THE SUPREME COURT
OF NEW SOUTH WALES
CRIMINAL DIVISION

IRELAND J

4 December, 1998

70034/96 - REGINA -v- Michael Alan HEATLEY

JUDGMENT

HIS HONOUR: The applicant, Michael Alan Heatley, was indicted on a single count which alleged that he on 7 March, 1995 did murder James William Meek.

At the conclusion of the Crown case, on the eighth day of the trial, I directed the jury to return a verdict of acquittal of the accused. Following the direction given, the accused was acquitted and discharged.

Mr Molomby, counsel for the defence, has made an application on behalf of his client for a Certificate under the **Costs in Criminal Cases Act**, 1967 (the Act).

The act relevantly provides:-

"2. The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may:

(a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or

(b) where, on appeal, the conviction of the defendant is quashed and:

(i) the defendant is discharged as to the indictment upon which he or she was convicted; or

(ii) the information or complaint upon which the defendant was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section 3 and relating to those proceedings.

3.(1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate;

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances."

It is common ground that at the close of the Crown case, there had been a hearing on the merits and no point is taken by the Crown as to the reasonableness of any act or omission on the part of the applicant within the meaning of S 3(1)(b).

Accordingly, the granting of a Certificate is dependent upon a consideration of the question posed by S 3(1)(a), that is to say "if the prosecution had, before the proceedings were instituted, been

in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings".

The applicant in defending the charge of murder was in receipt of legal aid.

The function of the Court in an application under the Act was outlined by Kirby P (as he then was) in **Ramskogler -v- Director of Public Prosecutions & Anor** (1995) 82 A Crim R 128 citing the judgment of Mahoney JA in **Treasurer (NSW) -v- Wade** (unreported - NSWCA 16 June, 1994) in the following words:-

> "... in deciding whether to issue a certificate under the Act, a judge must make two findings with respect to S 3(a). First, the judge must determine what Mahoney JA describes as "the facts issue". That is, the judge must determine what were, within the Act, "all the relevant facts". Secondly, the judge must decide the "reasonableness issue". He or she must determine whether, if it had known all of these facts, the prosecution would have been acting "reasonably" in bringing the proceedings."

The relevant facts, as I understand them to be in the present case, are the following. The victim, James Meeks, was the owner of a distinctive gold dress ring (Exhibit "B") which featured a large stone known as a "Tiger's Eye".

On Tuesday, 7 July, 1995 at approximately 1.15 pm the applicant attempted to sell the ring at Ian King's Loan Office at Merrylands. He was unable to furnish adequate evidence of age and identification. He left the pawnshop and returned at

approximately 1.30 pm with a relative, who was known to the proprietor, and who vouched for him.

The records maintained, as required by law, at Ian King's Loan Office, confirm that at 1.30 pm on 7 March, 1995 the deceased's ring was purchased by the proprietor of the shop from the applicant. It was later recovered from these premises by investigating police.

In his video taped record of interview, the applicant admitted that he had spent the night of Monday, 6 March, 1995 at the deceased's flat at Surry Hills where the deceased's body was found on Wednesday, 8 March. The applicant, however, admitted that he had stolen the ring on the Monday night and had taken it with him on the Tuesday morning when he left the flat at about 9 am.

The critical evidence in the Crown case was given by Mr Kevin Plumb, who was an acquaintance of the deceased, and who also resided in a flat in the same apartment complex.

Mr Plumb gave evidence of having seen the deceased at 10 am on Tuesday, 7 March, and again at 11.30 am that morning. On the second occasion Mr Plumb was having a conversation with the postman, Mr Stephen Watson, when James Meek walked up and spoke to the postman and received some mail from him. Mr Plumb testified that at the 11.30 am meeting, he had observed on

James Meek's left ring finger the Tiger's Eye gold ring, which was well known to him.

The postman, Mr Watson, corroborated the evidence of Mr Plumb as to the time and place of the meeting, but not the wearing by James Meek of the ring.

The significance of the evidence of Mr Plumb, if it were to be accepted, is that it established the applicant to be telling lies in his record of interview as to when he left the premises of the deceased and when he stole the ring and strongly raises the inference that he was doing so out of consciousness of guilt.

