

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A8 of 2017

ON APPEAL FROM
THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:



FRITS GEORGE VAN BEELEN

Appellant

-and-

THE QUEEN

Respondent

APPELLANT'S REPLY

Part I:

I certify that this submission is in a form suitable for publication on the internet.

Part II:

Summary of Issues on Appeal

Issues on Appeal (Para 2). We do not agree. The fundamental issue raised by this appeal relate to (1) the use of proper science, and (2) using science properly in the criminal justice system.

This appeal is not about the interpretation of sec 353A *CLCA*.

1. Procedural history (Para 4). No issue.
2. Key evidence at trial (Paras 5 – 23). No basic issue.
3. The new evidence in the Court below (Para 24). We do not agree that this is an adequate summary of the fresh evidence.
4. Second or Subsequent Appeals: s 353A (Paras 26ff). We do not agree that this legal analysis is relevant to the fundamental issue. In particular we do not agree with Paras 58 and 59. The Appellant's position is that the fresh evidence establishes that Dr Manock's opinion concerning time of death should never have been presented to the jury.
5. Application of s 353A to this case (Paras 60ff). We disagree with the argument of the Respondent. In this context, for present purposes, specific reference is made to:

- 1) Para 68 and Para 70

1. This Court should require the Respondent before any oral submissions are presented to explain what the Respondent means by “PROPERLY”. (Para 68)
2. This Court should require the Respondent (again before any oral submissions) to explain what the Respondent means by “SUGGESTED”. (Para 68)
3. Compare with Para 70 “remained open to the jury to accept Dr Manock’s opinion”.

2) Para 72

What “civilian evidence” is the Respondent referring to?

3) Paras 73 – 74 – 75

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The time of Deborah’s death was “relevant to opportunity” for some other person to kill Deborah. BUT the time of Deborah’s death is the critical issue. The reference to the 20 minutes is irrelevant. See Para 87; “Is the fresh evidence highly probative of the issue of time of death?”

4) Para 96

What is meant by “purported adoption of deductive reasoning”?

NB: “PREMISE” relates to the proposition that the jury may have convicted on the basis of Dr Manock’s opinion.

WE REFER NOW TO OUR ANALYSIS OF THE TRIAL PROCESS.

6. First Trial - Appeal

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See Para 21 (pages 6-7) of Applicant’s Submissions (Reference to *The Queen v Van Beelen* (1972) 4 SASR 353 at pp371-2).

All, then, depends on the scientific evidence as to what was the “relevant time”.

7. Second Trial - Appeal

A. Conduct of the prosecutor

8. At the outset of his cross-examination of Dr Pocock with regard to the passage in the Lovatt Evans “Principles of Human Physiology” text book, the prosecutor told Dr Pocock:

I think it would be better if I put my understanding to you.¹

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9. It is clear from this approach and the subsequent questions and statements made by the prosecutor that he was determined he would make sure the jury got the “point” *he* wanted to make, namely that there was only a small variation in gastric emptying times between

¹ Transcript, second trial of Van Beelen (evidence of Dr DA Pocock), p2565.8 (underlining added).

individuals. It is also apparent from the manner of his cross-examination of Dr Pocock, particularly his failure to follow up on some of Dr Pocock's answers, that the prosecutor was not going to let anything Dr Pocock said stop him from stating his own views regarding the meaning of the study and Figure 572.

10. It is clear from the transcript that the prosecutor was in fact aware that the physical composition of the test meal was of liquid only,² and aware that liquids empty from the stomach faster than solids (as confirmed by Dr Manock, his own expert witness, in cross-examination)³ and he certainly was well aware (from the evidence presented through Dr Manock)⁴, that the composition of the meal the deceased was assumed to have eaten
- 10 contained solids and liquid, yet he nevertheless proceeded to make his "point" concerning the supposed difference or variation in stomach emptying times between individuals.
11. At the end of the cross-examination on this topic the trial judge in effect questioned whether the prosecutor's "theory" was that the interval under discussion was plus and minus 10 minutes, to which the prosecutor replied "I think more properly it would be 12½" minutes⁵.
12. Apparently the trial judge was convinced and there was no further discussion of the topic. The entire exchange had lasted probably less than 10 minutes.
13. The fresh evidence shows that although the material presented to Dr Pocock looked scientific (it included a graph!) and the discussion included scientific terms such that it sounded like good science, it was not. It should never have been allowed to happen.
- 20 14. The new evidence provided in 2016 by Professor Horowitz has revealed that studies since 1972 have confirmed and extended the knowledge of the difference between processes of the emptying from the stomach of liquids and the emptying of solids.⁶
15. The results in Figure 572 of the Lovatt Evans text book in themselves show that any comparison of the 'test' meal with the case meal in terms of stomach emptying time is not valid. Deborah Leach was said to have started her meal at 12.15 pm. She was seen alive at 4 pm, 3¾ hours later. She obviously died sometime after this time, with about ¼ of the meal

² Ibid, p2566.26.

