



HIGH COURT OF AUSTRALIA

8 November 2018

RICHARD JOHN McPHILLAMY v THE QUEEN
[2018] HCA 52

Today the High Court published its reasons for orders made on 9 August 2018, allowing an appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales, quashing the appellant's convictions and directing a new trial.

In 2015, following a trial before a judge and jury, the appellant was convicted of six sexual offences alleged to have been committed between 1995 and 1996 against "A". At the time, "A" was an 11-year-old altar boy under the supervision of the appellant in his role as an acolyte. On "A"'s account, the offences occurred on two Saturday nights before mass when the appellant followed him into the church's public toilet. The appellant did not give evidence at trial. The appellant's case was that "A" had made up the allegations to support his claim for compensation from the Catholic Church, knowing that the appellant had been charged with sexual offences against boys, but without knowing the details of those offences. "A" had previously told police that he had falsely stated in his compensation application that the appellant had anally penetrated him.

Over objection, the prosecution led tendency evidence from two men, "B" and "C". In 1985, "B" and "C" were about 13 years old and were boarding students at a college at which the appellant was then an assistant housemaster. "B" and "C" gave evidence that they had separately sought out the appellant when they felt homesick. On their accounts, the appellant had then comforted them in the appellant's room before committing sexual acts against them. At the trial for offences against "A", the appellant did not challenge the evidence of "B" or "C". The jury were instructed that the prosecution relied on the tendency evidence as demonstrating the appellant's "sexual interest in male children in their early teenage years who were under his supervision".

The appellant appealed against his convictions to the Court of Criminal Appeal, challenging the admission of the tendency evidence. Tendency evidence is not admissible unless the court considers that it possesses "significant probative value". A majority of the Court of Criminal Appeal held that the tendency evidence strongly supported the prosecution case and had been rightly admitted.

By grant of special leave, the appellant appealed to the High Court. The High Court held that, while the tendency evidence was capable of establishing that the appellant had a sexual interest in young teenage boys, it did not meet the threshold requirement of significant probative value in circumstances in which there was no evidence that the asserted tendency had manifested itself in the decade prior to the commission of the alleged offending. The tendency evidence rose no higher than to insinuate that, because the appellant had sexually offended against "B" and "C" ten years before, in different circumstances, he was the kind of person who was more likely to have committed the offences that "A" alleged. It was not, however, capable of affecting to a significant extent the assessment of the likelihood that the appellant committed the offences alleged by "A".

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.