

LANE v THE QUEEN (S308/2017)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 46

Date of judgment: 22 March 2017

Special leave granted: 15 December 2017

In September 2012 Mr Peter Morris died, nine days after he had incurred head injuries during an altercation in the street with Mr Paul Lane. Video footage of the altercation recorded via CCTV camera showed Mr Morris falling and striking his head on the roadway on two occasions.

Mr Lane later stood trial on a charge of having murdered Mr Morris. Medical evidence was to the effect that either or both of Mr Morris' falls could have caused his death. The prosecution case was that Mr Morris' first fall had resulted from him stumbling backwards off the gutter due to Mr Lane advancing towards him (after having pushed him) and that his second fall had resulted from a punch thrown by Mr Lane that had connected with Mr Morris' face. The defence case was that the jury could not be satisfied that either fall had resulted from a voluntary act of Mr Lane's and that Mr Lane had been engaged in self-defence. In summing up, Campbell J instructed the jury that if they did not find Mr Lane guilty of murder they could find him guilty of manslaughter by either excessive self-defence or an unlawful and dangerous act. Campbell J also instructed the jury that they could return a verdict of guilty (of either murder or manslaughter) only if they were unanimous.

The jury found Mr Lane guilty of manslaughter, whereupon Campbell J sentenced him to imprisonment for 8 years and 6 months, with a non-parole period of 6 years and 4 months. Mr Lane appealed against his conviction.

The appeal was dismissed by the Court of Criminal Appeal ("the CCA") (Meagher JA & Davies J; Fagan J dissenting). The CCA unanimously held that Campbell J had erred by failing to direct the jury that they could not return a verdict of guilty unless they were unanimous as to the precise voluntary act (or acts) of Mr Lane's that had caused Mr Morris' death. The majority nevertheless held that the appeal should be dismissed, because no substantial miscarriage of justice had actually occurred. This was because the evidence was such that the jury would have entertained doubt about Mr Lane's guilt in respect of the first fall but could not have had a reasonable doubt about Mr Lane's guilt on the basis of his unlawful and dangerous act that had caused Mr Morris' second fall.

Fagan J however would have quashed the conviction and ordered a new trial. His Honour held that there was no occasion for the trial record to be examined by the CCA for the purpose of concluding whether Mr Lane was proved guilty. This was because a factual question central to an element of the charge of murder had not been properly identified for the jury, which was a serious error that had given rise to a substantial miscarriage of justice.

The ground of appeal is:

- The CCA erred in failing to determine the appellant's appeal in accordance with s 6(1) of the *Criminal Appeal Act* 1912 (NSW), and in particular, the CCA erred in finding that no substantial miscarriage of justice actually occurred in a case where the Crown relied on two distinct acts of the appellant, each of which was capable of forming the basis of a verdict of guilty, and where the CCA held that the trial judge erred in failing to direct the jury that they must be unanimous as to the act causing death.