A v The Queen [2012] NTCCA 9

PARTIES:	A
	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:	CA 16 of 2011 (20818980)
DELIVERED:	17 APRIL 2012
HEARING DATES:	2 APRIL 2012
JUDGMENT OF:	RILEY CJ, KELLY & BARR JJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

Criminal Code Act s 410, 411(1)
Sexual Offences (Evidence and Procedure) Act (NT)

Carr v The Queen 24 [1988] HCA 47; (1988) 165 CLR 314; *Gipp v R* [1998] HCA 21; 194 CLR 106; *House v The King* (1936) 55 CLR 499; *Jones v The Queen* [1997] HCA 12; (1997) 72 ALJR 78; 149 ALR 598; *Knight v The Queen* 26 [1992] HCA 56; (1992) 175 CLR 495; *M v R* [1994] HCA 63; (1994) 181 CLR 487; *R v Varley* [1976-1977] 12 ALR 347, followed.

R v Zorad (1990) 19 NSWLR 91, applied.

REPRESENTATION:

Counsel:

Appellant:	Self represented
Respondent:	M Thomas

Solicitors:

Appellant:	Self represented
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	KEL12011
Number of pages:	21

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

A v The Queen [2012] NTCCA 9
No. CA 16 of 2011 (20818980)

BETWEEN:

A
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 17 April 2012)

RILEY CJ:

[1] I agree with the orders proposed by Kelly J for the reasons expressed by her Honour.

KELLY J:

[2] This matter has a long and involved history. A was charged with committing offences of a sexual nature against the daughter of his de facto partner from about 2002 to about 2007.

[3] His first trial was before Martin CJ in August 2009. He was represented by counsel and was found guilty of a number of charges.

[4] A appealed and was self represented. Counsel appeared as *amicus curiae* in the Court of Criminal Appeal. The appeal was heard in October 2010 and was successful. A retrial was ordered.

[5] In July 2011 the evidence of the complainant was pre-recorded at a special hearing at which A was again self represented.

[6] In September 2011 there was a retrial before Southwood J. The complainant was called to give further evidence, and at the invitation of Southwood J, Mr Tippett QC appeared as *amicus curiae* to cross-examine the complainant.[1] Otherwise A was self represented.

[7] At the conclusion of the retrial A was again convicted of all but one of the nine charges on the indictment.

[8] In November 2011 A lodged a notice of appeal against conviction on the stated grounds that there had been coaching of a witness and the jury failed to take account of his Honour's summing up of the defence case.

[9] There followed numerous case management conferences at which A was self represented. It was explained to him that the provisions of s 410 of the *Criminal Code* gave him a right to appeal against the findings of guilt on a ground that involves a question of law alone, but that if he wished to appeal on any ground that involved a question of fact or of mixed law and fact he would need the leave of the court. He was asked to formulate his grounds of

---

1 See s 5(1)(b) *Sexual Offences (Evidence and Procedure) Act* (NT).

appeal in order to determine whether leave was required and, if so, whether it would be granted.

[10] In December 2011 A was invited to put his grounds of appeal in writing and he did so in January 2012 ("the January document"). Thereafter there were discussions as to what the January document meant. A had difficulty in making himself understood and Riley CJ offered to seek assistance from the Northern Territory Bar Association. However the Bar Association declined to assist because of the nature of the relationship between A and counsel who had earlier been involved on his behalf. The suggestion was made that A apply for Legal Aid and he said he would do so.

[11] In February 2012 Mr Thomas, for the Crown, provided detailed written submissions responding to his understanding of what had been put by A in the January document.

[12] On 1 March 2012 A advised that he did not want to seek help from Legal Aid and that he wanted the matter heard before three judges of the Court. The matter was then listed for hearing on 2 April 2012.

[13] At the hearing, the Court invited A to address both the leave application and the actual appeal at the same time. He was advised that where leave was necessary the Court would consider whether or not to grant leave, and in relation to any ground on which leave was not required, or on which leave was granted, the Court would then consider whether to allow the appeal.

