Prasad directions 'contrary to law'

Belinda Baker reports on *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 (8 November 2018)

A Prasad direction is a direction to a jury determining a criminal trial that it may bring in a verdict of not guilty at any time, after the close of the *Crown: R v Prasad (1979)* 23 SASR 161. In *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9, the High Court unanimously held that such directions are contrary to the common law of Australia.

This decision mirrors the High Court's unanimous decision in *McKell v The Queen [2019]* HCA 5, in emphasising the fundamental role of the jury as the constitutional tribunal for the determination of issues of fact in a criminal trial.

Background

The accused person was charged with murder. He entered a plea of not guilty to that charge, and a jury of 13 persons was empaneled (as permitted under Victorian law). Following the close of the prosecution case, the trial judge gave a Prasad direction, over the objection of the Crown.

The direction was lengthy. A printed copy of the transcript of the direction (which was provided to the jury) was in excess of 20 pages, and included instruction on the elements of murder and manslaughter with particular reference to proof of the intent for murder, as well as instructions on self-defence in the context of family violence.

Before the jury withdrew to consider its response to the direction, a ballot was conducted to reduce the jury to 12 jurors (in case the jury determined to return verdict(s) of acquittal). After retiring to consider the direction, those 12 jurors advised that they wished to hear more. The juror who had been balloted off re-joined the jury, and the trial continued with all 13 jurors present.

Following the close of the defence case, but before addresses were given, the trial judge reminded the jury of the Prasad direction. By a second ballot, the jury was again reduced to 12 persons before it considered its response to the renewed Prasad direction. On their return to the court, the jury delivered verdicts of not guilty of the charges of murder and manslaughter.

The Victorian Director of Public Prosecutions referred a point of law to the Victorian Court of Appeal pursuant to s. 308(4) of

the *Criminal Procedure Act* 2009 (Vic). In particular, the Director sought the court's opinion as to whether '[t]he direction commonly referred to as the "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.' (Such a reference does not affect the acquittal of the accused person.)

A majority of the Court of Appeal (Weinberg and Beach JJA; Maxwell P dissenting) answered this question in the negative, noting that the giving of a Prasad direction had been accepted practice in Australian courts for almost 40 years. In dissent, Maxwell P considered that the practice of giving the direction should be 'comprehensively disapproved', as it had been in England.

The High Court's decision

In the High Court, the Director contended that a trial judge is precluded from giving a Prasad direction either by the common law of Australia or by the statutory scheme for the conduct of trials in Victoria. The High Court unanimously upheld the Director's first contention, holding that Prasad directions are contrary to law, and should not be administered to a jury determining a criminal trial between the Crown and an accused person.

The Court observed retaining the trial judge's power to give a Prasad direction could be said to be justified on the basis of 'the saving of time and costs, and restoring the accused to his or her liberty at the earliest opportunity' (at [50]). However, their Honours noted that those considerations lose much of their force once it is recognised that a Prasad direction is unsuitable to trials that involve legal or factual complexity or to trials involving multiple accused (at [51]).

The Court listed the dangers that accompanied the giving of a Prasad direction, including the risk that a jury will consider that the judge considers acquittal to be the appropriate verdict. The Court noted the duty of the trial judge to preside impartially, and to ensure that the trial is fair to each party, including the prosecution (at [53]). The Court held that the exercise of the discretion to give a Prasad direction based on the judge's estimate of the evidence to support a conviction is inconsistent with the division of functions between judge and jury, and with the essential features of an adversarial trial (at [56]).

Finally, the Court noted that inviting a jury to stop a trial without having heard all of the evidence, without having heard counsel's addresses and without the assistance of a complete summing up 'is to invite the jury to decide the matter from a basis of ignorance which may be profound' (at [57]).

Accordingly, the Court concluded that:

> 'If evidence at taken at its highest is capable of sustaining a conviction, it is for the jury as the constitutional tribunal of fact to decide whether the evidence establishes guilt beyond reasonable doubt' (at [57]).