

GASSY v THE QUEEN (A2/2006)

Court appealed from: Court of Criminal Appeal, South Australia

Date of judgment: 22 December 2005

On 23 September 2004, after a trial by jury, the applicant was convicted of the murder of Dr Tobin, the Director of Mental Health for South Australia. The case against the applicant was circumstantial. The Crown alleged that the applicant travelled in a lift with Dr Tobin before shooting her four times as she left the lift. The Crown led evidence of the applicant's presence in South Australia at the relevant time, his ownership of pistols of the same brand and manufacture as the pistol used to shoot Dr Tobin, and his possession of ammunition of the same kind as that used. The prosecution also relied on evidence of motive in that Dr Tobin had played a role in the deregistration of the applicant as a psychiatrist in New South Wales, and various pieces of identification evidence.

The applicant gave evidence at trial, denied any involvement in the killing, denied being in Adelaide at the time of the offence, and relied on by way of an alibi telephone call made from his home in Sydney on the weekend of the shooting, which he claimed to only have been made by him as his parents were overseas at the time.

The applicant appealed to the Court of Criminal Appeal (Bleby, White and Debelle JJ) on multiple grounds. The appeal was dismissed by a majority of the Court, with Debelle J dissenting. The applicant filed an application for special leave to appeal, which was heard by the High Court on 9 August 2007. The Court dismissed nine grounds of appeal relied on by the applicant, but referred the remaining two grounds for consideration by a Full Court to be argued as on a full appeal.

The first ground of appeal to be considered by the Full Court is based on a ruling by the trial judge that the applicant could not be represented by counsel during pre-trial argument if counsel was not briefed to conduct the trial before the jury. On this basis, counsel did not appear on any pre-trial issue but was available to the applicant for advice for 11 days. On the 11th day counsel indicated that he had been retained to represent the applicant for the remainder of the proceedings, including the trial. The applicant was then represented by counsel for some of the pre-trial matters but terminated counsel's instructions before the trial commenced and acted in person thereafter. The Court of Criminal Appeal found there was no sound reason to deny the applicant his right to legal representation for the pre-trial argument and the trial judge had erred. The question was whether this error vitiated the trial. After reviewing the matters canvassed on the voir dire for the period of the non-representation, the majority of the Court noted that the opportunity was there, after counsel began representing the applicant, to have the matter reopened before the ruling was made if it was considered that he had suffered some disadvantage in arguing the matter himself. The majority concluded that in the circumstances, although he was wrongly denied representation when he wanted it, there was no miscarriage of justice. Debelle J found that the trial judge's error regarding representation during the voir dire hearing gave rise to a miscarriage of justice, particularly as the availability of counsel

may have seen more of the identification evidence excluded. This in turn may have had a material effect upon the reasoning of the jury.

The other ground of appeal to be considered by the Full Court arises from a direction given by the trial judge, after the jury indicated it was having difficulty in reaching a verdict. The applicant complained that the direction was unbalanced as, for example, her Honour said nothing about the evidence of his alibi on the weekend of the killing. The majority noted that viewing the direction as a whole, it was not intended to be nor was it a review of the evidence on which either the prosecution or defence relied. They found that the direction was not unbalanced and was neutral. It was appropriate for the judge to make a suggestion as to how the jury might approach the evidence and identify any errors of disagreement or uncertainty before proceeding to take the next step. Debelle J found that the direction did not maintain an appropriate balance between the defence and prosecution cases. The trial judge did little more than recite the elements of the prosecution case and suggest a line of reasoning based on the prosecution case leading to a verdict of guilty.

The grounds of appeal include:

- The Court of Criminal Appeal erred in holding that while the trial judge erred in ruling that the applicant could not be represented by counsel for pre-trial argument unless the applicant was also represented by counsel at the trial before the jury, no miscarriage of justice ensued, despite the fact that the applicant was unrepresented for the first third of the pre-trial argument when he wished to be represented and had counsel retained and available to provide representation limited to pre-trial argument.