

## **SWAN v THE QUEEN (S291/2019)**

Court appealed from: New South Wales Court of Criminal Appeal  
[2018] NSWCCA 260

Date of judgment: 23 November 2018

Special leave granted: 13 September 2019

In April 2013 Mr Alexander Kormilets was assaulted by two men during a home invasion. He was 78 years old at the time and he sustained severe injuries during that attack. After four months in hospital Mr Kormilets was released to a nursing home, but his condition steadily deteriorated. He died in December 2013.

In 2016 Mr William Swan and Mr Thompson Kimura were jointly tried for Mr Kormilets' murder. At issue during the trial was whether the prosecution had proven that their assault on Mr Kormilets had actually caused his death. The medical evidence established that the direct cause of Mr Kormilets' death was respiratory distress caused by a high concentration of fat emboli in small blood vessels in the lungs. It was also accepted that the presence of these fat emboli had resulted from an (intentionally) untreated fracture to Mr Kormilets' left femur, an injury caused by a fall. There was however conflicting evidence as to how that fall came about. The prosecution submitted that Mr Kormilets' fall was directly related to the decline in his health following the home invasion assault. Mr Swan submitted that it was caused by the metastasis of a tumour found on Mr Kormilets' left kidney, an event unconnected to that incident.

On 20 May 2016 the jury found both men guilty of murder. Mr Swan was then sentenced to a minimum term of 19 years and 6 months imprisonment, with Mr Kimura receiving a slightly shorter sentence.

Upon appeal, Mr Swan submitted that the prosecution's closing address had encouraged the jury on a path of reasoning not properly open to it. This was because the prosecution had submitted that the jury could still be satisfied that *the decision not to treat the fractured femur was caused by the injuries Mr Kormilets sustained during the home invasion*. This was even if the fracture itself had been caused by metastasis of the tumour.

On 23 November 2018 the Court of Criminal Appeal (Bathurst CJ, Hoeben CJ at CL and R A Hulme JA) unanimously held that the jury could convict Mr Swan on the basis that, even if the fractured femur had been caused by metastasis of the tumour, the home invasion assault remained a substantial or significant cause of Mr Kormilets' death. Their Honours found that metastasis of the tumour would not have been an intervening event, breaking that chain of causation. The Court of Criminal Appeal found that there was sufficient evidence for the jury to infer that the decision not to treat the fractured femur directly resulted from the injuries suffered by Mr Kormilets during the home invasion.

In this matter, the grounds of appeal are:

- The Court of Criminal Appeal erred by failing to come to the only conclusion available; namely, that the Crown case theory on cause of death the subject of complaint on appeal was not supported by the evidence, and to leave it to the jury caused a miscarriage of justice
- In the alternative, the Court of Criminal Appeal failed to consider the Appellant's sole ground of appeal as particularised; namely that a miscarriage of justice resulted from the Crown Prosecutor's closing address about causation, which encouraged a path of reasoning that was not properly open.