

BAKER v THE QUEEN (M154/2011)

Court appealed from: Court of Appeal of the Supreme Court of
Victoria
[2010] VSCA 226

Date of judgment: 9 September 2010

Date special leave granted: 28 October 2011

The appellant was found guilty of murder, after a trial in the Supreme Court of Victoria and was sentenced to 17 years' imprisonment with a non-parole period of 12 years. His co-accused ('LM') was acquitted.

The events giving rise to the conviction occurred on 27 November 2005, at a party which was being held at a warehouse. Amongst those attending the party were the appellant, LM, and the victim ('S'). Also in attendance was Ali Faulkner, a friend of the appellant. At about 3.00 am, there was an outbreak of unprovoked violence in the main party area. The appellant and Faulkner attacked party-goers at random and inflicted injuries. Soon afterwards, the appellant, Faulkner and LM went out of the party through a door into the stairwell. Outside the door there was a landing, on one side of which were nearly full-length windows. The death of S occurred after he crashed through the window and fell 5.4 metres to the footpath below. The question for the jury was whether the Crown had established that it was the actions of the appellant and/or LM which caused S to go through the window and, if so, whether at the time of the relevant actions the appellant intended to cause S really serious injury.

The appellant sought leave to appeal to the Court of Appeal (Maxwell P, Buchanan, and Bongiorno JJA) on the ground that the jury could not have been satisfied beyond reasonable doubt that he had the requisite intent at the relevant time. The Court noted that there were five eyewitnesses who gave evidence, three of whom (Doig, Acaro and Stuart) implicated the appellant, the other two (Asfer and Masonga) implicating LM. In refusing leave to appeal, the Court found there was a perfectly sound basis for the jury to prefer the accounts of Doig and Arcaro, which were clear and consistent, over the conflicting accounts of Asfer and Masonga. The Court considered that, far from the evidence precluding a conclusion beyond reasonable doubt that the appellant acted with the requisite intent at the crucial time, that conclusion was well open to the jury on the version of events which they accepted. The eyewitness accounts of Doig and Arcaro described the appellant as having engaged in an unbroken, unrelenting, ferocious attack on S. The jury were entitled to be satisfied that the appellant set out to do all those acts in order to achieve his objective of causing S really serious injury.

The appeal to this Court raises an issue which was not argued in the Court of Appeal. In the case against LM the Crown relied on evidence of admissions made by LM on two occasions. The first was an admission to police in a record of interview that he pushed S, and the second was a statement he made to Faulkner shortly after the party: "Look what you made me do". The trial judge directed the jury that the evidence of those admissions could not be

used in the appellant's case. It is conceded by the appellant that, as the common law of Australia is understood at present, there was no error in the approach of the trial judge, as there is no exception to the hearsay rule which renders hearsay evidence of an admission by a co-accused admissible. It is submitted by the appellant that had the point been taken in the Court of Appeal, that Court would have been bound to rule as the trial judge did. The appellant submits that the law should be reconsidered by this Court.

The grounds of appeal are:

- The Court of Appeal erred in failing to hold that the trial miscarried as a result of the trial judge's error:
 - a) in directing the jury that the evidence of admissions by the co-accused was "only evidence in his case, it is not evidence in [the appellant's] case"
 - b) in failing to direct the jury that the alleged admissions by the co-accused could be used in exculpation of the appellant.

The Court of Appeal erred in failing to have regard to the evidence of the co-accused's admissions in determining whether the jury's verdict was unreasonable or could not be supported having regard to the evidence.