[14] The following judgment addresses the grounds of appeal identified by A in the January document, although not all of these were further addressed by A at the hearing on 2 April. Although I have corrected mis-spellings, the words used to identify the seven grounds relied on by A have been taken directly from the January document.

First Ground of Appeal

[15] The first ground of appeal identified by A in the January document was as follows: *"Where a jury verdict is unreasonable and cannot be supported having regard to the evidence."*

[16] These words are taken from s 411(1) of the *Criminal Code*. An appeal on the ground that the jury verdict is unreasonable and cannot be supported having regard to the evidence involves mixed questions of fact and law and, as such requires the leave of the court.

[17] In support of this ground of appeal, A referred in the January document to some parts of the cross-examination of the complainant by Mr Tippett QC, and to a range of different passages from the trial judge's summing up. A does not seem to be complaining about the adequacy of these parts of the summing up, which mostly consist of the trial judge reformulating his arguments in an improved fashion. Rather, his contention is that in light of all of those matters which the judge pointed out to the jury, the jury ought to have entertained a reasonable doubt as to A's guilt and it was unreasonable for them not to have done so.

[18] In considering an appeal on the ground that the jury verdict is unreasonable and cannot be supported having regard to the evidence, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[2] If upon the whole of the evidence a jury, acting reasonably, was bound to have a reasonable doubt, then the verdict of guilty must be set aside.

[19] In answering that question the court must keep in mind that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and that the jury has had the benefit of having seen and heard the witnesses.[3]

> "An appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict, but the appellate court does not substitute its assessment of the significance and weight of the evidence for the assessment which the jury, properly appreciating its function, was entitled to make."[4]

> "The appellate court's function is to make its own assessment of the evidence not for the purpose of concluding whether that court entertains a doubt about the guilt of the person convicted but for the

---

2 *Gipp v R* [1998] HCA 21; 194 CLR 106 per McHugh and Hayne JJ at p 123, paragraph [49] re-affirming the test laid down in *M v R* [1994] HCA 63; (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at p 493 paragraph [7] and affirmed in *Jones v The Queen* [1997] HCA 12; (1997) 72 ALJR 78; 149 ALR 598.

3 *M v R* per Mason CJ, Deane, Dawson and Toohey JJ at [**7**].

4 *Carr v The Queen* 24 [1988] HCA 47; (1988) 165 CLR 314 per Brennan J at p 331, applied by Gaudron J in *Gipp v R* at p 114 paragraph [18].

purpose of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused."[5]

[20] Applying those principles, it does not seem to me that any one of the matters relied on by A to establish reasonable doubt, or all of those matters collectively, go close to establishing that a jury, acting reasonably, must have entertained reasonable doubt.

[21] The first matter he mentioned was the medical evidence of Dr Johns which was essentially neutral. It tended to show that the complainant had had sex with someone – mainly because of the presence of a sexually transmitted infection – but could say nothing about whether she had acquired that infection from A, or whether she had been exposed to five years of sexual abuse. Here, as elsewhere, A applied the false logic that absence of evidence amounts to evidence of absence. He argued that because there had been no evidence adduced that he had the same infection, the jury ought to have taken that as proof that he did not,[6] and hence, proof that the complainant had had sexual relations with someone else which, in turn, should have led them to doubt the complainant's evidence that he had sexually abused her from the age of 10 to the age of 15. This, of course, does not follow.

---

5 *M v R* per Brennan J at [3] citing *Knight v The Queen* 26 [1992] HCA 56; (1992) 175 CLR 495.

6 Evidence had been led at the first trial that A did in fact have the same infection but the Court of Criminal Appeal held that such evidence had been wrongly admitted since the complainant's evidence was that no sexual contact had occurred between A and her since the beginning of the year and there was no evidence as to whether A had the infection at that time.

[22] The next matter he mentioned was the evidence that the complainant had a boyfriend at the time she made the complaint. Again, this is neutral. There was no evidence of a sexual relationship with any boyfriend and even if there had been, it would not follow that a jury must have entertained reasonable doubt about whether she had been abused by A.

