SHORT PARTICULARS OF CASES
APPEALS
ADELAIDE
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THE QUEEN v DOOKHEEA (M159/2016)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 67

Date of judgment: 12 April 2016

Special leave granted: 18 November 2016

This appeal concerns whether the trial judge, in directing the jury in a murder trial that the prosecution had to prove an element of a crime "*not beyond any doubt, but beyond reasonable doubt*", caused a substantial miscarriage of justice.

The respondent was convicted by jury verdict of murder following a 10 day trial and sentenced on 4 December 2014 to 19 years' imprisonment with a non-parole period of 15 years. His wife the co-accused was charged with and pleaded guilty to manslaughter. She was sentenced to 8.5 years' imprisonment with a non-parole period of 6 years.

From 2007 the respondent and his wife were both employed by the victim in his fast food business. In mid-2012 the respondent took over a franchise of the business from the victim. By the end of 2012 the franchise was in debt and the victim resumed control of it, with the respondent's wife remaining as the manager. By early 2013 the accused were in debt and the respondent gambled at a casino in an attempt to win money to pay off debts. On 9 May 2013 when the victim attended at the accused's home to collect the business' takings (which the respondent had gambled away earlier that day at Crown casino) the respondent and his wife attacked the victim and the victim died.

The sole element of the offence of murder in issue at the trial was whether the respondent had an intention to kill or cause really serious injury to the deceased at the time he committed the act/s which caused the deceased's death. The direction in question by the trial judge related to the standard of proof regarding that element of the crime.

The Court of Appeal allowed the respondent's appeal from his conviction on the basis that in summing up to the jury the trial judge had erroneously sought to explain the phrase 'beyond reasonable doubt' and had therefore occasioned a substantial miscarriage of justice. The Court ordered that the conviction be quashed and the sentence set aside and directed that there be a new trial.

The Crown appealed to the High Court.

The grounds of appeal are:

- That the Court of Appeal erred in concluding that the trial judge, in her charge to the jury, erred in directing that the prosecution has to prove an element of a crime "*not beyond any doubt, but beyond reasonable doubt*".

- That the Court of Appeal erred in concluding that the said direction occasioned a substantial miscarriage of justice in all the circumstances.

CHIRO v THE QUEEN (A9/2017)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2015] SASCFC 142

Date of judgment: 30 September 2015

Special leave granted: 10 February 2017

This appeal concerns the issue of whether a trial judge is obliged to make further enquiries of a jury who has found a defendant guilty of the offence of "persistent sexual exploitation of a child" ("PSE") in order to identify the two (or more) sexual offences which they found had been committed in order to be able to sentence the defendant.

Section 50(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA") creates the offence of PSE, whereby an adult, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age. The Act defines the 'prescribed age' for present purposes (where the adult is a teacher of the child) as a child under the age of 18 years. The Act further defines an 'act of exploitation' as an act which could be the subject of a charge of a sexual offence.

The appellant is a former high school teacher at a school in Adelaide. He was convicted by jury verdict of 1 of 4 counts of separate sexual offences in relation to a student, the complainant ('V"). The 4 separate counts related to the period from July 2008 - when V was in Year 9 at the school where the appellant taught and was at times her teacher - to November 2011 when she was in Year 12. The appellant was convicted on count 1, a charge of aggravated indecent assault which took place in 2008 relating to "quick peck on the lips". The jury was hung on the remaining counts.

The appellant's appeal against conviction on count 1 was allowed on the basis that the Court of Criminal Appeal ("the CCA") found that the verdict was unsafe and that there had been a miscarriage of justice in that the offence of indecent assault required a sexual connotation. A retrial was ordered.

On the morning of the retrial, the DPP filed fresh information laying 1 count of PSE alleging that between 1 July 2008 and 19 November 2011 the appellant had committed more than 6 different sexual offences against V, and 3 of them on more than one occasion. During the learned trial judge's summing up the jury were twice directed that if they were satisfied of the kissing indecent assaults, then that alone would be sufficient to prove *actus reus*. During and after the trial judge's summing up the jury asked for direction as to several aspects of their task and answers were provided. The judge did not ask any questions in order to identify which of the alleged sexual offences the jury had found to be proven beyond reasonable doubt.

The jury delivered a majority verdict finding the appellant guilty of PSE. The learned trial judge sentenced the appellant to 10 years' imprisonment with a non-parole period of 6 years on the basis that he had committed the full range of acts alleged in the PSE charge over the relevant period, noting that the maximum sentence for the most serious of the acts of fellatio and digital intercourse would

amount to ‘unlawful sexual intercourse’ which under s 49 of the CLCA carries a maximum penalty of 10 years.

The appellant appealed to the CCA against conviction and sentence. The CCA dismissed his appeal.

The appellant appealed to the High Court.

The grounds of appeal are:

- That the CCA erred in failing to hold that the trial judge erred by failing to ask the jury the necessary questions to identify, for the purposes of sentencing, the 2 (or more) sexual offences in respect of which they had found the charge of PSE proven beyond reasonable doubt.

- That the Court of Appeal erred in in finding that, in the absence of an answer by the jury to those questions and in light of the direction to the jury that they were entitled to convict if satisfied of only 2 episodes of sexual offending of a relatively less serious nature (kissing), it was open to the trial judge to sentence the appellant as if he were guilty of all the sexual offending alleged.

The Court has directed that this appeal be heard at the same time as the appeal of *Hamra v The Queen* (A14/2017) which raises similar issues.

