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The State of Western Australia v Rayney [2013] WASCA 219
(CACR 264 of 2012)

JUDGMENT SUMMARY

This judgment summary issued by the Court is provided as an aid to obtaining a prompt understanding of the outcome of the lengthy reasons for decision delivered in this matter. It is not an addition to, or qualification upon, those reasons and has no purpose or effect beyond that stated.

1 The Western Australian Court of Appeal (Weinberg, Whealy and Buddin AJJA) today granted the State of Western Australia leave to appeal against a judgment of acquittal made in favour of Lloyd Patrick Rayney on 1 November 2012, but ordered that the appeal itself be dismissed. Mr Rayney had been charged with the wilful murder of his wife, Corryn Veronica Ann Rayney. The trial judge, sitting as a judge alone, had found Mr Rayney not guilty of both wilful murder and the alternative charge of manslaughter: ***The State of Western Australia v Rayney [No 3]*** [2012] WASC 404 (Trial Reasons).

2 The State, pursuant to s 27 of the *Criminal Appeals Act 2004* (WA), sought leave to appeal against Mr Rayney's acquittal. It submitted that there should be a new trial. Although the State had originally relied on four grounds of appeal, only two were ultimately pressed.

3 These were:

> 1A. The trial judge's finding that the events leading up to 7 August 2007 were capable of supporting a case that, by that time, any motive on the part of the respondent to kill the deceased (if motive had ever existed) was no longer a consideration, was not supported by the facts his Honour found in relation to those events and the respective attitudes of the respondent and the deceased.

1. The trial judge erred in law in failing to apply the principles enunciated in ***R v Hillier*** (2007) 228 CLR 618 in relation to the assessment of circumstantial evidence in that his Honour would only consider matters which were suggestive of the respondent's guilt where there was other evidence which proved guilt. In taking that approach, his Honour failed to consider the circumstances as a whole.

4 The case against Mr Rayney was entirely circumstantial. Broadly speaking, it relied on evidence as to the deteriorating relationship between the deceased and Mr Rayney, the assertion that he had both motive and opportunity to have carried out the murder, the finding of a place card bearing Mr Rayney's name in close proximity to the gravesite where the deceased had been buried, and evidence as to his conduct on the days following the disappearance of his wife, conduct which the State maintained had suggested consciousness of guilt on his part of the murder of his wife.

5 The trial judge found that the deceased had been attacked at or near the family home. However, he held that the State had singularly failed to prove that the attacker was Mr Rayney.

6 The trial judge did not completely reject the State's argument as to motive. He found, however, that whatever strength the evidence concerning the motive ascribed to Mr Rayney may at one time have had, the probative value of that evidence had, by 7 August 2007, significantly diminished. Secondly, the trial judge concluded that although there was an opportunity for Mr Rayney to have carried out the murder, it was 'a very limited opportunity in extremely risky circumstances'. Thirdly, the State's case was, the trial judge found, lacking in logic, lacking in proof and seriously inconsistent with the evidence, especially the physical and forensic evidence. Fourthly, the conduct relied on by the State to suggest consciousness of guilt was readily capable of explanation as conduct entirely consistent with innocence of the killing of Mrs Rayney.

7 A consideration of the entire circumstantial case led the trial judge to conclude that the State had failed to prove its case against Mr Rayney beyond reasonable doubt.

8 The Court of Appeal first gave consideration to the nature of the appeal before it. The Court accepted that the appeal provided for in s 33 of the *Criminal Appeals Act 2004* (WA) was in the nature of a rehearing. This was so because of the precise language of r 25 of the *Supreme Court (Court of Appeal) Rules 2005* (WA). Secondly, the Court gave

consideration to three earlier Western Australian appeal decisions, each of which had involved a prosecution appeal against acquittal. Only one of those appeals had been successful (***The State of Western Australian v Burke*** [2011] WASCA 190; (2011) 42 WAR 124). This case, however, had involved the reversal of a no case finding by the trial judge. It did not involve a challenge to a factual finding. Thirdly, the Court considered whether the doctrine laid down by the High Court in ***Warren v Coombes*** [1979] HCA 9; (1979) 142 CLR 531 had any application to the present appeal and, if so, how the doctrine should be applied in the instant case.

9 The Court held that this question was relevant to the correct approach to be taken to ground 1A. It was not, however, relevant to ground 1, because, unlike ground 1A, that ground was concerned with a pure question of law.

10 The Court said:

> Ground 1A … involves a challenge to what was plainly a finding of fact, namely the trial judge's (asserted) conclusion that any motive that the respondent might have had to kill his wife was 'no longer a consideration' by the time she was murdered [378].

