

OAE v THE QUEEN (A28/2007)

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 8 June 2007

Date of referral to the High Court: 31 August 2007

The applicant was charged with one count of indecent assault alleged to have occurred between 12 May and 31 July 1999, and one count of rape, alleged to have been committed between 12 May and 31 August 2003. He was acquitted of the first count but convicted of the second count. The complainant was the foster daughter of the applicant's sister. She lived on a property adjoining the applicant's property, and assisted him in the care of his horses. It was during those activities that the assaults allegedly occurred.

At the trial, despite defence objection, the prosecutor was allowed to lead evidence from the complainant that between 1999 and 2003 the applicant regularly committed various uncharged sexual acts against her. The trial judge admitted this evidence on the basis that it tended to show that the incident which was the subject of count 2 "did not happen out of the blue".

On appeal to the Court of Criminal Appeal, the applicant submitted that the evidence of uncharged acts lacked probative force in relation to count 2. He argued that the evidence might be relevant if consent was not in issue, but it was not relevant to proof of acts involving force. As the offence of rape was not one that involved the complainant submitting to the applicant, there was no need to explain why she might have submitted. Allegations of rape often involved conduct that was "out of the blue". The majority (Doyle CJ and Layton JJ, Debelle J dissenting) rejected that argument on the basis that the evidence of the uncharged acts was circumstantial evidence relevant to proof of the charged act: it provided a background that made the complainant's account of the rape, and her response to it, more believable. It could explain the applicant's boldness in taking the opportunity to act as he did, and the complainant's failure to kick and scream or to immediately complain.

The applicant also submitted that the trial judge should have directed the jury that they could use evidence of the uncharged acts only if satisfied beyond reasonable doubt that those acts occurred. The majority held that authority in South Australia did not support that proposition. In dissent, Debelle J held that where evidence of uncharged acts consists of allegations of repeated sexual misconduct which is intertwined with the charged acts, the trial judge must direct the jury that they must be satisfied that the uncharged acts have been proved beyond reasonable doubt. Here the trial judge failed to give any direction as to the standard of proof of the uncharged acts.

On the hearing of the application for special leave the Court referred the application to be heard by the same Court hearing the appeals in *HML v The Queen* and *SB v The Queen*.

The questions of law said to justify a grant of special leave to appeal are:

The Court of Criminal Appeal erred:

- In upholding the decision of the learned trial judge to admit evidence of uncharged acts of sexual misconduct.
- by not finding that the learned trial judge ought to have directed the jury that they could not have regard to evidence of uncharged acts unless they were satisfied of the commission of those uncharged acts beyond reasonable doubt.