HAMRA v THE QUEEN (A14/2017)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2016] SASCFC 130

Date of judgment: 8 December 2016

Special leave granted: 7 April 2017

This appeal concerns the issue of whether, to prove an offence of "persistent sexual exploitation of a child" ("PSE"), the prosecution must prove features of the circumstances surrounding each act of sexual exploitation relied upon which are peculiar to that act, such that the occasion of each act can be separately identified.

Section 50(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLCA") creates the offence of PSE, whereby an adult, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age (for present purposes a child under the age of 17 years). The Act defines an '*act of exploitation'* as an act which '*could, if it were able to be properly particularised, be the subject of a charge of a sexual offence'*.

The appellant's case is that proof of the constituent sexual offences involves proving the elements of those offences by adducing evidence capable of proving beyond reasonable doubt that there was an *actua*l occasion on which each element of the sexual offence in question occurred, and also proving that two such offences at least 3 days apart took place before the child attained 17 years of age. The respondent argues that the common law requirement for the particularity - which enables each occasion of offending conduct to be separately identified - has been abrogated for the purposes of proving an offence against s 50(1).

This case concerns allegations of historical sexual abuse by the male appellant of the male victim 'B' between 1977 and 1982 when the victim was aged between 12 and 17 years of age. The appellant was acquitted of the charge of PSE by the trial judge sitting alone on the basis that there was no case to answer because of the generalised nature of B's allegations. The DPP sought permission to appeal against that acquittal. The appeal was allowed on the basis that the Court of Criminal Appeal ("the CCA") considered that despite the generalised nature of the assertions, there was a case to answer. A re-trial was ordered. No specific order was made in relation to permission to appeal.

The appellant appealed to the High Court.

The grounds of appeal are:

- That the CCA erred in holding that the trial judge erred in concluding that there was no case to answer because the complainant's allegations were of a generalised nature such that it was not possible to identify two or more proved sexual offences within the meaning of s 50 of the CLCA.

- In the alternative, that the Court of Appeal erred in failing to address whether permission to appeal should be granted having regard, *inter alia*, to considerations relating to double jeopardy.

The Court has directed that this appeal be heard at the same time as the appeal of *Chiro v The Queen* (A9/2017) which raises similar issues.

VAN BEELEN v THE QUEEN (A8/2017)

Court appealed from: Court of Criminal Appeal of the Supreme Court of South Australia
[2016] SASCFC 71

Date of judgment: 13 July 2016

Special leave granted: 10 February 2017

In this appeal the appellant seeks to overturn the decision of the majority of the Court of Criminal Appeal of the Supreme Court of South Australia ('the CCA") to reject his application for permission to appeal against his 1973 conviction for murder. His appeal is based on the availability of fresh and compelling evidence which establishes that opinion evidence given at the trial by the Crown's forensic pathology witness as to the deceased's time of death based on her stomach contents was scientifically unsound.

Section 353A of the *Criminal Law Consolidation Act 1935* (SA) ("the *CLCA*") provides that the Full Court of the Supreme Court may hear a second or subsequent appeal against conviction if it *'is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered in an appeal'* and that it *"may allow an appeal under this section if … there was a substantial miscarriage of justice".* A convicted person may only appeal under s 353A with the permission of the Full Court.

The facts of the offence took place many years ago. The appellant was first convicted of the murder of 15 year old Deborah Joan Leach and sentenced to death in October 1972. His appeal against that conviction was allowed in 1973 and a new trial ordered. He was then convicted and sentenced to death for a second time in July 1973. His second appeal was dismissed later in 1973. Applications for leave to appeal to the High Court and to the Privy Council were refused. The appellant's conviction was again affirmed in September 1974 on the hearing of a petition for mercy.

On 28 October 2015 the appellant sought permission to appeal from the Supreme Court's Court of Criminal Appeal based on the fresh evidence.

It was common ground that the new evidence (from an eminent forensic pathologist who had critically analysed Dr Manock's opinion against current scientific knowledge) did establish that the opinion evidence given at the trial by the Dr Manock as to the deceased's time of death was scientifically unsound and that the evidence was '*fresh*' as defined in the *CLCA.* There was a dispute as to whether it was '*compelling*' which is defined as '*reliable*, '*substantial'* and '*highly probative in the context of the issues in dispute at the trial of the offence*'. There was a significant dispute as to whether there was a '*substantial miscarriage of justice'.*

The Supreme Court, by majority, held that the evidence was not '*compelling'* and that there had not been *a 'miscarriage of justice'.*

The appellant's case is that the scientific evidence presented via Dr Manock at the trial was wrong and irrelevant and should never have been introduced and that the prosecutor's introducing and cross-examining on that irrelevant

information was wrong. Further, that in the light of the fresh evidence it can now be seen that the consequence was that the judge and jury were misled. The (incorrect) precision of the time interval calculated by Dr Manock was a critical feature of the Crown case against the accused. The Crown argues that the impugned opinion was challenged at trial by the leading of contrary evidence, that the civilian evidence alone compelled an inference as to the time of death and that the circumstantial case against the appellant was compellingly probative of guilt. This included evidence of fibre residues on the deceased's clothing.

The appellant appealed to the High Court.

The grounds of appeal include:

- That the majority of the CCA failed to understand the nature of the fresh evidence which demonstrated that the evidence of time of death given in the original and subsequent trial was incorrect and led the jury to a false conclusion.

- That the majority of the CCA failed to understand the compelling nature of the new evidence as being highly probative in the context of the time of death of the deceased and central to the issue before the jury in the first and subsequent trial.

- That the majority of the CCA erred in accepting that the evidence of the pathologist at trial had been contested and therefore that further attack on that evidence was precluded.