[23] The next matter he relied on was delay in complaint. The complainant was asked why she had not complained earlier and gave a number of explanations which it was open to the jury to accept.

[24] The next matter he relied on was his submission that the complainant had lied when she said A had taken a naked photo of her on his mobile phone. The police did not keep or properly examine his phone and so there was no objective evidence about this one way or the other. It was open to the jury to believe her, or, even if they entertained a doubt about that, for that not to affect their overall assessment that she was to be believed in relation to the allegations of abuse.

[25] A also relied on his own closing address as raising a basis upon which the jury ought to have had reasonable doubt about his guilt. The first answer to that submission is that his address was not evidence. Much of that address was in any event incomprehensible and the trial judge summarised and rephrased his arguments to put them to the jury in a better form than he had. There was nothing about A's address which would lead to the conclusion that the jury ought to have had a reasonable doubt about his guilt.

[26] A also relied on several parts of Mr Tippett's cross-examination of the complainant where she responded that she could not recall various things such as how many times she had spoken to police, who had been present at the time of a particular conversation, and precisely what she had told police about the photo on the phone. There is nothing about the complainant's answers to this cross examination which would lead to the conclusion that a reasonable jury must have entertained a reasonable doubt about A's guilt.

[27] Nor is the combined effect of these matters such that a reasonable jury must have entertained a reasonable doubt about A's guilt. As Mr Thomas for the respondent pointed out, and as demonstrated in the transcripts of her evidence, the complainant was a very impressive witness. She gave a coherent and detailed account of the instances of abuse which formed the subject of the particular charges on the indictment, and also gave a detailed account of her relationship with A and how it changed over the years as she became older and more self confident and able to say no to him.

[28] In my view leave to appeal on this ground should be refused.

The Second Ground of Appeal

[29] The second ground relied on by A in the January document is as follows: *"The complainant lied to police about the photo on my mobile phone. How can the rest of her evidence be believed."*

[30] This is a question of fact. Leave to appeal is required and should be refused. There is no objective evidence one way or another about whether there had ever been a naked photo of the complainant on A's phone. It was perfectly open to the jury to accept her evidence on this matter.

[31] Even if they did not accept her evidence on this matter, they were not obliged, *ipso facto*, to disbelieve her evidence on the question of abuse or to entertain a reasonable doubt about it. Judges regularly instruct juries that they are entitled to reject part of a witness's evidence and accept other parts.

The Third Ground of Appeal

[32] The third ground relied on by A in the January document is as follows:

"[That] *his honour allowed the prosecution to do a summing up against an unrepresented defendant and then still closed his summing up with the 9 indictments* [ie charges] *was the biggest injustice to the defence."*

[33] This ground contains two complaints. The first is that the trial judge should not have allowed the prosecutor to address the jury.

[34] The trial judge has a discretion to allow or disallow a Crown closing address where the accused is unrepresented. In this case the trial judge decided to allow a closing address. In doing so he relied on *R v Zorad*[7] and the High Court decision in *R v Varley*[8].

---

7 (1990) 19 NSWLR 91.

8 [1976-1977] 12 ALR 347.

[35] A's reason for opposing this course at the trial was, "because this is a second time in a trial. It is the same trial prosecutor. … it just doesn't give someone representing themselves a fair chance, for Mr Thomas to be able to do that."

[36] The prosecutor's reasons for seeking a closing address were that this was a complicated child sexual case in which the Crown needed to clarify its position in relation to a number of matters, including the housing records, and also that the complainant's evidence was given in five separate phases and the question of consistency or inconsistencies between each of those phases was of significance to the Crown case.

[37] After extracting from the prosecutor an agreement that his address would condescend into all of the detail of the evidence, and in particular go to specific issues, and that it would be a fair and truly balanced address, the trial judge allowed the Crown to address. His Honour said:

> "The reasons are, one, the evidence is complicated by the manner in which the evidence has been received from the complainant. It's further complicated by the recall of a number of witnesses, including the complainant. And, in addition to that, the defence has called witnesses going to character and going to the relationship between the accused and the complainant. It's on that basis that I rule."

