

BUCCA v THE QUEEN (A26/2015)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 180

Date of judgment: 3 December 2015

Date special leave granted: 25 May 2015

The appellant was found guilty of the murder of Adrian McDonald, after a trial by a jury in the Supreme Court of South Australia. On 3 February 2013 McDonald was shot dead at the Big Bucket Car Wash in Parafield. Shortly before he was shot Mr McDonald got into the front passenger seat of a car parked in the grounds of the car wash. The prosecution case was that McDonald was shot by the appellant, who had concealed himself in the rear of the car, which was driven by the co-accused, Tristan Castle. At trial, Castle gave evidence that she was the driver of the car but that another man, Wesley Gange, was the shooter. The appellant did not give evidence. Gange died before the trial.

The prosecution case included evidence of telecommunication records which showed that between midnight on 2 February 2013 and the shooting of McDonald, Castle's mobile phone and the appellant's mobile phone moved around the north eastern suburbs of Adelaide and the vicinity of the Big Bucket Car Wash in "lock step with each other" and that Gange's phone was located almost 16 minutes driving time from the Big Bucket Car Wash at the time of the shooting. The prosecution also led evidence of what was claimed to be an admission, overheard by a witness (Pascoe), made by the appellant to the witness's father, and evidence of an admission made by the appellant to a police officer that he had been with Castle for 95% of the 24 hour period preceding 3.30pm on 3 February 2013.

In his appeal to the Court of Criminal Appeal the appellant submitted, *inter alia*, that the Judge misdirected the jury as to whether the Pascoe's evidence was evidence of a confession by him that he had shot McDonald. The Court found that this evidence had no evidentiary value as an admission against interest and should not have been left to the jury as a possible admission. They noted that it is the nature of evidence of an admission that it attracts the attention of a jury and may significantly influence their deliberations. In those circumstances it is not possible to apply the proviso, unless the other evidence rendered the appellant's conviction inevitable or so overwhelmed the evidence of the disputed admission that the jury would not have relied on it in any material way. The Court further noted that in the ordinary course, the proviso could not be applied in a case in which the guilt or innocence of the appellant depended on an assessment of oral evidence. They found, however, that this was an exceptional case, as Castle's evidence was not just implausible and inconsistent with the objective evidence, it was on its face so obviously false that it carried no weight at all.

The Court was satisfied beyond reasonable doubt that the appellant shot the deceased based on: the evidence of the telephone communications; the evidence of motive; evidence that a plan was devised by which Castle was to lure the deceased to a confrontation with the appellant; Castle's text messages to the deceased in apparent execution of that plan; evidence which placed Gange elsewhere at the time

of the shooting; and the difficulty which a man with Gange's injuries would have in hiding in the boot and moving from there into the compartment of the car.

The Court held that the admissions were a minor part of the evidence and were so overwhelmed by the circumstantial evidence against the appellant that it was unlikely they had any influence on the jury's verdict, so there was no substantial miscarriage of justice and the proviso applied.

The grounds of appeal include:

- The Court of Criminal Appeal erred in holding that the learned trial judge correctly admitted evidence of the appellant's past possession of firearms.
- The Court of Criminal Appeal erred in holding that although the learned trial judge misdirected the jury that an out of court statement by the appellant was available as a confession to the crime of murder, the proviso applied.