



HIGH COURT OF AUSTRALIA

7 May 2025

THE KING v CEM BATAK

[2025] HCA 18

Today, the High Court published its reasons for revoking, by majority, special leave to appeal from part of a judgment of the New South Wales Court of Criminal Appeal.

The respondent was convicted on two counts in a trial by jury in the Supreme Court of New South Wales. Count 2 was attempted robbery whilst armed with a dangerous weapon. Count 1 was murder. Count 1 was argued by the Crown and left to the jury as a charge of "constructive murder" on the basis of the respondent being an accessory before the fact to the foundational offence charged in Count 2.

The respondent appealed his conviction to the Court of Criminal Appeal on the ground, amongst others, that it was an error of law to permit constructive murder to be left to the jury on the basis of accessorial liability. The Court of Criminal Appeal upheld this ground of appeal, holding that being an accessory before the fact to constructive murder is not an offence known to law, but took the view that there appeared to be a "strong potential case" against the respondent for murder based on joint criminal enterprise. The Court of Criminal Appeal accordingly upheld the appeal in relation to Count 1, set aside the conviction on Count 1, and ordered a retrial.

The Crown was granted special leave to appeal to the High Court, originally seeking orders that the orders made by the Court of Criminal Appeal be set aside and, in their place, the appeal against conviction be dismissed. In its written submissions in chief, the Crown argued that being an accessory before the fact to constructive murder is an offence known to the law. However, the Crown contended for a significantly different formulation of the mental element of that offence to that relied on before the Court of Criminal Appeal. In its written submissions in reply, the Crown conceded that the trial judge had not directed the jury in accordance with what the Crown sought to argue in the appeal to the High Court was the requisite state of mind for the posited offence and that, if this Court were to accept the Crown's argument, the order for a new trial should be affirmed. Later the Crown reformulated that concession but maintained its submission as to the requisite state of mind for the posited offence of being an accessory before the fact to constructive murder.

In revoking special leave to appeal, the majority considered that the manner in which the Crown developed its case and the different formulations of the mental element for the alleged offence put forward by the Crown in the Court of Criminal Appeal and then in the High Court meant that it was not in the interests of justice to maintain the grant of special leave to appeal. The approach adopted by the Crown meant that there was no real dispute in this Court that the respondent's conviction for murder could not be sustained and that a new trial should be ordered. The Crown was in substance only seeking guidance from this Court as to the scope of a retrial on a basis that was disconnected from how the Crown conducted its case at trial and how it conducted the appeal in the Court of Criminal Appeal.

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.