CITATION:	*Witt v The Queen* [2018] NTCCA 9
PARTIES:	WITT, Jason Scott v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 9 of 2017 (21525785)
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JUDGMENT OF:	SOUTHWOOD, BLOKLAND and BARR JJ

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CRIMINAL LAW – APPEAL AGAINST CONVICTION – intentionally exposing a child under the age of 16 years to an indecent film – miscarriage of justice – misdirection of jury about the elements of the offence – fundamental error which went to the root of the proceedings – appeal allowed

Hugo v R [2000] WASCA 199; (2000) 113 A Crim R 484, *Wilde v R* (1988) 164 CLR 365

REPRESENTATION:

Counsel:

Appellant:	G O'Brien-Hartcher
Respondent:	M Nathan SC

Solicitors:

Appellant:	McQueens Solicitors
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Witt v The Queen [2018] NTCCA 9
No. CCA 9 of 2017 (21525785)

BETWEEN:

JASON SCOTT WITT
Appellant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 12 April 2018)

THE COURT:

[1] On 16 May 2017, following a trial by jury in the Supreme Court, the appellant was found guilty of count 1 on an indictment which charged him with intentionally exposing a child under the age of 16 years to an indecent film contrary to s 132(2)(e) and (4) of the *Criminal Code*. He was acquitted of count 2 on the indictment. On 19 May 2017, the appellant was sentenced by the court to imprisonment to the rising of the court.

[2] The appellant has appealed against his conviction under s 410 and s 411(1) of the *Criminal Code* on the ground that there has been a miscarriage of justice as the trial Judge erred in law by providing the jury with an aide

memoire which misstated the mental element of the offence and misdirecting the jury as to the mental element of the offence. The aide memoire that went to the jury was in the following terms.

> In order to prove the accused guilty of the offence, the Crown must prove each of the following elements beyond reasonable doubt.
>
> 1. The accused exposed VP to an indecent film.
>
>   "Indecent" means unseemly, unbecoming or offensive to common propriety; something that would offend the modesty of the average person; and it must have a sexual connotation. Whether a film is "indecent" must be judged in light of the time, place and circumstance.
>
> 2. The accused intended to expose VP to an indecent film.
>
>   OR
>
>   *The accused foresaw that a possible consequence of his conduct in inviting VP into the room was that she would be exposed to the indecent film* [Emphasis added].
>
> 3. The accused did so without legitimate reason.
>
>   It is a question of fact for the jury to determine whether in all the circumstances the act was done "without legitimate reason".
>
> 4. VP was under the age of 16 years at the time.

[3] The second part of element 2 of the aide memoire is wrong in law. For the offence charged on the indictment to be made out the Crown must prove that the accused intended to expose VP to an indecent film. Subsection 132(2)(e) of the *Criminal Code* states:

> Any person who: (e) without legitimate reason, intentionally exposes a child under the age of 16 years to an indecent object or an indecent film, video tape, audio tape, photograph or book, is guilty of an offence.

[4] Subsection 132(2)(e) of the *Criminal Code* expressly states that the mental element of the offence is intention, not foreseeability of the possible consequence.

[5] The error came about in the following way. As is the practice in the Supreme Court, prior to counsel making their final addresses to the jury the trial Judge presented them with a draft aide memoire for their consideration. The draft aide memoire was in the same terms as the aide memoire used in the previous trial in September 2016 in which the jury were discharged because they were unable to come to a verdict on this count. The draft aide memoire correctly stated the law. Having received the draft aide memoire the Crown prosecutor, Mr Morters, who signed the indictment, and who would thus be expected to know the elements of all counts charged by the Crown on an indictment, made the following submissions to the trial Judge.

> There is an issue that I have to take with the *mens rea* that is referred to.
>
> […]
>
> Yes, your Honour, it is a Griffith's code offence. For the most part, Griffith code offences do not have any *mens rea* whatsoever. It is a completely different structure to that of the Crimes Act or [Model] Criminal Code type structure. All the prosecution has to prove in relation to a Griffith code offence is that the *actus reus* was done, and then we go to section 31, which is a very different test altogether.

I appreciate that this was an aide memoire in the last trial.

The Crown submits that was wrong. I also took steps to consult with an expert in this area in our office who told me firstly that he agreed with me. But, secondly that he was aware that at times, such aide memoires have been delivered to the jury.

HIS HONOUR: All of it - in these sorts of cases?

[Mr Morters] Yes. Well – I mean, your Honour this comes from practising in a Griffith code jurisdiction, exclusively and being very familiar with the Griffith code and the Crimes Act type structures – which I am also very familiar with. I just happen to have moved to jurisdiction to jurisdiction and had the opportunity to experience them all.

[…]

But, your Honour the Crown's submission is that it is not incumbent upon the Crown to prove any *mens rea* whatsoever in relation to these Griffith code offences. [All the Crown is required to do] is to strictly prove that the accused did engage in the conduct that is necessary for the offence; and then we turn to s 31: did he avert to the possibility that the outcome could have occurred? Which is the key difference between the Griffith code and the Model Criminal Code, and is the reason why practitioners such as I, are so vehemently opposed to the [Model] Criminal Code. Because it significantly raises the bar for the prosecution.

It is for that reason, I say that the element that was contained in the aide memoire just should simply be removed. And you would need an alternative in relation to s 31.

HIS HONOUR: Can I put it to you this way, is it necessary for the Crown to prove that he intended to do the act?

[Mr Morters] No.

HIS HONOUR: It is not?

[Mr Morters] No. He did the act. And he did the act in circumstances where he would have adverted to the possibility that the outcome would have resulted. That is how the Crown says the Griffith code operates. Just like in a serious harm charge, where the prosecution simply has to prove that as a consequence of the accused's act, serious harm was caused – not that there was any intent to do anything whatsoever, even the physical act. And then we go to the s 31 provision, was there advertence to the possibility that such action could have been done and resulted in.

