

BURNS v THE QUEEN (S46/2012)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 56

Date of judgment: 1 April 2011

Special leave granted: 10 February 2012

Mrs Natalie Burns and her husband received methadone as part of a programme to treat their drug addictions. In breach of methadone clinic procedures (and of legislation), they pooled their drugs and sold them from their flat. Purchasers either carried the methadone away in a bottle or administered it intravenously whilst at the Burns' flat, using a syringe supplied by Mr & Mrs Burns. On 9 February 2007 Mr David Hay ingested methadone (probably by injection) in the Burns' flat. He was an inexperienced methadone user. Mr Hay had been taking olanzapine (a prescription drug) to treat a psychiatric illness. On the day he visited the Burns' flat he had taken greater than his prescribed dose of olanzapine, which caused him slight drowsiness. After ingesting the methadone he became very drowsy. Mrs Burns said that she wanted him out of the flat. Mr Burns however suggested calling an ambulance. Mr Hay declined and left the flat, accompanied by Mr Burns. The next day, Mr Burns found Mr Hay dead in a toilet in the back yard of their block of flats. The post mortem examination found that Mr Hay's death was caused by the toxic combination of methadone and olanzapine.

Mr & Mrs Burns were tried separately and a jury found each of them guilty of manslaughter. Mrs Burns was found guilty of manslaughter by gross criminal negligence (which required a finding that she had owed Mr Hay a duty of care) and/or by an unlawful and dangerous act. On 23 October 2009 Judge Woods sentenced her to 5 years 8 months imprisonment with a non-parole period of 4 years 6 months. This was for both the manslaughter charge and several offences involving the supply of methadone. Mrs Burns appealed against her conviction for manslaughter.

On 1 April 2011 the Court of Criminal Appeal (McClellan CJ at CL, Schmidt J & Howie AJ) unanimously dismissed Mrs Burns' appeal. Their Honours held that Judge Woods had not erred in refusing to remove from the jury the charge of manslaughter by gross criminal negligence, nor in directing the jury that a supplier of drugs owed the recipient a duty of care. The Court of Criminal Appeal also held that the existence of a duty of care was a matter of law for the judge to determine, and that Judge Woods had correctly instructed the jury on their fact-finding duty. Their Honours found that the jury's verdict, if based on gross criminal negligence, was not unreasonable on the evidence. In the circumstances of Mr Hay's condition deteriorating after he had received methadone, it was extremely negligent for Mrs Burns to require him to be taken out of the flat and abandoned.

Their Honours also held that Judge Woods had not erred in refusing to remove from the jury the charge of manslaughter by an unlawful and dangerous act. They found that Judge Woods had appropriately instructed

the jury that it could not find Mrs Burns guilty of manslaughter unless her act or omission had substantially contributed to Mr Hay's death. The Court of Criminal Appeal also found that it was open on the evidence for the jury to conclude that Mrs Burns (or Mr Burns) had injected methadone into Mr Hay's left arm. Such an act was unlawful and dangerous in the circumstances, and it had led to Mr Hay's death.

The grounds of appeal are:

- The Court of Criminal Appeal erred in holding that the circumstances that arose in this case were capable of giving rise to a duty of care.
- The Court of Criminal Appeal should have held that the directions of the trial judge as to duty of care and breach were erroneous.
- The Court of Criminal Appeal should have held that the directions of the trial judge as to causation were erroneous.
- The Court of Criminal Appeal should have held that causation could not be established on either limb of involuntary manslaughter.