HIGH COURT OF AUSTRALIA

HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

DANIEL GLENN FITZGERALD APPELLANT

AND

THE QUEEN RESPONDENT

Fitzgerald v The Queen
[2014] HCA 28
Date of Order: 19 June 2014
Date of Publication of Reasons: 13 August 2014
A9/2014

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of South Australia made on 16 August 2013 and in their place:*

   (a) *order that the appeal to that Court against conviction is allowed and the appellant's conviction is quashed; and*

   (b) *direct that a judgment and verdict of acquittal is entered.*

On appeal from the Supreme Court of South Australia

Representation

D M J Bennett QC with A L Tokley SC and S A McDonald for the appellant (instructed by Iles Selley Lawyers)

J P Pearce QC with T J Ellison for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Fitzgerald v The Queen

Criminal law − Evidence − DNA evidence − Where appellant's DNA obtained from object found at crime scene − Whether DNA evidence sufficient to establish beyond reasonable doubt appellant's presence at, and participation in, crime committed.

Words and phrases − "DNA evidence", "joint enterprise", "primary transfer", "secondary transfer".

Criminal Law Consolidation Act 1935 (SA), s 353(1).

1 HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ. Shortly before 6:00am on 19 June 2011, a group of men forced their way into a house in Elizabeth South in South Australia and attacked two of the occupants with weapons including a gardening fork and a pole. One victim, Kym Bruce Drover, died four days after the attack and another, Leon Karpany, sustained serious brain injuries.

2 The appellant was charged on information with one count of murder and a second count of "aggravated causing serious harm with intent to cause serious harm" contrary to ss 11 and 23(1) respectively of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA") arising out of this incident. After a joint trial before a judge and jury in the Supreme Court of South Australia, the appellant and his co-accused, Grant Andrew Sumner, were convicted on both counts. Each is serving a term of life imprisonment subject to a non-parole period of 20 years consequent upon the convictions. The appellant appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of South Australia.

3 The prosecution did not contend that either Sumner or the appellant inflicted the fatal blow on the deceased or the blows that occasioned serious injury to Leon Karpany. Shortly stated, it was the prosecution case that Sumner and the appellant were members of the group that forced entry into the house and that each member of the group was a party to a common plan to cause grievous bodily harm to persons inside the house. The real issue in the appellant's trial was the sufficiency of the evidence to establish that he was one of the group. The prosecution relied on DNA evidence obtained from a sample taken from a didgeridoo found at the crime scene to establish that fact. The appellant argued unsuccessfully before the Court of Criminal Appeal that the verdicts were unreasonable and could not be supported by the evidence.

4 Section 353(1) of the CLCA relevantly provides that the Court of Criminal Appeal:

> "shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence".

5 The parties agreed that the applicable principles are to be found in *M v The Queen*[1], as explained in *MFA v The Queen*[2]. The question which an appellate court is required to consider to determine whether a verdict of guilty "is unreasonable, or cannot be supported, having regard to the evidence"[3] is whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

6 The appellant's first ground of appeal, by special leave to this Court[4], contended that the Court of Criminal Appeal erred in failing to find that upon the whole of the evidence the verdicts could not be supported. The appellant's second and third grounds were different ways of stating that contention.

7 At the conclusion of the hearing of the appeal in this Court orders were made allowing the appeal and directing that a judgment and verdict of acquittal be entered. What follows are the reasons for making those orders.

The facts

8 The appellant's co-accused, Sumner, visited the house in Elizabeth South twice on 19 June 2011. Approximately two hours before the attack, Sumner had been involved in several physical altercations at the house. One such altercation, described as a "play fight", resulted in Sumner splitting the lip of the deceased. At one stage during those altercations, Sumner sat on a freezer in the kitchen near where the didgeridoo was located. Events culminated in a fight at the front of the house between Sumner and his father, as a result of which Sumner suffered a fracture to his jaw and was chased away from the house by the deceased. Eyewitnesses at the scene gave evidence at the trial that Sumner, together with his mother, shouted threats of retaliation as they drove away. Sumner gave unchallenged evidence that before this first visit to the house he had attended a boxing match at which he had occasion to shake hands twice with the appellant,

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1 (1994) 181 CLR 487 at 493-494; [1994] HCA 63.

2 (2002) 213 CLR 606 at 614 [25]; [2002] HCA 53; see also *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 56 and *Gipp v The Queen* (1998) 194 CLR 106 at 123 [49] per McHugh and Hayne JJ; [1998] HCA 21.

3 *MFA v The Queen* (2002) 213 CLR 606 at 614 [25].

4 [2014] HCATrans 048.

including at about 10:30pm. The significance of this evidence will be explained later.

