***Freeburn v The Queen* [2020] VSCA 155 (17 June 2020) – Victorian Court of Appeal**

'Application for leave to appeal against conviction' – 'Controlling, jealous, possessive behaviour' – 'Intention' – 'Past domestic and family violence' – 'People affected by substance misuse' – 'People with disability and impairment' – 'Physical violence and harm'

Charges: Murder

Case type: Application for leave to appeal against conviction

Facts: The applicant man was convicted of the murder of his female intimate partner and sentenced to 25 years' imprisonment, with a non-parole period of 20 years. The victim was mildly intellectually disabled and had been the victim of domestic violence in a prior relationship. The applicant acted in a jealous and possessive manner towards her, which sometimes included acts of violence. After the assault which resulted in the victim's death the applicant left the victim alive, but in a debilitated state and failed to seek assistance. He admitted to having "lost control" and seriously injuring the victim. An autopsy showed the victim suffered around 43 injuries, mostly soft tissue injuries caused by moderate blunt force trauma. Toxicology testing revealed the presence of GHB in her body. Expert witnesses disagreed as to whether the assault caused the victim's death: one forensic pathologist believed the victim died as a consequence of soft tissue injuries sustained in an assault in the context of her using GHB; another said that the cause of death could not be determined.

Grounds:

1. The jury's verdict of guilt was unreasonable and cannot be supported having regard to the evidence. Particulars:
   (a) The evidence failed to prove beyond reasonable doubt that the applicant had caused the death of the deceased.
   (b) The evidence failed to prove beyond reasonable doubt that the applicant had intended to cause grievous bodily harm to the deceased.
2. The trial miscarried due to the admission of prejudicial evidence that a closed circuit television system had been deactivated prior to the death of the deceased.

Held: Ground 1 was allowed, the murder conviction was set aside, and the Court substituted a verdict of manslaughter. Ground 2 was dismissed.

The Court found that whilst it was open for the jury to be satisfied beyond reasonable doubt that the applicant's actions, in assaulting the victim, were the substantial and operative cause of her death, it was not reasonably open to be satisfied beyond reasonable doubt that the applicant intended to cause her really serious injury ([106]). Taken at its highest, the admission the applicant made to Witness A was that as a result of causing her death, he had enjoyed or experienced a significant rush of adrenalin ([93]). Further, the Court accepted that a jury could not reasonably conclude that Witness A's evidence was either truthful or reliable ([94]). Whilst the assessment and credibility of a particular witness is essentially a matter for the jury, that proposition does not preclude the assessment by an appellate court of the evidence given by that witness (*Pell v The Queen* [2020] HCA 12 (7 April 2020)) ([95]).

The verdict of manslaughter was substituted because the applicant caused the victim's death by an unlawful and dangerous act and it was inevitable that the jury would conclude that a reasonable person in the applicant's position would have realised they were exposing the victim to an appreciable risk of serious injury [104]. Leaving the victim in a severely debilitated state and refraining from obtaining medical or other assistance constituted criminal negligence for the purpose of the offence of manslaughter. The evidence was that the applicant was well-aware that the victim required assistance and treatment. It was inevitable that the jury would have been satisfied the applicant's actions fell so far short of the standard of care which a reasonable person would have exercised in the circumstances, and involved such a high risk of death or really serious bodily injury, as to merit criminal punishment ([105]).

Ground 2 failed because the prosecution did not put to the jury that the evidence could or should be used as evidence of incriminating conduct by the applicant ([120]) and the judge gave a clear and specific direction to the jury that it should not rely on the evidence, and explained why it was of no probative value ([121]).

Note: The applicant was subsequently resentenced to 12 years imprisonment, with a non-parole period of 9 years: *Freeburn v The Queen (No 2)* [2020] VSCA 176 (1 July 2020) – Victorian Court of Appeal.