

A.K. v. STATE OF WESTERN AUSTRALIA (P27/2007)

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

Date of judgment: 17 November 2006

Date of grant of special leave: 15 June 2007

The appellant, who was 13 years of age at the time of offending, was tried before a judge sitting alone (Wisbey J) and convicted of three counts of indecently dealing with a child between the ages of 13 and 16 years. On 6 July 2005 he was sentenced to an intensive youth supervision order for a period of six months. As a consequence of this conviction, the appellant is classified as a reportable offender under the *Community Protection (Offender Registration) Act 2004 (WA)* and is subject to reporting conditions for 7½ years from the date of sentence. The appellant appealed against the conviction. The offences occurred when the complainant and the appellant, together with two other children, were sleeping together in a large mattress on the floor of the premises, and the complainant was awakened in the dark and indecently dealt with by the appellant. Wisbey J concluded that the complainant was a truthful witness and that it was possible for the complainant to identify the appellant by touch.

The Court of Appeal (Roberts-Smith and Pullin JJA; Buss JA dissenting) dismissed the appeal. Pullin JA gave the principal judgment of the Court. All three judges found that the trial judge failed to give adequate reasons as to why he believed the prosecution had proved the identity of the offender, but the majority applied the proviso in section 30(4) of the *Criminal Appeals Act 2004 (WA)* that no substantial miscarriage of justice had occurred. Buss JA would have allowed the appeal on this ground, and concluded that the evidence before the trial judge was not sufficiently reliable to identify the offender.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in applying the proviso, having found that the trial judge failed to provide adequate reasons for his conclusion that the prosecution had proved the identity of the appellant as the offender;
- Whether the majority of the Court of Appeal erred in concluding that the evidence was sufficient to prove the appellant guilty beyond reasonable doubt, and whether the verdict was unreasonable and could not be supported by the evidence.