

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 2017
(M129/2018)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2018] VSCA 69

Date of judgment: 23 March 2018

Date special leave granted: 15 August 2018

On 18 July 2015, the accused was charged with the murder of her de facto partner. The Crown case was that the pair had engaged in a heated argument during which she struck the deceased to the back of the head with a wooden footstool. The accused's trial began in the Supreme Court of Victoria on 15 November 2016, before Lasry J and a jury. She pleaded not guilty, on the basis that she was acting in self-defence. She relied on the deceased's record of more than 25 years of extreme violence towards her.

On 22 November 2016 the prosecutor closed the Crown case. Counsel for the accused immediately asked the judge to give the jury a '*Prasad* direction'. After hearing submissions from the prosecutor, who opposed the giving of such a direction, his Honour ruled that the case, in his opinion, was so tenuous as to warrant informing the jury of their right to acquit, without hearing further evidence. He informed the jury that as they had heard the whole of the Crown case, they now had three choices. They could: (a) deliver verdicts of 'not guilty' to both murder and manslaughter, (b) deliver a verdict of 'not guilty' to murder and hear more evidence in respect of the charge of manslaughter, or (c) indicate that they wish to hear more evidence in respect of both charges. The jury deliberated for about half an hour before informing the judge that they wished to hear more evidence in respect of both charges. The trial then continued with the accused giving sworn evidence, and being cross-examined. On 24 November 2016, counsel closed the defence case. Immediately thereafter and prior to closing addresses, the judge reminded the jury of the continuing operation of the *Prasad* direction that he had given them two days earlier. He then provided the jury with the opportunity to revisit their earlier decision. After a short deliberation, they acquitted the accused of both murder and manslaughter.

The Director of Public Prosecutions brought a reference to the Court of Appeal pursuant to s 308 of the *Criminal Procedure Act 2009* (Vic). He submitted that a *Prasad* direction is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person. The Director relied primarily upon English authorities, such as *R v Collins* [2007] EWCA Crim 854, which, he submitted, had not merely deprecated the continued use of the practice, but had effectively determined that it was now contrary to law. He further contended that even if it was to be assumed that *Prasad* had been correctly decided, legislative provisions in the *Criminal Procedure Act 2009* (Vic) and/or the *Jury Directions Act 2015* (Vic) had the effect of abrogating its continuing validity.

After examining the English authorities, the majority of the Court of Appeal (Beach & Weinberg JJA) concluded that they did not support the Director's submissions. Their

Honours accepted the submission of the acquitted person that the English authorities should be seen in context, and against the background of the very different approach to directed acquittals applicable in that country. They concluded that there was no reason, in principle, why trial judges should not continue to give appropriately worded *Prasad* directions, provided that it was understood that they are to be given only rarely, and where the circumstances made it proper to do so. Before giving such a direction, the trial judge must form the view that the prosecution case, considered as a whole, though sufficient to be left to the jury, was particularly weak. The case must be one where the jury would be able, without the assistance of closing addresses, still less a full judicial charge, to make a sensible assessment of whether, without hearing further evidence, an acquittal was the just and appropriate verdict. The majority further found that the Director's submission, that the provisions of the *Criminal Procedure Act* and/or the *Jury Directions Act* were inconsistent with the continued use of a *Prasad* direction, was strained and unconvincing.

Maxwell P (dissenting) found that the reasons given by the English Court of Criminal Appeal in *Collins* and *R v Speechley* [2004] EWCA Crim 3067 for disapproving this practice were cogent and compelling, and a survey of Australian decisions demonstrated that those criticisms applied with equal force here. He would have answered the point of law as follows: Although the direction commonly referred to as the '*Prasad* direction' is not contrary to law, such a direction should no longer be administered to a jury determining a criminal trial between the Crown and an accused person.

The ground of appeal is:

- The Supreme Court of Victoria (Court of Appeal) erred in determining on the reference:
 - (a) that the giving of a *Prasad* direction is not contrary to law; and/or
 - (b) that the giving of a *Prasad* direction may continue to be administered to a jury determining a criminal trial between the Crown and an accused person.