[38] A has given no reason why he says that this ruling is wrong.

[39] The principles to be applied in an appeal against a judicial exercise of discretion are well established.

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[9]

[40] No error of principle has been demonstrated or even suggested. This ground of appeal has no merit and should be dismissed.

[41] The second complaint in this ground is that, having allowed the prosecutor a final address, the trial judge then went on to finish his summing up by telling the jury about the evidence in relation to each of the charges on the indictment. A pointed to the fact that the trial judge told the jury that he was not going to go through the indictment in detail because the prosecutor had already done so, and also that he was not going to summarise the Crown case in any great detail. A contended that, contrary to what he had told the jury, the trial judge ended his summing up by going through the Crown case on each of the nine charges. That seems to be what he meant by saying the trial judge "*still closed his summing up with the 9 indictments*". As Mr

9 *House v The King* (1936) 55 CLR 499 at 509 and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Thomas pointed out in his submissions, A's complaint confuses three separate concepts – reading the indictment (which the trial judge did not do as the prosecutor had already gone through the indictment in detail), summarising the Crown case (ie the arguments of the prosecutor, which the trial judge did not do in any great detail) and summarising the evidence in relation to each charge on the indictment. The trial judge was obliged to summarise the evidence in relation to each of the charges, and his having done so does not give rise to an arguable ground of appeal.

[42] The third ground of appeal should be dismissed.

The Fourth Ground of Appeal

[43] The fourth ground relied on by A in the January document was as follows:

"The complainant's history was not allowed by his honour to be asked about by Mr Tippett. This was a miscarriage of justice to the defence."

[44] Apparently the complainant had 11 convictions for offences committed while she was living with her father, after the relevant time for the charges on the indictment. The reason A wanted to lead evidence of these convictions was not to damage the complainant's character and hence her credit. Rather, he wanted to show that what he and the complainant's mother had said was true – namely that if the complainant went to live with her father she would "run amok", that being the reason they both gave for not letting the complainant go to live with her father.

[45] The trial judge did not allow the evidence to be led for this purpose because it was not relevant. The complainant agreed in evidence that A and her mother told her she could not go to live with her father because she would "run amok", and she also agreed that that is what she would have done. The fact that she later went to live with her father and did "run amok" has no logical probative value in relation to the issues in the case – namely whether A sexually abused the complainant in the 5 years beforehand.

[46] This ground of appeal should be dismissed.

The Fifth Ground of Appeal

[47] The fifth ground relied on by A in the January document was as follows:

"Counts 8 and 9 on the indictment should have been dismissed …. according to the complainant's own evidence given at the last trial."

[48] The transcript references he gave in the January document in relation to this ground were to:

(a) evidence given by the complainant to the effect that the last time she could remember A "doing that" was at the beginning of the year (ie 2008) about 6 months before she made the complaint;

(b) a discussion between the trial judge and the prosecutor in which the prosecutor disclosed that the complainant had sent a number of text messages to A on 23 May 2008 to the effect that she was at Millingimbi

with her mother (which does not appear to have had any relevance to any issue at the trial); and

(c) a discussion between the trial judge and the prosecutor about the housing records and how those affected the possible dates of counts 8 and 9.

[49] Counts 8 and 9 concerned acts which occurred on the last occasion on which the complainant recalled A sexually molesting her. The dates on the indictment alleged that these acts occurred "between 31 December 2007 and 3 July 2008", and the offences were alleged to have occurred "at Howard Springs".

[50] The complainant's evidence was that the last time she remembered anything happening was "at the beginning of this year" (ie 2008), that her mum was at work in town, that she had a day off school, and that the events occurred at A's house at Lacey Rd, Howard Springs. She said that when she and her mother didn't have a house at Palmerston, they would spend time in Howard Springs, but when they had a house in Palmerston they would sleep at Palmerston. She also said during cross examination:

> "There's heaps of times where he's done that but I don't remember them all and that's the last time I remember. But I don't know if there were any after that, but that's just the last time I remember in detail."