In a nutshell, if the ring was on the deceased's finger at 11.30 am at Surry Hills and within one hour and forty five minutes was being offered for sale at Merrylands, the implication of the applicant in the murder of the deceased was strongly to be inferred.

In cross-examination, notwithstanding the initial strength of his evidence, Mr Plumb conceded that in the vital aspects of his testimony, he could have been mistaken both as to the wearing of the ring by the deceased and as to the day on which the events involving the meeting between Mr Watson, Mr Meeks and himself took place.

The possibility that the postman, Mr Watson, was also mistaken in his recall of the day on which the meeting occurred was conceded by him. This critical evidence in the Crown case having been so weakened, there was no remaining evidence of guilt fit to leave to the jury. Not as to the facts of which the witness Plumb, and to a lesser extent Watson had given evidence, but because of the concessions they made as to the reliability of their testimony.

For the applicant, reliance is placed upon what fell from the Court of Appeal (Kirby P, Meagher and Handley JJA) in **Allerton -v- Director of Public Prosecutions** (1991) 24 NSWLR 550 where at 559G in the judgment of the court, the following appears:-

> "As we read s 3(1)(a) the task of the court or judge, justice or justices in specifying their opinion is indeed to ask a hypothetical question, as stated by Sugerman P in **R -v- Williams.** But that question is addressed to evidence of all of the relevant facts, whether discovered before arrest or before committal (if any); after committal and before trial; during the trial; or afterwards admitted under s 3A of the Act. All of the relevant facts proved, whenever they became known to the prosecution and whether or not in evidence at the trial, must then be considered by the decision-maker. The decision-maker must then ask whether, if the prosecution had evidence of all of the relevant facts immediately before the proceedings were instituted it would not have been reasonable to institute the proceedings."

Mr Dawe of Queen's Counsel for the respondent, has submitted that where a verdict has been directed, the grant of a

Certificate under the act does not necessarily follow. See **Ramskogler**, ante.

In the present case, the Crown case failed not as a result of a change in the evidentiary situation, but as a result of unexpected concessions made by the witnesses, in particular the witness Plumb, as to the reliability of the evidence given. Mr Dawe has submitted that no reasonable inquiry by the Crown would have brought this change in quality of the evidence to light. There was no change in the factual situation and no additional facts were elicited at trial.

The Crown case perished on the issue of the reliability of the evidence and the concession by the critical witness that he could be mistaken. In this regard, the present case is to be distinguished on the facts from **Allerton** (ante) and also from the case of **John Fejsa** (1995) 82 A Crim R 253, a case in which, on appeal, the conviction was quashed and a judgment of acquittal entered on the unsafe and unsatisfactory ground. In the judgment of the court at 255, it was noted that the Court of Criminal Appeal had never sought to lay down any all-embracing definition of the circumstances in which it would be unreasonable, within the meaning of S 3(1)(a) of the Act, to have instituted proceedings. The court was of the view that it would be unwise to attempt to do so as the circumstances of different cases vary to such an extent that "unless such a definition were expressed in terms of such generality to be of no assistance in a particular case, it may well

cause an injustice in the case whose circumstances have not been foreseen."

The court cited with approval what had been said by Blanch J in **Warwick Ian McFarlane** (unreported - NSWSC - Blanch J - 12.8.94) where a number of examples were given in which it was not reasonable to prosecute. The examples there given do not have application to the present case.

I am persuaded that the events which resulted in a verdict being directed in favour of the applicant in the present case, did not flow from the prosecution being unaware of "evidence of all the relevant facts", as those words have been explained in the cases to which I have been referred.

The Crown case failed to get to the jury purely for the reason that the critical witness upon whose evidence the Crown case turned, was persuaded in cross-examination to cast doubt upon the certainty of his own testimony. This was an unforseen and largely unforeseeable turn of events. It was not the emergence of relevant facts which if known would have rendered the institution of proceedings unreasonable.

The issue arising under S 3(1)(a) must be resolved in favour of the respondent and the grant of a Certificate under the act is refused.

I certify that this and the 7 preceding pages are a true copy of the judgement summing-up, sentence herein of the Honourable Mr. Justice Ireland.

Dated 4.12.98 Associate