



HIGH COURT OF AUSTRALIA

8 November 2017

FRITS GEORGE VAN BEELEN v THE QUEEN
[2017] HCA 48

Today the High Court unanimously dismissed an appeal from the Full Court of the Supreme Court of South Australia. The appeal concerned s 353A(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the Act"), which confers a novel jurisdiction on the Full Court to determine a second or subsequent appeal against conviction in the case of fresh and compelling evidence. The Full Court had refused the appellant's application for permission to bring a second appeal on the basis of new evidence.

In 1973, the appellant was convicted of the murder of a 15 year old school girl at Taperoo Beach in South Australia. The prosecution case was circumstantial and depended upon evidence that, given the time of death, the appellant was one of the few male persons with the opportunity to have committed the offence and upon evidence of the similarity between fibres found on the clothing of the appellant and of the deceased. At trial, the pathologist who conducted the autopsy gave evidence, based on the rate of stomach emptying, that the deceased must have died by 4:30pm. The deceased had last been seen alive at around 4:00pm. There was unchallenged evidence that the appellant left Taperoo Beach not later than 4:30pm. In 2015, the appellant applied to the Full Court for permission to bring a second appeal pursuant to s 353A(1) of the Act.

A second or subsequent appeal may only be brought under s 353A(1) if the court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on the appeal. Evidence is "compelling" if it is reliable, substantial and highly probative in the context of the issues in dispute at the trial. The appellant applied for permission to appeal on the basis of fresh expert evidence of the results of studies conducted since the date of the trial which was said to demonstrate that the pathologist's opinion concerning the rate of stomach emptying was "unequivocally highly erroneous". The fresh evidence falsified the basis for the opinion that the deceased must have been dead by 4:30pm. The majority in the Full Court concluded that the fresh evidence was not "compelling" because it only confirmed the correctness of evidence given at the trial by an opposing defence expert. The majority concluded that the evidence did not possess high probative value in the context of the issues in dispute at the trial, again because the evidence of the time of death based on stomach emptying had been the subject of challenge at trial.

By grant of special leave, the appellant appealed to the High Court. The High Court unanimously held that the evidence was "compelling" within the meaning of s 353A(1) and that it was in the interests of justice for it to be considered on appeal. After reviewing the evidence given at the trial, the Court concluded that the prosecution had established beyond reasonable doubt that the deceased was dead by 4:50pm. In the absence of the pathologist's opinion concerning the time of death, there was a window of 20 minutes after the appellant left Taperoo Beach during which the expert evidence could not exclude the possibility that death occurred. The Court held, however, that this did not significantly reduce the improbability of a person other than the appellant being the killer. The Court held that the majority of the Full Court had been right to conclude that there was not a significant possibility that a properly instructed jury, acting reasonably, would have acquitted the appellant even if the pathologist's opinion concerning the time of death had not been admitted. Accordingly, the appeal was dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*