HIGH COURT OF AUSTRALIA

4 November 2020

GBF v THE QUEEN
[2020] HCA 40

Today, the High Court unanimously allowed an appeal from the Court of Appeal of the Supreme Court of Queensland ("the QCA"). The appeal concerned whether a statement made by a trial judge to a jury about an accused's failure to give evidence occasioned a miscarriage of justice.

An indictment presented in the District Court of Queensland charged the appellant in seven counts with sexual offences alleged to have been committed against his half-sister ("the complainant") when she was aged 13 and 14 years. The prosecution case was wholly dependent upon acceptance of the complainant's evidence. The appellant did not give or call evidence. The trial judge directed the jury in unexceptional terms with respect to the presumption of innocence and the onus and standard of proof, instructing the jury that the appellant's silence could not be used as a makeweight, to fill gaps in the prosecution's evidence or to strengthen its case. However, later in the trial judge's charge, after referring to the complainant's evidence, his Honour instructed the jury to: "bear in mind that [the complainant] gave evidence and there is no evidence, no sworn evidence, by the [appellant] to the contrary of her account. That may make it easier" ("the impugned statement"). The jury returned verdicts of guilty with respect to six counts.

The appellant challenged his convictions in the QCA, contending that, in effect, the impugned statement was a direction to the jury that the absence of evidence from him might make it easier to find him guilty. The QCA acknowledged that the impugned statement should not have been made but found that there was no real possibility: (1) that the jury may have misunderstood the earlier correct directions; and (2) that the appellant had been deprived of a real chance of acquittal. Their Honours held that the impugned statement had not occasioned a miscarriage of justice. This conclusion took into account the fact that neither the prosecutor nor defence counsel applied for any redirection arising from the making of that statement.

By grant of special leave, the appellant appealed to the High Court. The Court accepted his submission that the effect of the impugned statement was to invite the jury to engage in a process of reasoning that was contrary to the earlier correct directions. The impugned statement encouraged the jury to find it easier to accept the complainant's allegations because the appellant had not given sworn evidence denying them. Such a process of reasoning is false because it proceeds upon a view that an accused may ordinarily be expected to give evidence, which is insupportable in an accusatorial system of criminal justice. It followed that the QCA was wrong in finding that the impugned statement was not an irregularity amounting to a miscarriage of justice. Further, as the impugned statement had the capacity to affect the jury's assessment of the complainant's evidence it was not open to find, and indeed the respondent appropriately did not contend, that the proviso, which permits the Court to dismiss an appeal against conviction if it considers that no substantial miscarriage of justice has actually occurred, had been engaged. Accordingly, the Court allowed the appeal, set aside the appellant's convictions and ordered that a new trial be had.

- *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.*

Please direct enquiries to Ben Wickham, Senior Executive Deputy Registrar
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au