aged 19, appealed against his convictions for indecent dealing.

Section 120(2) of the *WA Criminal Procedure Act* provides that the judgment of the judge in a trial by judge alone must include the principles of law they have applied and the findings of fact on which they have relied. The Court of Appeal unanimously held that Judge Wisbey's reasons for judgment were inadequate because they did not identify and address the issue which arose at trial as the identity of the offender. However, by majority, the Court dismissed the appeal, applying the proviso that no substantial miscarriage of justice had occurred. AK appealed to the High Court.

The High Court agreed that Judge Wisbey erred in law in failing to give adequate reasons for his decision to convict AK, only stating his satisfaction beyond reasonable doubt that all elements of indecent dealing had been established. The Court held that Judge Wisbey was obliged to say why and how he resolved the question of identification in favour of the prosecution. However, the Court, by a 3-2 majority, held that the Court of Appeal erred in applying the proviso. The majority held that the complete failure to meet the mandatory requirements of section 120(2) of the Act with respect to the central issue of identification was a substantial miscarriage of justice. The High Court ordered that AK's convictions be quashed and directed that a new trial be held.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*