HIGH COURT OF AUSTRALIA

10 November 2021

THOMAS HOFER v THE QUEEN
[2021] HCA 36

Today, the High Court dismissed an appeal from a judgment of the Court of Criminal Appeal of the Supreme Court of New South Wales. The appeal concerned whether certain questions asked by the Crown prosecutor in cross-examination of the appellant were impermissible and prejudicial such that they resulted in a miscarriage of justice within s 6(1) of the *Criminal Appeal Act 1912* (NSW). It also concerned whether the trial miscarried on account of the alleged incompetence of the appellant's counsel. The Court then considered whether, despite those errors, the proviso in s 6(1) applied, in that no substantial miscarriage of justice actually occurred.

The appellant was convicted of eight counts of having sexual intercourse with another person knowing that the other person does not consent. The offences were committed against two complainants on consecutive days in similar circumstances. The appellant's belief as to consent was the key issue at trial and accordingly his credibility was important. During cross-examination of the appellant, it became apparent that certain of his evidence which contradicted that of the complainants had not been put to them by defence counsel for comment, in breach of the rule in *Browne v Dunn*. On each occasion, the prosecutor asked the appellant to acknowledge the omission. In respect of two of these omissions, the prosecutor put to the appellant that those aspects of his evidence were, in effect, of recent invention. Defence counsel did not pursue objections to these suggestions of recent invention and the trial judge did not direct the jury as to the use which could be made of this evidence.

The High Court unanimously held that the prosecutor's questioning amounted to a miscarriage of justice. The questioning was highly prejudicial because, absent any directions from the trial judge, there was a real chance that the jury may have assumed that the appellant had recently made up his story and rejected his evidence as not credible. The Court found it unnecessary to consider whether the inaction of the appellant's counsel separately resulted in a miscarriage.

However, a majority of the Court held that the proviso in s 6(1) of the *Criminal Appeal Act* applied because no substantial miscarriage of justice had actually occurred. In applying the proviso, an appellate court must decide whether, notwithstanding the error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had. Here, the appellant's evidence was so glaringly improbable as to be incapable of belief, such that it could not have given rise to a reasonable doubt as to his guilt. Nor was this a case where there had been a failure of process that involved a serious breach of the presuppositions of the trial, such that the proviso could not be applied; rather, the Crown's impermissible contention of recent invention was of little significance in the determination of the real issue in the trial.

- *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.*

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