9 Shortly before 6:00am, the intruders, including Sumner, arrived at the house in several motor vehicles. The men split into two groups and simultaneously attacked the property, forcing their way in through the front and rear doors. Some men were armed with axes and gardening forks, while others armed themselves opportunistically upon entering the house. The group attacked the occupants as described at the outset of these reasons.

10 As mentioned above, at the trial of the appellant and Sumner the prosecution contended that both men were part of the group that had forced entry into the house armed with weapons for the purpose of inflicting grievous bodily harm on one or more of the occupants. There was no direct evidence that either man inflicted harm on the deceased or Leon Karpany.

11 It was an agreed fact read to the jury that six persons who were present during the attack, and were shown photographs of the appellant, failed to identify him.

12 The appellant was excluded from DNA results taken from a variety of objects found at the crime scene and from four out of five forensic samples taken from the didgeridoo. However, one forensic sample from the didgeridoo, Sample 3B, contained a mixed DNA profile of "major" and "minor" contributors. The appellant's DNA was the major contributor and an unknown source was the minor contributor.

13 The prosecution case was that the presence of the appellant's DNA on the didgeridoo, together with apparent blood stains containing the DNA of the deceased and Leon Karpany, sufficed to prove the appellant's presence at the scene as one of the intruders. That case depended upon satisfaction beyond reasonable doubt that the appellant's DNA was transferred by him to the didgeridoo at the time of the attack.

14 The appellant did not give evidence at the trial.

The evidence concerning the didgeridoo

15 Nardene Wanganeen, Sumner's aunt and the tenant of the house, gave evidence that the didgeridoo, normally kept beside the washing machine in the laundry, had been acquired in 2009 by her late partner. Although she stated that she did not allow people to play the didgeridoo, at around 5:00pm on the night

before the attack the didgeridoo had been played by the deceased. Nardene Wanganeen did not know the appellant.

16 The deceased's sister, Leticia Webb, gave evidence that during the course of the attack at the house she had grabbed the didgeridoo defensively when it was next to the freezer in the kitchen. She gave evidence that she put the didgeridoo back next to the freezer when commanded to put it down by the intruders and that she did not take it into the lounge room.

17 The didgeridoo was found in the lounge room in close proximity to where the deceased was left after the attack. There was no evidence of how it came to be in the lounge room and no direct evidence that it was used in the attack.

The evidence concerning DNA

Sample 3B

18 That the appellant's DNA was contained in Sample 3B was not challenged by the appellant.

19 A qualified forensic expert, Dr Julianne Henry, gave evidence at the trial for the prosecution. She explained that Sample 3B came from an area on the didgeridoo showing "reddy-brown stains" which had been removed using a scalpel. The sample consisted of two separate "bloodlike stains", one having a diameter of 2 millimetres by 1 millimetre and the other a diameter of less than 1 millimetre. Dr Henry said that even if the abovementioned "reddy-brown stains" were in fact blood (as indicated by a presumptive test), that circumstance did not prove that the DNA in Sample 3B derived from blood because the DNA may have been "under the stain", ie placed on the didgeridoo at an earlier time. She agreed with counsel for the prosecution that the "reddy-brown stains" may have "contributed nothing" to Sample 3B.

DNA and blood

20 Dr Henry explained that DNA, a molecule in cells from the human body, can be transferred to an object in biological fluid such as blood (or saliva) or through contact with a person's skin. She said the amount of DNA transferred through contact with a person's skin, called "contact" or "trace" DNA, is low compared to the amount of DNA transferred in a biological fluid. Finally, Dr Henry gave evidence that some people "shed" contact or trace DNA more readily than others.

21 Dr Henry stated that there were three possible ways in which blood may be transferred to an object: direct transfer (where contact occurs between a person and an object), airborne transfer (where blood travels through the air and then lands on an object) and passive transfer (where a person's blood drips onto an object). Dr Henry was unable to distinguish, from a photograph, whether the deceased's blood on the didgeridoo was transferred directly or by having been airborne.

Primary and secondary DNA transfer

22 Dr Henry explained the differences between "primary" and "secondary" DNA transfer. A primary transfer occurs as a result of direct contact between a particular person and an object. A secondary transfer occurs when contact or trace DNA is transferred onto an object by an intermediary as a result, for example, of a handshake. Dr Henry gave evidence that the most likely way to obtain contact or trace DNA on an object was through primary, rather than secondary, transfer. She also stated that a secondary transfer of DNA remains possible a few hours after contact between a person and an intermediary, and that an intermediary's DNA is not necessarily transferred at the same time, although she was only aware of one example of this in the relevant literature. She accepted as a possibility that the appellant's DNA in Sample 3B was the result of a secondary transfer.

