The Bowraville Murders

Statutory exception to the double jeopardy principle

Jillian Caldwell reports on *Attorney General for New South Wales v XX* [2018] NSWCCA 198 and *Attorney General for New South Wales v XX* [2019] HCATrans 052

Between September 1990 and February 1991, three children – Colleen Walker, Clinton Speedy and Evelyn Greenup – disappeared from the northern NSW town of Bowraville. The respondent was tried and acquitted of the murders of Clinton Speedy and Evelyn Greenup. On 16 December 2016, the Attorney General for New South Wales made an application to the Court of Criminal Appeal ('CCA') under s 100(1) of the *Crimes (Appeal and Review) Act 2001* (*CARA*) for an order that the respondent be retried for the murders of Clinton Speedy and Evelyn Greenup. The application was the first to be made under s 100(1) of *CARA*. If the application was successful, it was proposed that the respondent would be retried for those offences and for the murder of Colleen Walker at a single trial on the same indictment.

The CCA (Bathurst CJ, Hoeben CJ at CL and McCallum J) dismissed the application. In doing so, the Court undertook a detailed analysis of the scope of the provisions inserted into *CARA* in 2006 which provide an exception to the principle of double jeopardy for a person convicted of a life sentence offence where there is fresh and compelling evidence against the acquitted person in relation to the offence and it is in the interests of justice for the person to be retried. The High Court refused an application for special leave to appeal.

Background

On 13 September 1990, Colleen Walker (aged 16) disappeared after attending a party at which the respondent was present. Her remains were never discovered, but items of her clothing were found in a river. On 3 October 1990, Evelyn Greenup (aged 4) disappeared after she attended a party with her mother and siblings, which was also attended by the respondent. On 1 February 1991, Clinton Speedy (aged 16) went missing after he and his girlfriend fell asleep in the respondent's caravan after a party. The remains of Evelyn Greenup and Clinton Speedy were found in bushland near Bowraville in April 1991.

The respondent was charged with the murders of Evelyn Greenup and Clinton Speedy. Prior to the commencement of the trials, the trial judge ordered that the counts be tried separately and concluded that the 'similar fact' evidence which the Crown relied on as connecting the two murders was not admissible in either trial. That order was made prior to the introduction of the *Evidence Act 1995*. The respondent was acquitted by a jury of the murder of Clinton Speedy, following which the Crown determined not to proceed with the charge of murdering Evelyn Greenup.

A coronial inquest into the death of Evelyn Greenup and the disappearance of Colleen Walker was held in 2004. The respondent was subsequently charged with the murder of Evelyn Greenup and was acquitted by a jury of that offence in 2006.

Statutory provisions

Section 100(1) of *CARA* provides that the CCA may order an acquitted person to be retried for a life sentence offence if satisfied that there is 'fresh and compelling evidence against the acquitted person in relation to the offence' and 'in all the circumstances it is in the interests of justice for the order to be made'. 'Life sentence offence' is defined in s 98(1) to mean murder or any other offence punishable by imprisonment for life. Section 102(2) provides that evidence is 'fresh' if (a) it was not adduced in the proceedings in which the person was acquitted and (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence. Section 102(3) provides that evidence is 'compelling' if it is reliable, substantial and in the context of the issues in dispute in the proceedings in which the person was acquitted, highly probative of the case against the acquitted person. Section 105(7) of *CARA* provides that the CCA may consider more than one application for a retrial at the one hearing, but only if the offences concerned 'should be tried on the same indictment'.

The Court of Criminal Appeal

The applicant submitted that the evidence relating to the disappearance of Colleen Walker ('the Walker evidence') was fresh evidence, as it was not adduced in the trials for the murder of Clinton Speedy or Evelyn Greenup. The applicant argued that, once that evidence was considered, the probative value of the evidence relating to the Speedy and Greenup offences significantly increased. He contended that the Walker evidence would establish that coincidence reasoning was permissible between the three murders and that each of the children was murdered by the same person, the respondent. The applicant identified other categories of evidence which were said to be 'fresh', but accepted that they would not be sufficient to justify setting aside the acquittals if the Walker evidence was not found to be fresh.

