

NGUYEN v THE QUEEN (M30/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2010] VSCA 23

Date of judgment: 23 February 2010

Date special leave granted: 15 March 2013

After a trial by jury in the Supreme Court of Victoria, the appellant was convicted of the murder of Hieu Trung Luu and the attempted murder of Chau Minh Nguyen ('Chau Minh'). The events that gave rise to the conviction occurred on 7 November 2004. The appellant, with two co-accused, Bill Ho ('Ho') and Dang Quang Nguyen ('Quang'), went to a flat in Carlton, allegedly to collect a drug debt. While they were there Ho pulled out a hand gun, shot Chau and then killed Hieu.

Both the appellant and Quang appealed to the Court of Appeal (Neave and Bongiorno JA and Lasry AJA), both arguing that the trial judge had erred in her directions to the jury concerning the alternative verdict of manslaughter. Quang's appeal was upheld and his convictions were quashed. The Court found that a jury, acting reasonably, must have had a reasonable doubt as to Quang's guilt. There was no evidence that he knew of the existence of the drug debt or knew that Ho was carrying a gun before they went to the flat. There was also insufficient evidence to establish that, after the men arrived at the flat, Quang reached an agreement or understanding with Ho to kill or inflict serious injury if necessary to recover the debt, or to use violence to recover the debt, and that Quang foresaw the possibility that death or serious injury could occur. However, the Court did not consider that the verdicts against the appellant were unsafe and unsatisfactory. On the basis of the evidence of one of the witnesses it would have been open to a reasonable jury to conclude that the drug debt was owed to the appellant rather than Ho, and/or that the appellant went to the flat to assist Ho to use violence, if necessary to collect the drug debt. In addition the jury would have been entitled to rely on the evidence of Chau Minh that the appellant told Ho to 'fuck him off' or 'get him off' and that he nodded at Ho before Ho shot Chau Minh in the head.

The respondent had sought special leave to appeal in this Court against the orders made by the Court of Appeal in relation to Quang, and on 30 July 2010 Hayne, Crennan and Bell JJ directed that the application be referred to an expanded bench to be argued as on appeal. Quang had filed a Notice of Contention on the ground that the trial judge had erred in failing to properly direct the jury as to criminal complicity, and in particular as to the alternative verdict of manslaughter. On 3 November 2010 this Court ordered that the respondent's appeal and Quang's cross-appeal be allowed, the orders of the Court of Appeal be set aside, Quang's convictions be quashed, and a new trial be had. On 9 November 2010, Quang pleaded guilty to manslaughter and recklessly causing serious injury. Subsequently in September 2012 the appellant applied for special leave out of time and was successful in obtaining a grant of special leave.

The ground of appeal is:

- The Court below erred in failing to determine that the trial judge had erred in failing properly to direct the jury as to criminal complicity and, in particular, as to the alternative verdict of manslaughter?

The respondent will be seeking to rely on a Notice of Contention which contains the following grounds:

- The Court of Appeal erred in considering that if the possibility of an alternative of manslaughter arose on the facts it could not take into account the manner in which the case was run in determining if there was a substantial miscarriage of justice.
- The Court of Appeal erred in considering that it was bound by *Gilbert v The Queen* (2000) 201 CLR 414 and could not use the conviction on the count of murder as showing that the alternative of manslaughter was not a viable alternative.