Mixed DNA profiles

23 Dr Henry explained that where DNA of more than one person is identified in a sample, there will usually be one major contributor and one minor contributor to the DNA profile. In most (but not all) cases where a secondary transfer of DNA occurs, the major contributor to the DNA profile will likely be the person transferring the DNA and the minor contributor will be the person whose DNA is transferred. Dr Henry gave evidence that it was likely that a person who was the major contributor to a DNA profile would have left blood on an object because blood is a richer source of DNA than epithelial cells. However, she went on to state that it was possible that the DNA in Sample 3B was derived from a source other than blood because "it was difficult to conclude from the yield of DNA that we obtained from those stains that the DNA did come from blood". After giving that evidence, she was cross-examined about the source of the DNA in Sample 3B. It is convenient to set out the passage transcribing her answers:

> "A. It could have been blood, it could have been something other than blood.

Q. By 'something else' it could be saliva for example.

A. That's possible, yes.

Q. It could be the transference of cells.

A. That's possible, yes.

Q. And we will come back to the question of transfer, but primary or secondary transfer.

A. Yes."

24 Sumner's DNA was not found on the didgeridoo at all. That was relevant to the appellant's reliance upon an hypothesis of a transfer of DNA from the appellant's hand to Sumner's hand when the two men shook hands at the boxing match, and a subsequent secondary transfer of the appellant's DNA to the didgeridoo by Sumner on one or other of his two visits to the house on 19 June 2011.

DNA accumulation

25 Dr Henry stated that recovering DNA from an object does not indicate the time of its deposit on the object from which it is retrieved. With current technology, DNA cannot be "aged". She also stated that DNA could accumulate over a period of time, days or even weeks, and she accepted that contact or trace DNA could have been on the didgeridoo for some time before the attack.

The reasoning of the Court of Criminal Appeal

26 The Court of Criminal Appeal (Gray and Sulan JJ; Blue J agreeing) found that it was open to the jury to conclude beyond reasonable doubt that the appellant's DNA was deposited on the didgeridoo as a result of direct contact by the appellant at the time of the attack[5]. In their Honours' view, in light of Dr Henry's evidence, the alternative hypothesis of a secondary transfer of the appellant's DNA to the didgeridoo by Sumner was "extremely unlikely"[6]. In so concluding, the Court of Criminal Appeal confined its considerations to Sumner's

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5 *R v Sumner* (2013) 117 SASR 271 at 298 [108].

6 *R v Sumner* (2013) 117 SASR 271 at 298 [106].

second visit to the house at around 6:00am and did not refer to Dr Henry's evidence that an intermediary's DNA will not necessarily be deposited when the intermediary makes a secondary transfer of another's DNA. Further, the Court of Criminal Appeal referred neither to the possibility that the appellant's DNA may have been the subject of a primary transfer to the didgeridoo on an occasion earlier than the attack nor to Dr Henry's evidence about the accumulation of DNA and the impossibility of "dating" DNA. The Court of Criminal Appeal concluded that the jury was entitled to reject any argument that there was an hypothesis consistent with the appellant's innocence and unanimously dismissed the appellant's appeal against conviction.

The questions

27 The appellant had no complaint about the trial judge's summing up to the jury regarding the DNA evidence. However, the appellant contended that this appeal raised two questions for consideration by this Court. The first was whether DNA evidence alone is sufficient to establish beyond reasonable doubt both presence and participation for the purposes of joint enterprise liability, in circumstances where the issue is not whether there is a match between the appellant's DNA and a DNA sample but when and how the DNA got there. The second question was whether it was unreasonable to convict the appellant in circumstances where the expert called by the prosecution to give evidence about DNA testified about secondary transfer of DNA, thereby raising a reasonable hypothesis on the evidence consistent with the appellant's innocence.

28 There was no dispute between the parties that it was an essential link in the prosecution's circumstantial case that the appellant's DNA was transferred by him to the didgeridoo during the attack. That circumstance was required to be proved beyond reasonable doubt[7].

Arguments in this Court

The appellant

29 It was submitted by the appellant that both elements of the statutory provision were satisfied. It was contended that the only evidence tending to establish the appellant's presence during the attack (Sample 3B) failed to establish that fact beyond reasonable doubt, and the jury should not have convicted. In particular, it was contended that the evidence failed to establish

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7 *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56.

how, or when, the DNA of the appellant was transferred to the didgeridoo. In amplifying these submissions, possibly beyond what had been put below, four aspects of the prosecution case against the appellant, based on Sample 3B, were contested.

30 The first and major contest was over whether the microscopic sample of the appellant's DNA in Sample 3B came from his blood. The second contested point was whether secondary transfer of DNA was "rare". The third contest was over whether the hypotheses raised on behalf of the appellant, as alternatives to the prosecution case, depended on a highly improbable chain of events. The final contested matter concerned the timing of the transfer of the appellant's DNA to the didgeridoo.