There were two principal issues arising out of the application, namely, whether s 105(7) of *CARA* required the Court to consider whether the Walker evidence was fresh and compelling in relation to the murders of Clinton Speedy and Evelyn Greenup together or separately and whether the Walker evidence was 'fresh' in relation to the murder of Evelyn Greenup for the purposes of s 102(2). The CCA declined to consider whether the Walker evidence was fresh in relation to the murder of Clinton Speedy as the application

was made on the basis that the respondent would be tried for the three murders together.

Construction of s 105(7) of CARA

The applicant argued that the question of whether the evidence was 'fresh' in relation to each acquittal could be considered jointly. He submitted that if the Court found that the offences 'should be tried on the same indictment' for the purposes of s 105(7) of *CARA*, then the evidence in respect of each offence would be 'fresh' in relation to each other, given that there had been separate trials for the Speedy and Greenup offences and no trial for the Walker offence. In contrast, the respondent submitted that the application to quash each acquittal should be considered separately and on the basis that the other acquittal still stood. When the evidence in respect of each offence was viewed separately, it could not be said that the evidence was 'fresh'.

The CCA rejected the respondent's construction on the ground that it gave s 105(7) no work to do. However, the Court found that it did not follow that the question of whether the evidence was 'fresh' in relation to each acquittal could be considered jointly. The applicant's submission failed to take into account that the concepts of 'fresh' and 'compelling' were dealt with separately in s 102 of *CARA* and comprised separate elements. Section 102(2) looked at the evidence itself and whether it was fresh in relation to particular proceedings, rather than whether there could be a change in the use to be made of the evidence in those proceedings. Further, s 105(7) did not go so far as to provide that where it could be established that any new trial for the relevant offences 'should be tried on the same indictment', what is found to be fresh evidence in relation to one acquittal will be fresh evidence on the other (at [167]-[172]).

The Court stated that this approach did not mean that s 105(7) had no work to do. If the Court determined that there was evidence which was 'fresh' in relation to one or more acquittals and that those offences 'should be tried on the same indictment' for the purposes of s 105(7), then the question of whether the evidence was 'compelling' would be considered in the context of a future joint trial of those offences. The Court noted, however, that it must be the evidence which has been found to be 'fresh' which must also be 'compelling'. It was not enough that the fresh evidence added to the body of the evidence against the person acquitted; the fresh evidence must be compelling of itself (at [173]-[176]).

'Fresh evidence'

The question of whether the Walker evidence was 'fresh evidence' against the respondent turned on the proper construction of the word 'adduced' in s 102(2) of *CARA*. The applicant submitted that the term 'adduced' meant 'admitted', so that fresh evidence would extend to evidence which had not been admitted in the earlier proceedings and could not have been admitted with reasonable diligence. The applicant accepted that this approach would have the effect that changes to the rules of evidence – such as the enactment of the coincidence provisions in the *Evidence Act* – could result in evidence that was previously available but inadmissible falling within the meaning of 'fresh evidence' in s 102(2). He argued that, on that construction, the Walker evidence was 'fresh' in the Speedy and Greenup proceedings and that the evidence in each of those proceedings was 'fresh' in relation to the other.

The Court rejected the applicant's construction, accepting the respondent's argument that the word 'adduced' meant 'tendered' or 'brought forward'. Therefore, evidence satisfied s 102(2)(a) only if it was not tendered in the proceedings in which the person was acquitted and evidence satisfied s 102(2)(b) only if it could not have been tendered or brought forward in those proceedings with the exercise of reasonable diligence, irrespective of the admissibility of the evidence at the previous trial. Accordingly, evidence that was available but not tendered due to a view that it was inadmissible at the time would not be evidence which falls within s 102(2)(b) (at [225]-[248]).

The Court concluded that, as the Walker evidence was available prior to the Greenup trial, and part of it was sought to be tendered at that trial, the evidence was not 'fresh' within the meaning of s 102(2) (at [256]).

The Court rejected the applicant's other arguments and dismissed the application.

The High Court

The Attorney General applied for special leave to appeal to the High Court on the basis that the CCA had erred in its construction of s 102(2) of *CARA*. Kiefel CJ, Bell and Gageler JJ refused the application. In the Court's oral reasons, Kiefel CJ noted that 'when a party wishes the evidence of witnesses to be taken into account in a trial it puts that evidence before the Court and if the Court considers it qualifies as legally admissible evidence, it receives or admits that evidence. There are, in effect, two stages'. Her Honour observed that the CCA had held that the word 'adduced' in s 102(2) refers to the first stage. The Court could find no reason to doubt the correctness of the decision of the CCA.