[51] Housing records show that the complainant's mother was the tenant of a house in Emery Avenue Palmerston from 15 August 2007 to 18 April 2008, and the complainant is listed on those records as an occupant.

[52] The Crown relied on evidence from the complainant's mother to the effect that the tenancy of the Emery Avenue property ended at the end of 2007 and that they were staying with A in Howard Springs at the beginning of 2008.

[53] The Crown also relied on the Taminmin College records. (Taminmin is the secondary school for the Howard Springs area. The Emery Avenue property is in Palmerston.) Those records show that the complainant was enrolled at Taminmin College from January 2008 to June 2008 and there seem to be 12 days in that period on which she was absent from school all day, the first being on 29 February 2008. Eight of those days were after 18 April 2008 – the first being on 29 April.

[54] This information was all before the jury. Moreover, contrary to A's contention that this evidence was not drawn to the jury's attention, it was referred to in the closing address by the Crown and also in the trial judge's summing up. The prosecutor said this:

> "Now the next matter though is that the address at 4/85 Emery Avenue, Gray, the lease there, I repeat, was between 15 August of '07 through to 18 April of '08. Now that effectively covers much of the period, not all, but much of the period of the counts concerning counts 8 and 9 which commences between 31 December '07 to 3 July of '08.

> Now it is still significant because [the complainant] said that the offences in counts 8 and 9 occurred in early '08. So the question squarely raised is this: if she was living at 4/85 Emery Avenue, Gray at that time, early '08, then the offences specified in count 8 and 9 as occurring at Lacey Road [Howard Springs] could not have occurred. So that's the live question there.
>
> However, what is relevant there is, the Crown says to you, is firstly the evidence of the mother who says as far as she was concerned …. that the lease at the second Emery address …. finished … last year, she says, ie '07; '07 not '08."

[55] He then went on to refer to the school records referred to above and concluded his address on this topic in this manner:

> "Now of course there is [the complainant's] evidence where she simply says that that location, the Lacey Road property was where she was when these two counts on the indictment, counts 8 and 9 , were committed. So, members of the jury, the Crown does submit to you that the evidence also should be looked at carefully in terms of those particular counts."

[56] It is not true to say, as A contends, that he could not have been guilty of the acts charged on counts 8 and 9 at the time and place nominated on the indictment, on the complainant's own evidence. For the jury to have found A guilty of those charges, they presumably accepted and relied on the evidence of the complainant's mother that they left the Emery Avenue property at the end of 2007 (contrary to the Housing Commission records) and were living at Howard Springs with A in early 2008; the school records which tend to support the mother's evidence; and the evidence of the complainant herself that the offences occurred at the beginning of 2008 while they were living at the Howard Springs property. Alternatively, they may have been of the view that the complainant was mistaken about the time

the last offences occurred and that they occurred somewhat later in the year. The jury was perfectly entitled to take either of those views on the available evidence.

[57] If this ground is construed as a contention that there was no evidence on which A could have been properly convicted on counts 8 and 9, that is a question of law and leave to appeal is not required. In that case, I would dismiss the appeal. If it is construed as based on s 411 of the *Criminal Code* – ie that the jury verdict is unreasonable and cannot be supported having regard to the evidence, then leave is required and, in my view should not be granted: there is insufficient merit in this ground of appeal to warrant the grant of leave to appeal.

The Sixth Ground of Appeal

[58] The sixth ground relied on by A in the January document was as follows:

"In relation to the DVO (ie domestic violence order) perjury by detectives."

[59] In support of this ground, A wrote in the January document:

> *"Detectives claim they don't know who agreed with the complainant to put the DVO on my ex-partner* (ie the complainant's mother). *This denial from detectives only strengthened the prosecution's case and put the defence's case at a disadvantage."*

[60] Suffice to say that there was no evidence to suggest that any police officer had lied about this, and the question was, in any case, completely irrelevant to any issue on the trial.

