



HIGH COURT OF AUSTRALIA

Public Information Officer

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DLSHAD HAMAD MAHMOOD v STATE OF WESTERN AUSTRALIA

A judge in a murder trial failed to give a jury appropriate instruction in response to a prosecutor's argument as to the use that could be made of certain evidence, the High Court of Australia held today.

In February 2006, Mr Mahmood was convicted in the WA Supreme Court of the wilful murder of his wife, Chnar Dabag, on 4 July 2004 at their restaurant, the Kebabistan Restaurant, in Mt Lawley in Perth. Mr Mahmood testified that he was cleaning when Ms Dabag visited the toilet. When she did not return he went to find her. She was lying in a passageway bleeding. Her throat had been cut. Mr Mahmood picked his wife up but she was not breathing. He went outside to see if the person responsible was still there but saw no-one. In a distressed state, he called an ambulance. A police record of interview was videotaped that same day. A week later Mr Mahmood did a walk-through of the events for police which was also videotaped. No weapon was ever found.

The case against Mr Mahmood was circumstantial, based on his belief that Ms Dabag had been unfaithful. Defence counsel sought to tender a brief extract – showing Mr Mahmood demonstrating how he knelt down and lifted his wife's body on to his knee – from the video recording. Defence counsel expressed willingness to tender the whole video. The prosecutor did not consent. He told the jury that in the portion of the video tendered, Mr Mahmood's reaction and demeanour were cold-blooded and clinical. Defence counsel applied to re-open the defence case to tender additional parts of the video to counter that impression. Justice Lindy Jenkins refused the application. Instead she told the jury they would be unwise to draw any adverse view of Mr Mahmood's demeanour in the walk-through as they had seen only a small portion of the video which was made a week after the murder.

The Court of Appeal dismissed an appeal against conviction. Mr Mahmood appealed to the High Court over the treatment of the video recording and the significance of blood stains on his clothes. The Court unanimously allowed the appeal on the first ground and remitted the matter to the Court of Appeal to consider whether or not there had been a substantial miscarriage of justice. It held that while a sufficiently firm direction to the jury may have overcome the prejudicial effects of the prosecutor's remarks about Mr Mahmood's demeanour, Justice Jenkins had merely given comment. The Court held that the jury should have been directed unequivocally that they knew so little of the context of the video segment that they should ignore the prosecutor's remarks.

A scientific report referred to the presence of Ms Dabag's blood in Mr Mahmood's trouser pocket but expert witnesses were not asked whether this was consistent with a knife being in the pocket. Mr Mahmood denied in cross-examination that he had put the knife in his pocket before disposing of it outside. The High Court held that Mr Mahmood had had the opportunity to explain the presence of blood in his pocket but did not do so. Justice Jenkins's directions conveyed to the jury that they could not draw the inference suggested by the prosecution so this ground of appeal failed.

- *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.*