



Judgment Summary

Supreme Court
Australian Capital Territory
Court Of Appeal

Wednesday, 9 September 2026

McGary v DPP [2026] ACTCA 29

Muller, White and Charlesworth JJ

The Court of Appeal has allowed an appeal against a conviction on two counts of sexual intercourse without consent. The jury verdicts and convictions in respect of those counts have been set aside. The prosecution of one of those counts has been permanently stayed.

The appellant was charged with three sexual offences against two complainants, both of whom he was in an intimate relationship with at the time of the charged acts. At trial, he was convicted of one count against each complainant (counts 1 and 3) but acquitted of the charge in count 2. The prosecution case was that the appellant had a tendency to engage in sexual intercourse with an intimate partner where that person had indicated a lack of consent and where consent had previously been forthcoming in relation to past acts of sexual intercourse.

Two previous trials in respect of counts 2 and 3 had failed to obtain a verdict. In those earlier trials, the complainant in respect of count 1 had given evidence about then-uncharged acts in support of the tendency alleged by the prosecution. The appellant had given evidence in his own defence in the second trial, including in relation to the conduct which would eventually constitute count 1 on the indictment in the third trial, and on which he was convicted.

An application by the appellant for orders founded on an allegation of unfairness arising from the laying of count 1 and the proposed trial joining counts 1, 2 and 3 was dismissed. The appellant was subsequently convicted on counts 1 and 3.

The appellant appealed his convictions on the basis that the court erred in permitting the Crown to lead tendency evidence in the third trial (ground (e)). Charlesworth J (Muller and White JJ agreeing) held that the evidence should have been excluded because it failed to meet the “significant probative value” condition under s 97(1) of the *Evidence Act 2011* (ACT); and because it was more prejudicial than probative. As a result, her Honour found that the verdicts in respect of count 1 and count 3 must both be set aside.

The appellant further appealed his conviction on count 1, alleging that the trial judge erred by refusing to grant a permanent stay of the prosecution of that charge on the basis that the continuation of the proceeding constituted an abuse of the Court’s processes

(ground (d)). Charlesworth J (Muller and White JJ agreeing) found that the appellant's "forensic choice" to give evidence in the second trial concerning acts which became count 1 was indeed illusory. The appellant could not go into evidence to defend the charged acts in that trial without foregoing the right to silence he had thus far maintained in connection with the then-uncharged allegations. In that sense, he was effectively called upon to disclose his defence before the trial of the allegation which became count 1 had commenced. As a result, the trial on count 1 miscarried and a retrial would miscarry for the same reason.

The appellant also appealed his conviction on count 3 on the basis that it was not open to a properly directed jury to be satisfied beyond reasonable doubt of the appellant's guilt (ground (b)). Justices Muller and White held that the jury must be taken to have considered the appellant's evidence, and having done so put it to one side. Their Honours found that although certain matters in evidence may have raised credit issues in respect of the complainant on that count, the complainant was extensively cross-examined at trial about those matters and the jury was in a position to adjudicate upon the explanations which she offered. In dissent, Charlesworth J held that, on the basis of the evidence before the court, the jury ought to have found that the appellant's version of events might be true, and that the complainant had not been truthful in aspects of her evidence.

It was unnecessary to consider ground (a) of the appeal. Grounds (c) and (g) were not made out. Ground (f) was not pressed.

This summary has been prepared for general information only. It is not intended to be a substitute for the judgment of the Court or to be used in any later consideration of the Court's judgment.

General enquiry contact details
Telephone: (02) 6205 0000
Email: SC.Media@courts.act.gov.au