VAN BEELEN v THE QUEEN (A8/2017)

Court appealed from:	Court of Criminal Appeal of the Supreme Court of South Australia [2016] SASCFC 71
Date of judgment:	13 July 2016
Special leave granted:	10 February 2017

In this appeal the appellant seeks to overturn the decision of the majority of the Court of Criminal Appeal of the Supreme Court of South Australia ('the CCA") to reject his application for permission to appeal against his 1973 conviction for murder. His appeal is based on the availability of fresh and compelling evidence which establishes that opinion evidence given at the trial by the Crown's forensic pathology witness as to the deceased's time of death based on her stomach contents was scientifically unsound.

Section 353A of the *Criminal Law Consolidation Act 1935* (SA) ("the *CLCA*") provides that the Full Court of the Supreme Court may hear a second or subsequent appeal against conviction if it *'is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered in an appeal'* and that it *"may allow an appeal under this section if … there was a substantial miscarriage of justice".* A convicted person may only appeal under s 353A with the permission of the Full Court.

The facts of the offence took place many years ago. The appellant was first convicted of the murder of 15 year old Deborah Joan Leach and sentenced to death in October 1972. His appeal against that conviction was allowed in 1973 and a new trial ordered. He was then convicted and sentenced to death for a second time in July 1973. His second appeal was dismissed later in 1973. Applications for leave to appeal to the High Court and to the Privy Council were refused. The appellant's conviction was again affirmed in September 1974 on the hearing of a petition for mercy.

On 28 October 2015 the appellant sought permission to appeal from the Supreme Court's Court of Criminal Appeal based on the fresh evidence.

It was common ground that the new evidence (from an eminent forensic pathologist who had critically analysed Dr Manock's opinion against current scientific knowledge) did establish that the opinion evidence given at the trial by the Dr Manock as to the deceased's time of death was scientifically unsound and that the evidence was '*fresh*' as defined in the *CLCA.* There was a dispute as to whether it was '*compelling*' which is defined as '*reliable*, '*substantial'* and '*highly probative in the context of the issues in dispute at the trial of the offence*'. There was a significant dispute as to whether there was a '*substantial miscarriage of justice'.*

The Supreme Court, by majority, held that the evidence was not '*compelling'* and that there had not been *a 'miscarriage of justice'.*

The appellant's case is that the scientific evidence presented via Dr Manock at the trial was wrong and irrelevant and should never have been introduced and that the prosecutor's introducing and cross-examining on that irrelevant information was wrong. Further, that in the light of the fresh evidence it can now be seen that the consequence was that the judge and jury were misled. The (incorrect) precision of the time interval calculated by Dr Manock was a critical feature of the Crown case against the accused. The Crown argues that the impugned opinion was challenged at trial by the leading of contrary evidence, that the civilian evidence alone compelled an inference as to the time of death and that the circumstantial case against the appellant was compellingly probative of guilt. This included evidence of fibre residues on the deceased's clothing.

The appellant appealed to the High Court.

The grounds of appeal include:

- That the majority of the CCA failed to understand the nature of the fresh evidence which demonstrated that the evidence of time of death given in the original and subsequent trial was incorrect and led the jury to a false conclusion.

- That the majority of the CCA failed to understand the compelling nature of the new evidence as being highly probative in the context of the time of death of the deceased and central to the issue before the jury in the first and subsequent trial.

- That the majority of the CCA erred in accepting that the evidence of the pathologist at trial had been contested and therefore that further attack on that evidence was precluded.