FILIPPOU v THE QUEEN (S59/2015)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 92

Date of judgment: 2 May 2013

Special leave granted: 13 March 2015

The Appellant and his victims (brothers, Sam and Luke Willis) were neighbours who lived in Newcastle. Following an extended period of intermittent conflict between the two parties, the Appellant shot and killed the Willis brothers on the footpath outside his home on 27 June 2010. The Appellant was charged with two counts of murder and was tried by a judge sitting alone. The sole issue at his trial was provocation.

Section 23 of the *Crimes Act* 1900 (NSW) ("the Act") provides the legal structure within which the partial defence of provocation may be established. The trial judge, Justice Mathews, identified the relevant elements of both s 23(2) and s 23(3) of the Act in her judgment. Her Honour also noted that the Crown bears the onus, if provocation has been raised, of disproving it beyond reasonable doubt.

Justice Mathews noted that the partial defence of provocation requires a loss of self-control by an accused, involving a temporary suspension of the capacity to reason or to think rationally and sensibly. Her Honour found however that the particular facts of this case pointed the other way. She held that it was the Appellant's inherently angry nature which led to him firing the fatal shots, not his loss of control. Justice Mathews also went on to consider the issues raised by s 23(2)(b) of the Act, being the "ordinary person test." Her Honour however concluded that an ordinary person, confronted with the situation the Appellant found himself in (being abused by the Willis brothers on the street outside his house), would not have lost self-control so as to form an intention to kill or to inflict grievous bodily harm.

On 18 November 2011 Justice Mathews convicted the Appellant of two counts of murder. Her Honour then sentenced him to an effective sentence of 25 years imprisonment, with an additional term of 6 years. The Appellant duly appealed against both his conviction and his sentence.

On 9 May 2013 the Court of Criminal Appeal (McClellan CJ at CL, Fullerton and Campbell JJ) ("CCA") unanimously dismissed the Appellant's appeal. The CCA was not persuaded that her Honour had erred with respect to provocation and held that no miscarriage of justice had occurred. The CCA also rejected the Appellant's appeal against sentence, finding that Justice Mathews had also not erred in the sentencing process. Their Honours noted that there was nothing in the Appellant's subjective circumstances that could adequately explain the seriousness of his offending. The only mitigating factor in his favour was that the offences appeared to have been unplanned.

The grounds of appeal include:

- The CCA erred in failing to apply s 6(1) of the *Criminal Appeal Act* 1912 (NSW) in its determination of an appeal against conviction by judge alone, which itself was governed by s 133 of the *Criminal Procedure Act* 1986 (NSW).