



HIGH COURT OF AUSTRALIA

Public Information Officer

15 December 2005

BOHDAN WEISS v THE QUEEN

This appeal concerned the application of the “proviso”, by which a criminal appeal may be dismissed, even though a trial judge has made an error of law, where there has been no substantial miscarriage of justice.

Mr Weiss was convicted in the Victorian Supreme Court of beating Helen Elizabeth Gray to death on 24 November 1994. He was charged with her murder six years later. His former de facto wife, Jean Horstead, testified that on the night of the murder Mr Weiss confessed he had killed Ms Gray, a friend of theirs. Ms Horstead originally provided him with a false alibi, but after she split up with him and moved to America she contacted police to tell the truth. After the murder, Mr Weiss began a relationship with a 14-year-old girl named Renée. In November 2000, in an interview with police, he admitted visiting Ms Grey, quarrelling with her and striking her with her son’s cricket bat. Mr Weiss admitted stripping the rubber grip from the bat handle and throwing it from the car on his way home. He told the trial these confessions were false.

The Victorian Court of Appeal unanimously held that evidence of Renée’s age should not have been admitted as it was not relevant, could not be used to bolster the credit of Ms Horstead, and any probative value was outweighed by its prejudicial quality. The Court however dismissed the appeal, holding that it should apply the proviso. The Court held that a distinction should be drawn between whether, without the wrongly admitted evidence, the jury in the case would inevitably have convicted Mr Weiss, and whether, without that evidence, any reasonable jury, properly instructed, would inevitably have convicted him. On the “this jury” test, the Court concluded that conviction was inevitable. On the “any reasonable jury” test, conviction was not necessarily inevitable because another jury might have a different view of Ms Horstead’s evidence or the reliability of Mr Weiss’s confession. The Court held that the “this jury” test was the relevant test and dismissed the appeal. Mr Weiss was granted special leave to appeal to the High Court.

The High Court unanimously allowed the appeal. It held that consideration of the proviso is not to be undertaken by attempting to predict what a specific jury would do. Rather, in applying the proviso, the task is to decide whether a substantial miscarriage of justice has actually occurred. The appeal court must make its own assessment of the evidence and the strength of the case for or against the accused. The Court remitted the matter to the Court of Appeal for further consideration in accordance with the reasoning of the High Court.

- *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.*