



HIGH COURT OF AUSTRALIA

16 December 2021

MALCOLM LAURENCE ORREAL v THE QUEEN

[2021] HCA 44

Today, the High Court unanimously allowed an appeal from a decision of the Court of Appeal of the Supreme Court of Queensland. The appeal concerned whether, having found a miscarriage of justice, the Court of Appeal was correct to dismiss the appeal against conviction pursuant to s 668E(1A) of the *Criminal Code* (Qld) because "no substantial miscarriage of justice [had] actually occurred".

The appellant was convicted by a jury of three counts of unlawfully and indecently dealing with a child under the age of 16 years and two counts of rape. Evidence was admitted at trial ("the impugned evidence") with the appellant's consent, the substance of which was that both the complainant and the appellant had tested positive for the presence of the herpes simplex virus type 1 ("HSV-1"). The jury were told that HSV-1 is commonly found as a genital infection and could have been transmitted to the complainant other than through the charged conduct.

The Court of Appeal found that the impugned evidence was irrelevant and inadmissible, and there had been a miscarriage of justice because the trial judge failed to direct the jury that they were obliged to disregard the impugned evidence in its entirety. However, the majority of the Court of Appeal nevertheless dismissed the appeal pursuant to s 668E(1A) because it concluded that the impugned evidence could not have impacted on the credibility of the complainant or the reliability of her evidence.

The High Court unanimously found that the Court of Appeal was wrong to dismiss the appeal. The High Court rejected the contention that the impugned evidence was neutral or incapable of affecting the jury's assessment of guilt. The prosecution's case at trial turned on issues of contested credibility and the prejudicial nature of the impugned evidence meant that it may well have been misused by the jury to support the complainant's evidence. The High Court found that, unless properly instructed, the jury may have reasoned that it was no coincidence that both the appellant and the complainant tested positive for HSV-1, which may have pointed to the complainant having contracted the virus from the appellant. Therefore, the Court of Appeal was unable to assess whether guilt was proved beyond reasonable doubt by the evidence properly admitted at trial. Accordingly, the High Court allowed the appeal, set aside the appellant's convictions and ordered a new trial be had.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*