

AJS v THE QUEEN (M2/2007)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment: 7 December 2005

Date special leave granted: 20 December 2006

This application concerns the issue of whether a court of appeal should order an acquittal or a retrial where a conviction is quashed.

The appellant was convicted, after trial by jury, of an act of sexual penetration of his 13 year old granddaughter. On 13 December 2002 the complainant went to the appellant's house where it was intended that she would stay over for the night. The complainant consumed a quantity of liquor in the course of the evening. She complained of a stomach ache and vomited a number of times. She was in great pain, and allowed the appellant to rub her stomach. She claimed that the appellant then put his hand under her underpants and inserted his fingers into her vagina. The appellant denied that he had touched the complainant. He gave evidence that the complainant had asked him to "take the hurt away" and that was when he rubbed her stomach. He volunteered that he had put his hands under the elastic of her pyjamas and her knickers to take the pressure off her stomach. He said had no recollection of touching her on the vagina, and that if he had done so it would have been unintentional.

On appeal to the Court of Appeal (Maxwell P, Nettle JA and Redlich AJA) the appellant submitted that the trial judge erred by failing to direct the jury that an element of the offence of incest is that the act of penetration be committed intentionally. This ground was upheld and the conviction was quashed.

After reviewing the evidence, the Court of Appeal stated that it had doubt as to the guilt of the accused and that the evidence was insufficient to establish any degree of penetration beyond reasonable doubt. Despite the advantages the jury had in assessing the demeanour of witnesses and observing the atmospherics of the trial, the jury, acting reasonably and appreciating the burden as to standard of proof, could not have reached the view beyond reasonable doubt that the appellant was guilty of incest. A new trial was ordered.

The appellant contends that once the Court of Appeal quashed the incest conviction on the basis that the jury's verdict could not be supported having regard to the evidence, it was erroneous for the Court not to have acquitted the appellant and to have ordered that there be a new trial. The appellant notes that in exercising the discretion whether to enter an acquittal or order a new trial the common law recognises that where evidence at the original trial is insufficient to warrant a conviction, then it is contrary to the interests of justice to order a new trial and the appellant is entitled to an acquittal as of right.

The grounds of appeal are:

- The Court below erred in failing to direct a judgment and verdict of acquittal on the count of incest and by directing that there be a new trial.