11 The Court noted that in Western Australia there appeared to be at present a difference of opinion within the Court of Appeal regarding the application of ***Warren v Coombes*** in criminal appeals (see ***Evans v State of Western Australia*** [2011] WASCA 182; ***Morgan v State of Western Australia*** [2011] WASCA 185).

12 The Court, however, noted:

> There is no authority whatever on the question whether ***Warren v Coombes*** applies to an appeal from a verdict of acquittal following a bench trial, and certainly none where the basis of the appeal involves an allegation of factual error [416].

13 The Court ultimately did not regard the resolution of that issue as necessary to the outcome of the State's appeal. In that regard, the Court said:

> As will be seen, we do not consider it necessary, for the purpose of determining this appeal, to resolve that issue. Any views we express on the subject should be considered as dicta. Nonetheless, we are content, for present purposes, to act upon the basis that Mr Jackson's submission that ***Warren v Coombes*** applies to an appeal that is grounded upon alleged factual error in a judge alone trial, is correct, and that the principles laid down by the High Court in that case should be applied by this Court.

> Notwithstanding our acceptance of the application of ***Warren v Coombes*** to our task, the 'advantages enjoyed by the judge' who conducted the trial must be considered alongside the 'natural limitations' that attend the appeal process. The product of these 'natural limitations' will be a measure of appellate restraint [417] - [418]. (footnotes omitted)

14 The Court noted that the trial judge's findings as to motive - relevant to ground 1A - were based upon a combination of what various witnesses had to say regarding the events leading up to 7 August 2007, and his analysis of the various emails that had passed between Mr Rayney and the deceased during that period. The Court acknowledged that this process involved an element of inferential reasoning, but not exclusively so.

15 The Court said:

> It is difficult, if not impossible, for this Court, working from transcript alone, to disentangle those parts of the evidence that led his Honour to his conclusion regarding the weight to be accorded to the evidence of motive. For that reason alone, we would not lightly disturb that finding [424].

16 The Court dealt first with ground 1, as this was the principal ground relied upon. It accepted that the four impugned passages relied on by the State to show '***Hillier*** error', read literally and outside of their context, provided a level of support for the State's argument. However, the Court concluded, after a detailed analysis of the overall structure of the trial judge's reasons, including his careful statement of legal principles, and the manner in which he had assessed and later re-assessed the relevant evidence, that no such error had been demonstrated. The Court held that, far from putting aside and ignoring the matters sought to be relied on by the State, the trial judge had in fact carefully and correctly evaluated them in light of the State's overall circumstantial case.

17 The Court next dealt with ground 1A. It approached this ground in accordance with the ***Warren v Coombes*** principles. After a careful consideration of all of the evidence bearing on relationship and motive, the Court was not prepared to differ from the trial judge's conclusion that, by 7 August 2007, an alternative view could be taken of the relationship between Mr Rayney and the deceased which tended 'to support the case for the defence that no motive existed other than to ensure that the children could continue to be raised by their mother' (Trial Reasons [321]).

18 The Court did not consider that, in making this finding, the trial judge was necessarily rejecting outright the State's contentions as to motive. Rather he was, in a manner which accorded with this Court's

view, giving less weight to the State's argument than that for which the State contended.

The 'proviso'

19 For reasons of convenience, the Court and the parties referred during argument to the provisions of s 33(2a) of the *Criminal Appeals Act 2004* (WA) as 'the proviso'. This section provides that, even if a ground of appeal might be decided in favour of the prosecutor, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

20 The Court accepted the position, also adopted by both parties, that there was, at the very least, a substantial overlap between the notice of contention procedure generally available in appeals by way of rehearing in this State, and the 'proviso'. The argument was put that, as a consequence, the 'proviso' effectively operated to subsume the notice of contention procedure.

21 The Court acknowledged the force of this argument. However, it considered it unnecessary, in the circumstances, to reach any firm conclusion as to its resolution.

Orders

22 Section 27(2) of the *Criminal Appeals Act 2004* (WA) provides that the Court 'must not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding'. The word 'has' appears to cast the operation of the section into a particular mould. On a literal interpretation it seems to require this Court to refuse leave to appeal once it concludes that none of the proposed grounds of appeal have been made out.

23 However, a practice has developed in this State whereby this Court sometimes grants leave to appeal, but nonetheless orders that the appeal be dismissed. Often this is done when the application for leave to appeal is heard alongside the merits of the appeal, but the Court is ultimately unconvinced that the grounds are made out.

24 In these circumstances, the Court was disposed to the view that the points raised by the State were sufficiently arguable to warrant the grant of leave, but concluded that the appeal should be dismissed.

The judgment of the Court is available on the Supreme Court of Western Australia website at www.supremecourt.wa.gov.au.