

SUPREME COURT OF WESTERN AUSTRALIA		NO: 516 of 2010	
COURT OF APPEAL AMENDED		Grounds of Appeal	
Parties to the Appeal	CDV	Appellant	
	The State of Western Australia	Respondent	
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Filed by	The Appellant		
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APPEAL AGAINST CONVICTION

1. The learned trial judge erred by failing to give the jury an adequate *Longman* direction on counts 1, 2, 3, 4 and 5.

PARTICULARS

- (a) The events the subject of counts 1, 2, 3, 4 and 5 occurred many years previously and the accused was at a significant forensic disadvantage as a result.
- (b) The learned trial judge should have warned the jury of the actual prejudice suffered by the accused as a result of the passage of time since the events occurred and directed their attention to the specific difficulties and forensic disadvantage which arose as a result of the complainants' failure to complain for many years.

- (c) In the circumstances of the case, the warning by the learned trial judge was inadequate, and the jury should have been told that it would be dangerous to convict.
2. The learned trial judge erred by failing to give the jury an adequate direction on propensity and uncharged acts.

PARTICULARS

- (a) The direction was excessively long, complex and was likely to have confused the jury.
- (b) The direction did not make it clear to the jury that they should not reason that, because the accused had been charged with offences against five separate boys, the case against the accused in respect of each individual boy was necessarily stronger.
- (c) The use of the word "likely" in the context of the propensity/uncharged acts direction may have misled the jury as to the standard of proof required in relation to the substantive offences.
3. The learned trial judge erred by failing to give the jury an adequate summation of the defence case.

PARTICULARS

- (a) The learned trial judge was required to put to the jury the primary factual issues relied upon by the accused in his defence.
- (b) The summary by the learned trial judge failed to deal adequately or at all with the central issues raised by counsel during the case and in his closing address, including:
- (i) the absence of any admissions;

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- (ii) the delay and failure to complain;
 - (iii) the circumstances in which the complaints emerged;
 - (iv) the various contradictions in the evidence of the complainants and their prior inconsistent statements;
 - (v) the inherent unlikelihood of the events occurring in a full classroom with a permanently open door;
 - (vi) the specific unlikelihood of counts 9 and 15 having occurred;
 - (vii) the lack of any evidence of perversion at the appellants' home or on his computer;
 - (viii) the matters arising from the pre-text phone call;
 - (ix) the failure to find any white T-shirt; and
 - (x) the potential for contamination of the evidence of the REDACTED brothers.
- (c) The failure of the learned trial judge to give the jury an adequate summary of the central issues raised by defence counsel during the case was an error of law that caused the trial to miscarry.
4. The learned trial judge erred by giving the jury the summary of the prosecution and the defence case before completing his directions of law, and the process of fact finding, inferences, propensity and uncharged acts.

PARTICULARS

- (a) The jury should have been directed fully as to the law and the process of fact finding prior to them being given the summary of the prosecution and defence cases.
- (b) It was necessary for the charge to the jury to proceed in this manner in order that the jury might properly understand the defence case.
- (c) The accused was significantly disadvantaged by the charge proceeding in this order because the inference and propensity directions had not been given and were required so as to inform the jury as to what the defence case entailed and what the restrictions should be put on the use of evidence led by the prosecution.
- (d) The directions regarding inferences and propensity were ones which went to the question of onus of proof and burden of proof in fact finding and needed to be given before any summary of the defence case.
5. As a result of the learned trial judge's direction the jury in this order, the defence case was significantly prejudiced.
6. The learned trial judge erred by failing to give the jury a direction of the type referred to by the High Court in *Crofts v R*.

PARTICULARS

- (a) The learned trial judge gave the statutory direction required by section 36B of the *Evidence Act*, but did not adequately give the jury any direction as to the extent to which they might use the evidence of delay in complaint.

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- (b) The delay in respect of all counts was significant, particularly in relation to 1, 2, 3, 4 and 5 and was an integral part of the defence case.
 - (c) There was not, on the evidence, any obvious impediment to an early complaint being made by any of the complainants.
 - (e) In respect of the complainant CDX there had been a previous and early denial of any offending on the part of the appellant.
 - (f) The failure of the learned trial judge to give a direction of the type referred to in *Crofts* left the jury in the position of having been effectively told that the delay in complaint was not a matter that could properly be taken into account and the defence case was significantly prejudiced as a result.
6. The verdicts of guilty on counts 9 and 15 were inherently unsafe and unsatisfactory.

PARTICULARS

- (a) The factual scenario in relation to each of these two counts was that the offences occurred during testing in the appellant's class on the last day of term.
- (b) The overwhelming weight of the evidence before the Court on this issue was that there was no testing ever conducted on the last day of term, or that there was any school work of any type done on those days.
- (c) The allegations described by the complainants were entirely contrary to the evidence, and to logic and so inherently unlikely as to make the verdicts on those counts unsafe and unsatisfactory.

7. The learned trial judge erred by rebuking senior counsel in the presence of the jury for "making comments" which had the effect of reflecting adversely on the appellant's case.

PARTICULARS

- (a) The learned trial judge through the course of the trial rebuked the appellant's senior counsel for "making comments".
 - (b) The jury were warned not to take any notice of the "comments" by counsel with the implication that counsel was behaving improperly.
 - (c) The learned trial judge erred in doing so, there being no "comments" as such by counsel that should have drawn any warning to the jury.
 - (d) The suggestion by the learned trial judge made in front of the jury, that senior counsel had "been getting away with it" previously was not appropriate and had the tendency to vicariously denigrate the appellant and his case by implication.
 - (e) The impression given to the jury that senior counsel for the appellant was not behaving appropriately was reinforced by the judge's interruption of counsel's final address, which was not justified in the circumstances in which it was made.
 - (f) There was a real risk that the trial miscarried as a result of the various rebukes and disparaging comments made about senior counsel's conduct of the case by the learned trial judge.
8. In the event that none of the errors alleged in grounds 1 to 7 above are seen by the Court as having led to a substantial miscarriage of justice the combined and cumulative effect of those alleged errors did lead to a miscarriage of justice.