

***R v Dhir* [2019] SASCFC 55 (22 May 2019) – South Australia Supreme Court (Full Court)**

‘Misdirection or non-direction’ – ‘Permissible and impermissible use of evidence’ – ‘Sexual and reproductive abuse’

Charges: 1 x digital rape (count 2), 4 x aggravated assault causing harm (counts 1, 3, 4 and 5).

Appeal type: Appeal against conviction of above charges.

Facts: The appellant and complainant were married. The appellant allegedly committed the rape by putting his hand under the complainant’s jeans at a train station platform. The assault (count 3) was alleged to have been committed soon after the rape when the couple was walking home from the train station. The remaining offences were committed in the matrimonial home.

Issues: The appellant appealed against the convictions on seven grounds (see [4]), all of which generally concerned the directions given to the jury by the Judge.

Decision and reasoning: appeal was allowed on grounds 3, 4, 5 and 7 and dismissed on grounds 1, 2 and 6. All convictions ordered on the District Court information were quashed and the matter was remitted for a new trial.

For the purposes of convenience, Kourakis CJ first dealt with the fifth ground of appeal in which the appellant contended the Judge erred in directing the jury to ignore a defence submission concerning the plausibility of the digital rape charge (see [49]-[50]). His Honour accepted this ground of appeal, claiming the Judge withdrew a legitimate and factually compelling submission ([50]) with the likely effect of leading the jury to interpret the Judge’s direction as withdrawing the defence counsel’s broader implausibility submission (of which this particular submission formed an integral part of) from their consideration ([51]).

The first ground of appeal was divided into two complaints; his Honour rejected the first complaint, stating it was unnecessary to draw the distinction in order to comply with s 34R of the *Evidence Act 1929* (SA) (see [53]). As to the second complaint, His Honour acknowledges that the Judge ought to have expressly directed the jury in relation to the impermissible use of the discreditable conduct evidence under s 34R(1) of the *Evidence Act 1929* (SA). In failing to do this, the Judge was said to have failed to comply with the obligations laid out under s 34R(1). Nonetheless, such an omission did not occasion any miscarriage of justice and the second complaint was therefore rejected ([58]).

His Honour notes the merit of the second ground of appeal in stating that the Judge should have directed the jury as to the limited use that could be made of the alleged admissions ([59]). However, his Honour discerned no miscarriage of justice in this omission on the Judge's part, particularly in light of the Judge's cautionary observations ([45]-[46]) and the fact that the complainant's evidence was proven unreliable in any event ([59]).

The third, fourth and seventh ground of appeal raised a particular issue that was considered through the relevant authorities (see [61]-[75]). Ultimately, his Honour allowed these grounds of appeal in recognising that the Judge placed undue weight to the evidence of distress.