



## Summary of Judgment

*Jason Joseph Roberts v The Queen* [2020] VSCA 58

25 March 2020

The Court of Appeal (Justice R Osborn, Justice T Forrest and Justice Taylor) today granted leave to appeal against conviction in a second or subsequent appeal to the applicant, Jason Joseph Roberts, in respect of sentences imposed upon him in the Supreme Court in 2002. This decision opens the gateway to the hearing of a further appeal.

This application was the first to be made under new provisions inserted into the *Criminal Procedure Act 2009* which provide for second or subsequent appeals against conviction for an indictable offence for a person who has exhausted their rights to appeal, subject to strict preconditions.

### *Background*

On 31 December 2002, the applicant, together with Bandali Debs, was convicted by a jury, after a four and a half month trial in the Supreme Court, on two charges of murder. The applicant was sentenced to life imprisonment with a non-parole period of 35 years.

An appeal to the Court of Appeal was dismissed on 6 April 2005, and an application for special leave to appeal to the High Court was refused on 18 November 2005.

The convictions relate to the murders of two police officers – Sergeant Gary Silk and Senior Constable Rodney Miller – who were shot in the early hours of Sunday, 16 August 1998 outside the Silky Emperor Restaurant in Cochranes Road, Moorabbin. The premises had been identified by police as a potential target of armed robbers who had already committed a number of armed robberies known as the Hamada robberies. Sergeant Silk and Senior Constable Miller had been participating in an operation intended to prevent further such robberies and were killed when they intercepted a car which attended the premises and aroused their suspicion.

The Crown case at trial was that there had been two offenders and was a circumstantial one involving six principal threads of evidence, some elements of which are now admitted by the applicant. At trial, both Debs and the applicant disputed that they were the offenders and, as a subsidiary proposition, each submitted to the jury that they could not be satisfied that there were two offenders as distinct from one acting alone. A pivotal part of the Crown case on the issue of whether there was more than one offender was evidence of what Senior Constable Miller said to police officers whilst in a fatally wounded condition ('dying declarations'), including witnesses who gave evidence that Senior Constable Miller had uttered words to the effect that there was more than one offender.

### *The application for leave to appeal*

The grant of leave under the new appeal provisions is subject to strict preconditions intended to preclude unmeritorious repeat appeals. The Court of Appeal must be satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on appeal. If so satisfied, the matter can proceed to a substantive appeal hearing. On an appeal, the Court of Appeal must allow the appeal if it is satisfied that there has been a substantial miscarriage of justice. Today's judgment is in respect of the leave stage only.

The applicant seeks leave to appeal under these provisions on the basis of two aspects of what is said to be fresh evidence going to firstly, the fairness of his trial, and secondly, the credibility and reliability of the evidence of police witnesses at the trial as to Senior Constable Miller's dying declarations.

The evidence relied on by the applicant in support of this application came to light as a result of evidence given by way of private and public examinations to the Independent Broad-based Anti-corruption Commission ('IBAC'). From this, the applicant can now adduce evidence that an officer or officers of Victoria Police fabricated evidence relating to statements made by Senior Constable Miller. In particular, a written statement made by Senior Constable Pullin which was in fact made 10 months after the murders, was expressed to be, and subsequently adopted at the committal as, a statement made only some four hours after the events in issue. The trial proceeded on the basis that the statement recorded the substantially contemporaneous recollection of the witness. The statement included material matters which were not included in an initial statement which was in fact made four hours after the relevant events. The second statement was put forward in the prosecution brief without disclosure of its falsity as to the stated date of its making and without disclosure of the existence or contents of the original statement. It appears that Senior Constable Pullin also gave false evidence at the committal as to the date of the making of the second statement.

The applicant also sought to rely on evidence obtained as a result of IBAC investigations to demonstrate that there was a broad ranging, multifaceted manipulation of the evidence bearing on the issue of Senior Constable Miller's dying declarations crystallising in a further 10 allegations of police misconduct, which, he submitted, had they been known, could have been of real forensic utility to the defence at trial. In particular, the applicant submitted there was evidence that officers were dissuaded from including evidence as to Senior Constable Miller's dying declarations in statements made on the morning of the murders; original statements were subsequently revised; records of that process were now unavailable and a number destroyed; and none of these matters were substantially disclosed at trial. It was also submitted that the senior officer who oversaw the gathering of the evidence relating to the dying declarations has been discredited and his account of the process of gathering evidence should be rejected as unsatisfactory.

The respondent conceded appropriate disclosure had not been made and that the applicant's trial counsel was not, but should have been, in an informed position to challenge the evidence of the dying declarations given by the first responders. But, it was further submitted that the evidence of the dying declarations was important in, but not critical to, the Crown case.

The Court of Appeal found that there was no dispute that the IBAC evidence with respect to Senior Constable Pullin's statement is fresh and, in the Court's view, it is compelling. The Court found that the evidence is highly probative in the context of the issues at the trial in that it raises a serious question as to the fairness of the trial; and it raises a serious issue as to

the reliability of evidence of what Senior Constable Miller actually said by way of dying declarations. Some aspects of the evidence relied on in respect of the further allegations of misconduct reinforced this conclusion. In turn, the Court was satisfied that it is in the interests of justice that the applicant be granted leave to appeal.

On the further appeal hearing, the Court will be required to decide whether a substantial miscarriage of justice has occurred, and if so, what consequences should follow.

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**NOTE:** This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.