HIS HONOUR: It was intended or foreseen?

[Mr Morters] That is the trick – foreseen, your Honour. Foresaw the possibility in fact, not the probability. And it is important – it is more important than anything, in relation to count 1 because there is an issue about whether there was an accidental exposure to the child pornography, as opposed to whether it was a situation where there would have been advertence to the possibility.

But, from a strict legal point of view, your Honour, the Crown's submission is that a direction in relation to intention should not appear in relation to any of the charges.

HIS HONOUR: The Crown must prove that he intended to do the act which resulted in the exposure of the child to the indecent film, must it not?

[Mr Morters] No – that he did expose the child to the indecent film and he adverted to the possibility of that outcome.

HIS HONOUR: He either intended or adverted to the possibility of it?

[Mr Morters] Yes. Yes. Well, I mean …

HIS HONOUR: And proceeded when an ordinary person in similar circumstances would not have proceeded with the relevant conduct.

[Mr Morters] Yes, certainly, s 31 talks about intention and advertence. But, because advertence to the possibility is the lowest

test, then that is all the jury has to be satisfied about. But if your Honour wants to put it in terms of intended or adverted to the possibility – the Crown does not have anything to say about that.

HIS HONOUR: But, really the Crown's case here is that he intended to do it, isn't it?

[Mr Morters] It doesn't matter what the Crown's case is, your Honour it is what the law requires, and I don't want any angst on the part of the jury about whether there was some sort of – was a need for them to be satisfied that there was a specific intention in relation to that exposure.

The fact of bringing her in – I mean the Crown says she was asked in, sat on the bed …

HIS HONOUR: This is the difficulty that I have.

[Mr Morters] He can never say that he knew from those circumstances she would see the child pornography but he certainly adverted to the – by engaging in those acts, he adverted to the possibility that would be the outcome. Because she could have shut her eyes, she could have looked up to the sky, she could have done anything.

HIS HONOUR: The Crown case is essentially predicated on VP's evidence. That evidence, if accepted, is that she knocked on the door, he told her to come in and the pornographic film was playing, she sat up on the bed next to him and then she watched the film, asked him certain questions about the conduct that was going on in the film and the reaction of the players.

In those circumstances, if that evidence is accepted, clearly there was an intention to expose her to an indecent film.

Why would the Crown want that issue muddied by advertence to notions of foresight? Why is it not enough for the Crown to say, "Look, this is the

> case, this is what VP said, it is obvious, in the Crown submissions, that this went on because of the nature of the questions and the observations and the recollection she's got and the clarity with which she recounted these events, obviously, if you accept that evidence, he intended to do it.

> [Mr Morters] That might be the case, your Honour, but your Honour is obliged to instruct the jury in relation to what the law is and the Crown says that the aide memoire does not reflect the law. So your Honour says why should I care? Well, one of the reasons I care, your Honour is because this has happened time and time again and the Crown says that it is not right.

> HIS HONOUR: But if that [is what the] evidence is, and that is essentially the Crown case, obviously the s 31 requirement is satisfied isn't it?

> [Mr Morters] Yes, your Honour. But the jury should be directed in terms of the s 31 provision. And you say why am I quibbling with this, well, I do have a concern in relation to the child pornography charge. I don't want the jury – because who knows what they agonise about in that jury room, I might say it until I am blue in the face, you know, believe what VP said about the discussions etcetera, but they might decide they are not going to believe that part [of her evidence] and will believe other parts of her evidence, but they can't be satisfied that there was an intention for her to be exposed to that child pornography.

> And if it is something that the Crown doesn't have to satisfy, then it should not be in that aide memoire.

[6] Counsel for the defence, Mr Thomas, agreed that what Mr Morters had said to his Honour was a correct statement of the law. In those circumstances his Honour the trial Judge amended the aide memoire in accordance with what we have set out at [2] above.

[7] What the Crown prosecutor said about the law was totally incorrect. He completely failed to have regard to the text of s 132(2)(e) of the *Criminal Code* in circumstances where he signed the indictment, and in circumstances where he thought there was a real possibility the jury may not have been convinced that the appellant intentionally exposed the child to the indecent film. As a result, the trial Judge was misled about the elements of count 1 on the indictment.

[8] The error in the direction about the elements of the offence is a fundamental error which went to the root of the proceedings.[1] The failure to properly direct the jury about the elements of the offence gave rise to a substantial miscarriage of justice. The appellant lost a fair chance of an acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the elements of the criminal offence were correctly explained to the jury. As is fairly and properly conceded by the Crown in this appeal, the proviso has no application in this case where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings.[2]

[9] As is fairly and properly conceded by the Crown, the appeal should be allowed, the conviction of the appellant of count 1 on the indictment should be quashed, and for the following reasons the appellant should be acquitted. The appellant has already served the sentence imposed on him. The Crown

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1 *Hugo v R* [2000] WASCA 199; (2000) 113 A Crim R 484 at [49] - [51].
2 *Wilde v R* (1988) 164 CLR 365 at 372.

had already proceeded against the appellant on these same charges on two prior occasions. In September 2016 the appellant was acquitted of one count, and the jury was discharged in respect of the remaining three counts as they were unable to reach a verdict. The retrial in May 2017, from which this appeal lies, resulted in acquittals on all counts but the count under appeal. It is most likely that the jury found the appellant guilty on the basis of foresight rather than intention. On that basis the jury could not have been satisfied of the appellant's guilt of the charge contrary to s 132(2)(e) of the *Criminal Code*. Neither was the previous jury able to reach a verdict of guilty on the basis that the appellant intentionally exposed the child to an indecent film.