³ Ibid, p691.30. "Mr Borick: Would you agree with this statement, 'Liquids, whether ingested separately or with solid food, tend to leave the stomach more rapidly than do solids or semi-solids'. Dr Manock: Yes."

⁴ Ibid, p638.11 (Dr Manock XN).

⁵ Ibid, p2567.

⁶ Report of Professor Michael Horowitz. 'RE: Use of stomach contents to estimate time of death in the Van Beelen case', 10 February 2016, p2. [Exhibit A1; *R v Van Beelen* [2016] SASFC 71.]

still in her stomach, according to Dr Manock. On that basis total emptying time for her meal would have to have been more than about 4 hours (more than about 240 minutes). Figure 572 shows that the total emptying time for the 'test' meal was effectively about 100 minutes; clearly different.

16. Thus the knowledge concerning gastric emptying that has become available since the time of the Van Beelen trial confirms the irrelevance of using a liquid 'test' meal to assess any parameter to do with the gastric emptying of a solid/liquid meal.

B. Bright J – summing up (see Para 31 (p9) of the Appellant's submissions).

- 10 17. "To try to fix a time of death more precisely we have to consider the evidence of Dr Manock the pathologist."

18. "Obviously you cannot uphold his [Dr Manock's] conclusion even if you are satisfied of his learning and honesty unless you are satisfied that the facts on which the conclusion is based have been clearly proved. ...

19. "You will have to make up your minds as to whether to accept him as a man of science, competent in his work."

20. Was Dr Manock a man of science?

21. Petition Judgment

22. Dr Manock's opinion as to time of death was critical.

C. A critical point

- 20 23. There was no reference by the prosecution in the whole of the trial and appellate processes to the period of 20 minutes.

OUR RESPONSE

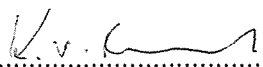
Our Fundamental Submission

24. The fundamental submission is that the gastric emptying **study**, and consequently the **resultant Figure 572** as presented in the Lovatt Evans textbook, were of **no relevance whatsoever** to Van Beelen's case and should never have been introduced and referred to at his trial. Introducing and cross-examining on that irrelevant information by the prosecutor was wrong and in the light of the fresh evidence it can be clearly seen that as a consequence the judge and jury were **misled**.

The 'study'

25. The **fundamental reason** why the study which produced the data, and consequently the Figure 572, have no relevance to the case, is that **the 'test' meal used in that study bore no resemblance in either its physical composition or its calorific value to the meal assumed by Dr Manock the deceased had eaten** when he was forming his opinion as to the time of her death.
26. The misleading of the judge and jury by the prosecutor by the introduction of a study which had no relevance to the case was then to be compounded by misrepresentation and misinterpretation by the prosecutor of the data produced by that study. The prosecutor's interpretation, based on the standard deviation lines plotted on the graph in Figure 572, and presumably on 'advice' (from Dr Manock) rather than his own knowledge meant that the graph was used for a different purpose than that for which it had been designed and intended. Neither the study nor the purported scientific interpretation of the data produced had any valid scientific basis.
27. Dr Manock maintained to the trial Court that his interval of one hour covered all the variables involved in his estimate of the time of death.⁷
28. The fresh evidence has shown that Dr Manock's one hour time period had no scientific support and was wrong, and likewise the prosecutor's attempt, apparently in support of Dr Manock's one hour interval, to make his 'point' that there was minimal variation in gastric emptying times between individuals also lacked scientific support and was wrong and misleading.
29. The **precision** of that one hour interval was a critical component of the Crown case that the death had occurred no later than 4.30 pm.

Dated 13 April 2017


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the Case in Court

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⁷ Transcript, second trial of Van Beelen (1973), p640. See also pp647 and 654.