

McPHILLAMY v THE QUEEN (S121/2018)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 130

Date of judgment: 14 June 2017

Special leave granted: 20 April 2018

The appellant was convicted of six offences involving acts of indecency or sexual intercourse committed upon the complainant between November 1995 and March 1996. At the relevant time, the complainant was an altar boy at Bathurst Cathedral and the appellant was an acolyte responsible for supervising altar servers.

At trial, the Crown sought to rely upon the evidence of two other witnesses, TR and SL. That evidence related to sexual assaults committed upon them by the appellant 10 years earlier. Those assaults occurred while the appellant was an assistant house master at St Stanislaus' College, Bathurst. It was relied upon as tendency evidence to prove that the appellant had a sexual interest in early teenage boys, a tendency which he had acted upon with TR and SL. The trial judge admitted that evidence, but failed to deliver reasons for that ruling.

Upon appeal before the New South Wales Court of Criminal Appeal ("CCA"), the issue was whether the admission of the tendency evidence resulted in a miscarriage of justice.

On 14 June 2017 the CCA (Harrison & Hulme JJ; Meagher JA dissenting) dismissed the appellant's appeal. The majority held that both the earlier and the charged conduct concerned the appellant taking advantage of his position of responsibility for early teenage boys. They found that any differences between the precise circumstances of each incident did not detract from an overriding similarity between the sets of conduct. The majority further held that the passage of time between the earlier and the charged conduct did not fatally imperil the strength of the tendency evidence relied upon. Furthermore, that tendency was capable of being regarded by a jury as enduring rather than temporary. If it was the latter, then it would have no relevant bearing upon the proof of the charged conduct.

Justice Meagher however found that whilst the earlier conduct manifested a sexual interest in young boys, it did not show that the appellant was prepared to act on that interest in circumstances similar to those in which the charged offences occurred. His Honour found that the absence of a sufficient similarity between the earlier and the charged conduct prevented the earlier evidence from having any significant probative value.

All Justices found however that a failure to give reasons (to admit the tendency evidence) would not ordinarily result in a substantial miscarriage of justice. This was in circumstances where there was no significant procedural unfairness resulting from the absence of reasons, and where the appellate court was able to assess for itself whether the evidence was properly admitted.

The grounds of appeal are:

- The majority of the CCA erred in holding that the tendency evidence had significant probative value.
- The majority of the CCA erred in holding that the probative value of the tendency evidence substantially outweighed its prejudicial effect.