

WASHER v STATE OF WESTERN AUSTRALIA (P6/2007)

Court appealed from: Court of Appeal, Supreme Court of Western Australia

Date of grant of special leave: 9 February 2007

The appellant, Raymond James Washer, was charged (with two other co-conspirators, John Di Lena and Andrea Scott, Di Lena's de facto partner) and convicted on 23 March 2000 of one count of conspiring between 18 May 2000 and 2 June 2000 to possess a prohibited drug, namely methylamphetamine, with intent to supply or sell it to another. The appellant was sentenced to seven years' imprisonment with eligibility for parole. Over objection by the appellant at trial in the District Court (Fenbury DCJ), evidence led by the prosecution was admitted of transcripts of telephone intercepts and listening devices of certain inculpatory statements, some of which post-dated the period of the conspiracy alleged in the indictment. The appellant argued that this evidence was highly prejudicial and was not admissible as propensity evidence because the conversations occurred after the alleged conspiracy had come to an end. The appellant also argued that because the same evidence had been led in another conspiracy trial in which he had been acquitted, the trial judge should have allowed him to lead evidence of that acquittal and should have directed the jury that they were bound to give full effect to his acquittal on the other conspiracy charge.

On appeal, the Court of Appeal (Wheeler, Roberts-Smith and Pullin JJA) applied section 31A of the *Evidence Act* 1906 (WA) which requires the court in deciding whether to admit propensity evidence to determine whether the evidence has significant probative value and, if so, whether fair-minded people, comparing that significant probative value to the degree of risk of an unfair trial, would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial. The Court held that the trial judge had, despite not considering section 31A, nevertheless approached the issue correctly and that there had been no error in admitting the evidence.

The Court also concluded that the trial judge did not err in refusing to allow the appellant to lead evidence of his previous acquittal, or in failing to direct the jury that the previous acquittal could not be challenged and that they were bound to give full effect to it. The Court concluded that the previous conspiracy case never arose before the jury, and the jury was neither invited nor required to make findings of fact on the existence of any element of the conspiracy of which the appellant was acquitted.

Special leave to appeal was granted but was limited to the second ground raised in the court below.

The ground of appeal for which leave was granted is:

- Whether evidence forming the basis of a prosecution case of which an accused is acquitted may be led as propensity evidence in a subsequent trial, and whether the trial judge erred in refusing to admit evidence of that acquittal, thereby giving rise to a substantial miscarriage of justice.