

FITZGERALD v THE QUEEN (A9/2014)

Court appealed from: Court of Criminal Appeal Supreme Court of South Australia [2013] SASCFC 82

Date of judgment: 16 August 2013

Date special leave granted: 14 March 2014

The appellant, together with a co-accused, was convicted after trial by jury in the Supreme Court of South Australia of one count of murder and one count of “*aggravated causing serious harm with intent to cause serious harm*” contrary to s 23(1) of the *Criminal Law Consolidation Act 1935* (SA). The Crown case was that both accused were part of a larger group of men that broke into a house in the early hours of 19 June 2011 and attacked and killed one person (Drover), and seriously injured another (Karpany) and that they were part of a joint enterprise to cause grievous bodily harm upon those inside the house. The attackers were seen to arrive in a number of cars, parking around the corner from the house; walk as a group to the house and then split into two groups, smashing their way through the front and back doors simultaneously and using weapons. It was not part of the prosecution case that either of the co-accused did the actual killing. None of the eyewitnesses identified the appellant as being present during the crimes. The Crown case against the appellant depended upon his DNA being found on a didgeridoo, which had been moved within the house, together with evidence that he had never previously been to the house. There was expert evidence given at trial regarding DNA identification and differences between “primary” and “secondary” transfer of DNA. Primary transfer occurs when a person’s DNA is placed on an object by that person; secondary transfer is when the first person’s DNA is placed on that object by a second person.

In his appeal to the Court of Criminal Appeal (Gray, Sulan and Blue JJ), the appellant’s primary ground of appeal was that the verdict was unsafe or unreasonable and not supported by the evidence. The appellant submitted, inter alia, that the Crown had failed to exclude a reasonable hypothesis consistent with his innocence, namely the presence of his DNA on the didgeridoo being explained by secondary transfer via his co-accused. With respect to the DNA evidence, the Court found that the hypothesis that the appellant’s DNA was transferred by secondary transfer onto the didgeridoo depended upon the occurrence of a succession of unlikely events. In the circumstances, it was open to the jury to conclude beyond reasonable doubt, as it did, that the appellant’s DNA was deposited on the didgeridoo as a result of direct contact by him (and not as a result of secondary transfer).

The grounds of appeal include:

- The Court below erred in holding that the finding of the the appellant’s DNA at the location of the crime was sufficient to establish beyond reasonable doubt the the appellant’s presence at and participation in the joint enterprise alleged.