

## **WGC v THE QUEEN (A20/2007)**

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 14 December 2006

Date special leave granted: 25 May 2007

After a trial by jury in the District Court, the appellant was convicted of two counts of unlawful sexual intercourse with a person between the ages of 12 and 17 years contrary to s 49(3) of the *Criminal Law Consolidation Act 1935 (SA)* ("the Act"). The prosecution case was that this occurred in 1986 when the complainant would then have been 13 years of age. The appellant admitted that he had performed the sexual acts as alleged by the prosecution, but said that they had occurred in 1989, not in 1986, and that although the victim was 16 years of age when the said sexual acts took place, he believed on reasonable grounds that she was at least 17 years of age (a defence under s 49(4) of the Act).

In instructing the jury, the trial judge set out the elements of the offence being that: there was an act of sexual intercourse; at the time the act took place the complainant was under the age of 17; and that the act of sexual intercourse was unlawful. The jury were told that if they were satisfied beyond a reasonable doubt that the acts occurred in February 1986, then they would likely find the appellant guilty on both counts and there would be no need to consider the question any further. However, if they were not satisfied beyond reasonable doubt that the acts of sexual intercourse occurred in 1986 but thought they had occurred in February 1989 or thereabouts, then the jury would need to consider whether the appellant had a special defence to him under the law, namely that he believed on reasonable grounds that the complainant was then 17 years of age or more.

The appellant appealed to the Court of Criminal Appeal (Vanstone, Layton and David JJ). He complained of the failure of the trial judge to direct the jury that the date of the offence as alleged in the information was a material particular. He submitted that it had to be proved beyond reasonable doubt that the sexual acts took place in February 1986 and that the jury should have been directed that if the conduct was not proved to have occurred in that month, then they should bring in verdicts of not guilty. The Court found that the argument had no substance. What was material was the age of the complainant at the time of the offences, not the date on which those offences were said to have been committed. An identification of exactly when the sexual acts took place within the range of those years was not a material factor demanding proof beyond reasonable doubt.

The appellant also argued that the convictions were bad for duplicity and uncertainty because, as a result of the way that the jury were directed, they could find that the acts took place in either 1986 or 1989 and in either case could bring in verdicts of guilty. He contended that it was unclear whether the appellant had been found guilty of acts of unlawful sexual intercourse in 1986 or less serious offences which took place in 1989. He submitted that upon

receiving verdicts of guilty the trial judge should have asked the jury whether those verdicts were based on a finding of 1986 or 1989, and that the prosecution should have laid alternative charges on the information. This argument was rejected. Layton J noted that there was strong authority for the proposition that if evidence was led or adduced in cases in which there was uncertainty as to which incident formed the basis of the verdict because of the multiplicity of incidents, the verdict was uncertain and provided a basis for quashing it. However, that was not the situation in this case. There was only one incident which was agreed to have occurred, the only difference being the date on which it occurred. That circumstance did not lead to latent duplicity or uncertainty of verdict and it did not matter whether some members of the jury may have thought it was 1986 or others in 1989; the incident was the same.

The appellant further argued that the Judge's directions on delay were inadequate. David J was satisfied that the direction was clear, strong enough, related the warning of delay to the facts, and was in accordance with principle. The appeal was dismissed.

The grounds of appeal include:

The Court of Criminal Appeal erred in failing to hold that:

- the only offences charged by the information were offences in respect of neither of which could the defence provided by section 49(4) *Criminal Law Consolidation Act 1935* be engaged and hence the date of such offences had to be proven as alleged;
- the majority verdicts are uncertain or void in that it is impossible to know whether the appellant has been convicted of offences committed in February 1986 in the circumstances alleged by the prosecution or of offences committed in 1989 in the circumstances stated by the appellant on oath.