

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2019 0134

FARUK ORMAN

Appellant

v

THE QUEEN

Respondent

JUDGES: MAXWELL P, NIALL and EMERTON JJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 26 July 2019
DATE OF JUDGMENT: 26 July 2019
MEDIUM NEUTRAL CITATION: [2019] VSCA 163
JUDGMENT APPEALED FROM: [2009] VSC 538 (Weinberg J)

CRIMINAL LAW - Appeal - Conviction - Murder - Petition of mercy - Referral to Court of Appeal - Appellant convicted of murder after trial by jury - Counsel for appellant had encouraged presentation of principal evidence against him - Fundamental breach of duty - Subversion of right to fair trial - Crown concession properly made - Substantial miscarriage of justice - Conviction quashed - Unjust to order re-trial - Verdict of acquittal entered - *Criminal Procedure Act 2009* ss 276(1)(c), 277(1) and 327.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr P J Smallwood with Ms C M Lloyd	Galbally Rolfe
For the Respondent	Ms K E Judd QC, Director of Public Prosecutions with Ms R J Sharp	Mr J Cain, Solicitor for Public Prosecutions
For the Chief Commissioner of Victoria Police	Dr I Freckelton QC with Mr J Bayly	Victorian Government Solicitors Office

1 On 29 September 2009, Faruk Orman was found guilty by a Supreme Court
jury of the murder of Victor Peirce. He was sentenced to 20 years' imprisonment,
and a non-parole period of 14 years was fixed.

2 On 21 September 2010, this Court refused his application for leave to appeal
against that conviction and, in February 2011, the High Court refused special leave to
appeal.

3 On 4 February this year, Mr Orman filed a petition of mercy with the
Attorney-General, seeking a referral to this Court pursuant to s 327 of the *Criminal
Procedure Act 2009*. He provided detailed submissions and evidence in support of
the petition in April and May 2019. Among other things, the petition alleged that he
was denied a fair trial because of the conduct of Nicola Gobbo and her role as a
human source for Victoria Police.

4 On 25 June this year, the Attorney-General advised the Chief Justice that she
had decided to refer the whole case to the Court of Appeal. That means, under
s 327(2) of the *Criminal Procedure Act*, that the Court of Appeal 'must hear and
determine the case as if it were an appeal'.

5 Following that referral, Mr Orman filed an application for bail pending the
hearing and determination of the appeal. The bail application first came before the
Court on 10 July 2019, and was adjourned to 2 August 2019. Subsequently, the
Director of Public Prosecutions requested that the matter be brought on at an earlier
date.

6 The bail application was supported by an affidavit of Mr Orman's solicitor,
which included a number of allegations about Ms Gobbo's conduct. In a written
response filed on 24 July, the Director has indicated that the Crown does not accept
the factual basis for the majority of the allegations.

7 Four allegations in particular are disputed, for reasons set out in the response. It is unnecessary for present purposes to deal with those matters. The Director's response will be publicly available at the conclusion of the hearing.

8 What is significant is that the Director's response makes a number of factual concessions, which include the following:

- (a) from as early as October 2002, Ms Gobbo represented a person ('Witness Q'), on whose evidence the murder case against Mr Orman substantially depended. Ms Gobbo continued to represent Witness Q from time to time until 8 August 2008;
- (b) on 11 October 2006, Ms Gobbo was engaged by Mr Orman to represent him in relation to charges he was then facing in Queensland. She continued to represent him from time to time until at least 10 December 2008;
- (c) on 9 November 2007, at a time when she was engaged to act on behalf of Mr Orman, Ms Gobbo improperly took active steps to ensure that Witness Q gave evidence against Mr Orman in the murder trial.

9 The Crown concedes that, as a result of Ms Gobbo's conduct on 9 November 2007, there was a substantial miscarriage of justice, within the meaning of s 276(1)(c) of the *Criminal Procedure Act*. The Crown's submission, which is of course supported by counsel for Mr Orman, is that the appeal must therefore be allowed.

Disposing of the appeal

10 In our view, the Crown's concession is properly made. We proceed on the basis of the facts conceded by the Director. Because of that concession, it has not been necessary for the Court to undertake any factual investigation of its own. Nor, of course, do we need to say anything about the contested factual allegations.

11 The Director concedes that Ms Gobbo, while acting for Mr Orman, pursued the presentation of the principal evidence against him on the charge of murder. Self-evidently, that conduct was a fundamental breach of her duties to Mr Orman and to

the Court. We refer, as did the Director, to the following statement of the High Court in *Tuckiar v The King*:

Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance.¹

12 On the facts as conceded, Ms Gobbo's conduct subverted Mr Orman's right to a fair trial, and went to the very foundations of the system of criminal trial. There was, accordingly, a substantial miscarriage of justice.² The appeal must therefore be allowed.

13 The question which then arises is whether there should be an order for a new trial or whether, instead, a judgment of acquittal should be entered. Those are the relevant options under s 277(1) of the *Criminal Procedure Act*.

14 The Director draws attention to the decision of the High Court in *Director of Public Prosecutions (Nauru) v Fowler*, which requires the Court in deciding whether or not to order a new trial to take into account

any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused.³

15 Although Witness Q's evidence is said to be 'in theory, still available', and the Director does not concede that it would be inadmissible at a re-trial, she nevertheless concedes that it would be unjust to order a re-trial. This is said to be so because there has been 'significant time' since the events the subject of the charge took place. Further, the Director says, Mr Orman:

has already served a significant portion of his non-parole period and by the time any re-trial is heard, subject to any grant of bail, he will have served more.

¹ (1934) 52 CLR 335, 347.

² See *Wilde v The Queen* (1988) 164 CLR 365, 373; *OKS v Western Australia* [2019] HCA 10, [36].

³ (1984) 154 CLR 627, 630.

16 In our view, that concession is also properly made. We will order that the appeal be allowed, the conviction for murder set aside and in its place a judgment of acquittal be entered for the offence of murder.

17 Before we make those orders, we wish to add some brief words of commendation in relation to the conduct of this matter. Plainly, these are matters of great significance to the Victorian community, and of deep concern to participants in the justice system. They affect the integrity of our system of criminal trial which is, of course, a cornerstone of our democracy.

18 It is noteworthy that it is only just over four weeks since the Attorney-General referred this matter to the Court. The Director and the lawyers working with her have acted with great speed and conspicuous fairness. As she has indicated in her submissions this morning, as soon as she was satisfied that there was at least one matter, one aspect of Ms Gobbo's conduct, which required the concession which she has now made, the Director acted to have the matter brought back earlier than it had been scheduled.

19 We also commend those acting for the appellant, Mr Orman, for their very constructive involvement in ensuring that these questions, going squarely to Mr Orman's liberty, were able to be brought on at the earliest practicable opportunity. Similarly, counsel for the Chief Commissioner of Police, who appeared on the first occasion and again today, have assisted the Court very constructively.