31 In relying on Dr Henry's evidence summarised above, the appellant submitted that the evidence did not make out, beyond reasonable doubt, that the appellant's DNA in Sample 3B was sourced from the appellant's blood. The appellant submitted that Dr Henry's evidence, that a primary transfer is the most likely way that contact or trace DNA is placed on an object, did not render a "rarity" the possibility, which she conceded, of a secondary transfer of DNA.

32 There were at least two occasions on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred – when Sumner first went to the house on the day in question, or two hours later when Sumner was present during the attack. As to whether the alternative hypothesis of a secondary transfer by Sumner was "extremely unlikely" (as concluded by the Court of Criminal Appeal), the appellant submitted that if Sumner were the intermediary, the likelihood was that a secondary transfer of the appellant's DNA to the didgeridoo occurred on his first visit to the house. That possibility was not referred to by the Court of Criminal Appeal. It was also contended that Nardene Wanganeen's lack of knowledge of the appellant did not exclude a second hypothesis, consistent with the appellant's innocence, that the appellant had come into contact with the didgeridoo at the house on an earlier occasion, a consideration put aside by the Court of Criminal Appeal. In regard to both points, the appellant relied on the expert evidence that DNA deposits can accumulate and that DNA cannot be "aged".

33 In summary, the appellant contended that the Crown had not proved its case against the appellant and reasonable hypotheses consistent with innocence could not be excluded by the jury, which should have resulted in the Court of Criminal Appeal applying s 353(1) of the CLCA in the appellant's favour.

The respondent

34 The respondent relied on *R v Hillier*[8] to support the proposition that evidence supporting inferences compatible with the appellant's innocence should not be considered in isolation from the rest of the evidence. So much may be accepted.

35 The respondent contended that it was open to the jury to be satisfied beyond reasonable doubt that the appellant had not come into direct contact with the didgeridoo prior to the attack because of the circumstances in which the didgeridoo was kept and because there was no evidence of the appellant's presence at the house prior to the incident. It was also contended that, notwithstanding an absence of direct evidence on the point, it could be inferred that one of the intruders picked up the didgeridoo and took it into the lounge room because it was found there, it contained DNA from both victims and there was evidence that the intruders armed themselves opportunistically after breaking into the house. More critically, the respondent urged the Court to reject the secondary transfer theory, whether applied to Sumner or another, essentially on the basis that the appellant's DNA was the major contributor to the DNA in Sample 3B and the likelihood that the appellant's DNA in Sample 3B derived from blood. It was also submitted that whether the DNA in the sample derived from blood could be assessed against the "unlikelihood" of a secondary transfer. A degree of circularity in those submissions reflected the dearth of evidence of what had been done with the didgeridoo before the attack.

Guilt beyond reasonable doubt?

36 On Dr Henry's evidence, including that extracted above, the prosecution's main contention, that the appellant's DNA in Sample 3B derived from the appellant's blood, was not made out beyond reasonable doubt. Secondly, Dr Henry's evidence was not that secondary transfer of DNA was "rare"; rather, she said that a primary transfer is a much more likely source of contact or trace DNA than a secondary transfer, but that nevertheless a secondary transfer of contact or trace DNA is possible. There was no conflict in the evidence that there were at least two distinct occasions, described above, on which a secondary transfer of the appellant's DNA to the didgeridoo may have occurred. Thirdly, the recovery of the appellant's DNA from the didgeridoo did not raise any inference about the time when or circumstances in which the DNA was deposited

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8 (2007) 228 CLR 618 at 637-638 [46]-[48]; [2007] HCA 13.

there. For those reasons, it could not be accepted that the evidence relied on by the prosecution was sufficient to establish beyond reasonable doubt that the appellant was present at, and participated in, the attack. The jury, acting reasonably, should have entertained a reasonable doubt as to the appellant's guilt[9]. Alternative hypotheses consistent with the appellant's innocence, in particular the hypothesis that Sumner transferred the appellant's DNA to the didgeridoo on Sumner's first visit to the house on the day in question, were not unreasonable and the prosecution had not successfully excluded them. As the evidence was not capable of supporting the appellant's conviction for either offence, no question of an order for a new trial arose.

Orders

37 The orders made were as follows:

1. Appeal allowed.

2. Set aside the orders of the Court of Criminal Appeal of the Supreme Court of South Australia made on 16 August 2013 and in their place:

   (a) order that the appeal to that Court against conviction is allowed and the appellant's conviction is quashed; and

   (b) direct that a judgment and verdict of acquittal is entered.

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9 *M v The Queen* (1994) 181 CLR 487 at 493-494.