

## **LIBKE v THE QUEEN (B1/2007)**

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

Date of judgment: 23 June 2006

Date of grant of special leave: 20 December 2006

The appellant, Justin Patrick Libke, was convicted after a trial in the District Court of one count of rape, two counts of unlawful carnal knowledge of an intellectually impaired person, one count of wilful and unlawful exposure of an intellectually impaired person to an indecent act, and one count of unlawful and indecent dealing with an intellectually impaired person. He was sentenced to eight years' imprisonment for each of the first three counts, three years' imprisonment on the fourth count, and five years' imprisonment on the last count, all sentences to be served concurrently.

The appellant had met the complainant at a public park where, after talking for a short while, he inserted his finger into her vagina. The complainant then gave the appellant her address and arranged for him to visit. When the appellant visited the complainant at her home, at a time she arranged in order that her parents and siblings would not be present, the complainant let him into the house where the complainant then removed her clothing and the appellant inserted his penis in her vagina and her anus and masturbated himself. The complainant, who attended a "special school" and was considered to be intellectually impaired by her parents and her teachers, subsequently became concerned that she may have been exposed to pregnancy or a sexually transmitted disease, and wrote a letter to a teacher at her school seeking advice.

The appellant appealed against his conviction and sought leave to appeal against the sentences imposed. The Court of Appeal (Williams JA and Mullin J; Chesterman J in dissent) dismissed the appeal against conviction but granted leave to appeal against sentence and reduced the eight-year sentences to five years' imprisonment. The majority held that there was sufficient evidence for the jury to convict on the basis that the complainant did not have sufficient cognitive capacity to consent to sexual contact with the appellant or that the appellant did not have an honest and reasonable, but mistaken, belief that the complainant had such cognitive capacity. A further ground of appeal, that the cross-examination of the appellant by the prosecution counsel was so unfair as to have had a significantly negative effect on his credit, was rejected.

Chesterman J would have allowed the appeal against conviction on the count of rape and ordered a new trial. His Honour concluded that even if the evidence of the complainant was accepted and that of the appellant rejected, there was insufficient evidence for the jury to be satisfied that the complainant had not consented to the sexual activity or that the appellant could not have honestly and reasonably believed that she had consented.

At the hearing of the special leave application, leave was granted to amend the draft notice of appeal to clarify the grounds and to raise additional grounds of appeal concerning the trial judge's directions to the jury.

The grounds of appeal include:

- Whether the verdicts of the jury on all counts, or on the rape count, were not reasonable or unsafe and unsatisfactory;
- Whether by reason of the cross-examination of the appellant at trial there was a miscarriage of justice;
- Whether the trial judge adequately directed the jury (including by use of a flow chart) on consent, particularly as it related to cognitive capacity, and on the several defences of mistake as to consent.