[61] Leave to appeal on this ground should not be granted.

The Seventh Ground of Appeal

[62] The seventh ground relied on by A in the January document was as follows: *"The coaching of the complainant by Detective Megan Duncan"*.

[63] In relation to this ground, A said in the January document, *"The defence asked had the complainant been interviewed more than once,"* and went on to give transcript references. He then complained, *"His honour over six times mentions in front of the jury, "at the conclusion", and also in his summing up..... but it wasn't at the conclusion."*

[64] It was very hard to follow what A was complaining about in this ground. However, I think that the essence of his argument was as follows.

(a) The jury found A guilty presumably because they accepted the complainant as a witness of truth.

(b) They ought to have had doubts about her evidence because they ought to have concluded that she had been (or at least might have been) "coached" by police about what to say.

(c) They could/should have drawn this conclusion because there was evidence that police had interviewed the complainant "off the record" before they conducted the electronically recorded child forensic interview ("CFI") which constituted the bulk of the complainant's evidence in chief, and they lied about it. [Detective Coombs said that

the complainant told police that A had taken a naked photo of her on his phone "at the conclusion of the CFI". The "evidence" A relied on to suggest that this was false was what he referred to as "an admission" by the complainant in cross examination that she was interviewed by police before she went to the Sexual Assault Referral Clinic ("SARC").]

(d) A complained also that the judge said "over 6 times" in his summing up that the conversation about the photos on the phone occurred "at the conclusion" of the CFI. A contended that this was factually inaccurate. He contended further that the fact that the jury kept hearing from the judge that the conversation about the mobile phone occurred "at the conclusion" of the CFI rather than before, may have affected the verdict. If the judge had pointed out that the police had talked to the complainant about the matter before doing the recorded CFI and that they had lied about that, the jury would have been more likely to conclude that the police had coached the complainant in the earlier unrecorded interview, and therefore more likely to entertain a reasonable doubt about the reliability of her evidence given at the later CFI.

[65] The problem with this contention is that the "evidence" A relied on (ie the "admission" by the complainant that she was interviewed by police before going to the SARC) does not support the proposition he sought to establish (ie that there was an unrecorded interview between the police and the

complainant before the recorded CFI). The complainant said the police interviewed her before she went to the SARC. This tallies with police evidence that they did the CFI on 4 July and she went to the SARC on 7 July. A contended (strenuously) that police had tampered with the date shown on the recorded CFI and that it was actually held on 7 July – but he could not point to any evidence to support this assertion.

[66] He did point to the fact that the police applied for a warrant to seize his phone on 7 July – ie 3 days after the date they say they held the CFI and the subsequent interview about the phone. However, this does not, as a matter of logic, support his contention that the "off the record" conversation about the phone occurred before the CFI, or that the CFI was held on 7 July.

[67] At the hearing of the application for leave to appeal, A referred to an earlier copy of the warrant to seize his phone which he claimed proved that the CFI had been held on 7 July. Mr Thomas for the Crown agreed that there had been an earlier copy of the warrant and produced it to A and to the Court. It proved no such thing. The only difference between the warrant produced by Mr Thomas at the hearing and the one tendered at the trial was that the former had an additional paragraph referring to an allegation against A made by the complainant's sister. It was for that reason that an amended document was tendered at the trial.

[68] A was very quick to make totally unsupported allegations against everyone involved in the trial process. In my view there was simply no evidence to

support his repeated contention that police had committed perjury, that they tampered with the date on the CFI, or that they had coached the complainant before recording her evidence on the electronically recorded CFI.

[69] Leave to appeal should not be granted on this ground.

Orders

[70] In my view, the appropriate orders are as follows.

(a) Leave to appeal is refused in relation to proposed grounds 1, 2, 6 and 7.

(b) On grounds 3, 4, and 5 the appeal is dismissed.

BARR J:

[71] I agree with the orders proposed by Kelly J and with her Honour's reasons.