

MILLER v THE QUEEN (A28/2015)

Court appealed from: Court of Criminal Appeal, Supreme Court of South Australia [2015] SASCFC 53

Date of judgment: 28 April 2015

Date special leave granted: 13 November 2015

The appellant was found guilty by unanimous jury verdict of the murder of Clifford Hall. The incident the subject of the charge occurred at about 11.00 pm on 12 December 2012 at Grant Street, Elizabeth Park. Mr Hall was assaulted near his home by a group of men including the appellant and the co-accused Joshua Betts, Johnas Presley, and Wayne Smith. A number of weapons were used in the assault, including a baseball bat, a shovel and a bottle. Mr Hall was stabbed with a knife to his back, penetrating his chest cavity, lung and heart. It was not disputed at trial that this wound, which was fatal, was inflicted by Betts. The prosecution case was that the appellant, Betts, Presley and Smith were part of a joint enterprise that had as its object, or within its contemplation, an attack on Mr Hall with weapons accompanied by an intention to cause grievous bodily harm. At trial, counsel for the appellant conceded during his closing address that the appellant was present at the time of the confrontation. His contention was that the evidence led by the prosecution did not establish that he was physically involved in the confrontation or that he was a party to any relevant joint enterprise.

A breath test performed on the appellant three hours after the assault produced a reading of 0.167 mg of alcohol per litre of blood, and a blood sample taken the following morning showed the presence of diazepam, nordiazepam, cannabis and carboxy THC. A pharmacologist (Dr Majumder) gave evidence that the appellant's level of intoxication at the time of the offending would have significantly impaired his decision making and his ability to foresee the consequence of certain decisions.

In his appeal to the Court of Criminal Appeal (Gray, Sulan and Blue JJ) the appellant submitted that the trial judge had erred in leaving extended joint criminal enterprise as a basis for liability for murder in the circumstances of the case against him because it caused confusion and obfuscated the real issues at trial. He also submitted that the judge erred in failing to leave an alternative verdict of manslaughter by excessive self-defence, and further that the verdict was unreasonable or could not be supported having regard to the evidence. None of these submissions was successful. In its judgment rejecting the appeal, the Court did not refer to the evidence relating to the appellant's level of intoxication and its effects.

The grounds of appeal include:

- The court below ought to have found, on the basis of the evidence of Dr Majumder, that the applicant's consciousness was or would have been impaired, by his intoxication and drug use, to such an extent that there was a reasonable doubt about whether the applicant could contemplate or foresee the consequences of his or another's actions.

The appellant has filed a summons seeking leave to amend his grounds of appeal to add the following grounds:

- The directions given by the learned trial judge to the jury on the question of extended joint criminal enterprise were incorrect in law;
- Further or alternatively, the trial judge applied the principle concerning joint criminal enterprise laid down by the High Court in *McAuliffe v The Queen* (1995) 183 CLR 108, which principle is now considered incorrect in English law.

The applications for special leave to appeal by two of the co-accused, Presley and Smith were, on 12 February 2016, referred to the Full Court to be argued as on an appeal and are listed for hearing together with this appeal.