HIGH COURT OF AUSTRALIA

6 May 2015

LINDSAY v THE QUEEN

[2015] HCA 16

Today the High Court unanimously allowed an appeal from the Court of Criminal Appeal of the Supreme Court of South Australia ("the CCA"), quashed the appellant's conviction for murder and ordered a new trial.

The appellant, an Aboriginal man, was tried before a jury for the murder of Andrew Roger Negre. The appellant, his de facto wife and a friend met the deceased, who was not previously known to them, at a hotel. When they left the hotel, all four went to the appellant's home to have some further drinks. It was open to the jury to find that the deceased made sexual advances towards the appellant at the appellant's home and these culminated in an offer, made in the presence of the appellant's de facto wife and others, to pay the appellant for sex. It was also open to find that the appellant killed the deceased in a state of loss of self-control following the making of that offer.

In South Australia, the partial defence of provocation under the common law operates to reduce murder to manslaughter. The trial judge directed the jury that it was incumbent on the prosecution to prove that the appellant was not acting under provocation at the time of the killing. The appellant was convicted of murder.

On appeal, a majority of the CCA held that the directions given to the jury on provocation were flawed in respects that amounted to a miscarriage of justice. However, the CCA concluded that the evidence taken at its highest could not satisfy the objective limb of the partial defence of provocation – that is, that no reasonable jury could fail to find that an ordinary person provoked to the degree that the appellant was provoked could not have so far lost his self-control as to form the intention to kill or inflict grievous bodily harm and to act as the appellant did. The CCA majority held that provocation should therefore not have been left for the jury's consideration and it followed that the erroneous directions had not occasioned a substantial miscarriage of justice. The CCA dismissed the appeal under the proviso to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA).

By grant of special leave, the appellant appealed to the High Court. The Court unanimously allowed the appeal, holding that the trial judge was right to leave provocation to the jury. The High Court said there is a need for caution before a court determines as a matter of law that contemporary attitudes to sexual relations are such that conduct is incapable of constituting provocation. The gravity of the provocation must be assessed from the standpoint of the accused. The High Court said it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the latter's home and in the presence of his wife and family may have had a pungency that an unwelcome sexual advance made by one man toward another in other circumstances would not have. The assessment of the gravity of the provocation and its capacity to satisfy the objective limb of the test were issues for the jury. Accordingly, it was wrong for the CCA to dismiss the appeal under the proviso. The appropriate consequential order was for a new trial.

- *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.*

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