

## The conviction of Frederick Lincoln McDermott

Caroline Dobraszczyk reports on *A reference by the Attorney General for the State of NSW under s 77(1)(b) of the Crimes (Appeal and Review Act) 2001 re the conviction of Frederick Lincoln McDermott* [2013] NSWCCA 102

In 1936 William Henry Lavers and his family had a store, to which their house was attached, on a road linking Grenfell to Forbes. It was 12 miles north of Grenfell and 30 miles south of Forbes. On 5 September 1936 Mr Lavers went out of the store to feed his horses and he was never seen alive again. On 10 October 1946 an itinerant shearer, Frederick Lincoln McDermott was arrested and charged with the murder of Mr Lavers. On 26 February 1947 he was found guilty by a jury and sentenced to death. The death sentence was subsequently commuted to life imprisonment.

This case deals with a procedure for the review of the conviction such that the New South Wales Court of Criminal Appeal in this decision, on 6 May 2013, set aside the conviction and entered a verdict of acquittal.

The case was brought under s 77(1)(b) of the *Crimes (Appeal and Review) Act 2001*. This section allows for the attorney general to refer a case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act 1912*, after the attorney general receives a petition for a review of a conviction either by the convicted person or on behalf of the convicted person.

The petition was made after the remains of Mr Lavers were found on a property and in a cave in Birangan Hill, by a farmer on 11 November 2004. The location of the remains meant there was a real question as to the conviction of Mr McDermott. It is important to note that on 14 August 1951 a royal commission was established to inquire into the conviction and subsequently found that there was a strong probability that the jury was misled by incorrect evidence on a matter of importance and recommended that Mr McDermott be released from imprisonment. He was released on 11 January 1952 and died on 17 August 1977. There had been two appeals to the Court of Criminal Appeal in 1947 which were unsuccessful and the High Court refused leave to appeal in relation to the second appeal.

The Court of Criminal Appeal in this case first dealt with the issue of jurisdiction, i.e. in particular, the issue that the minister may refer the conviction of a deceased person to the CCA and that the court may determine that appeal notwithstanding the death of the convicted person. Chief Justice Bathurst notes in particular at [23] that 'The fact that a wrongly

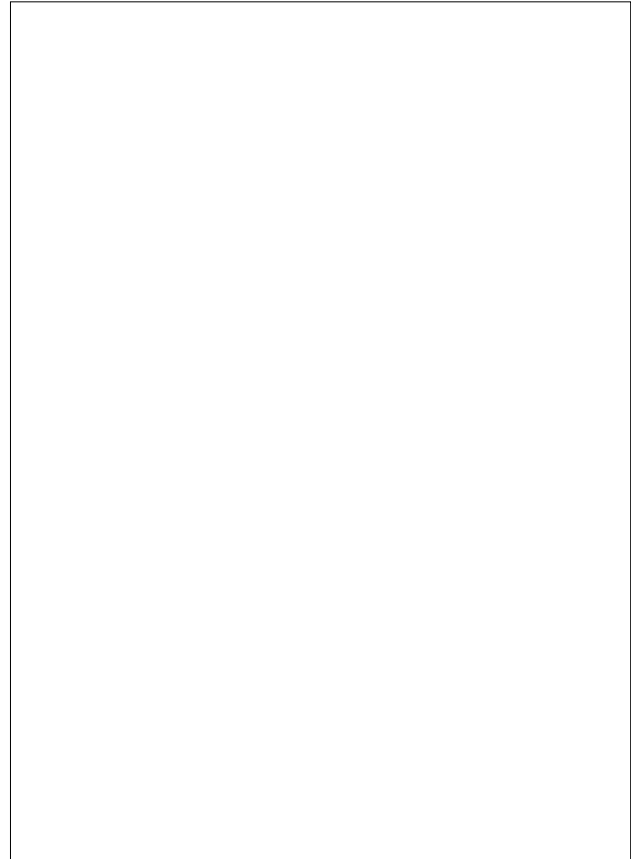


Photo: Newspix

convicted person has died does not mean an injustice has not incurred. There is no reason to limit the words of s 77 and s 86 so as to prevent a remedy in the case of such injustice.'

The purpose of such a procedure is obvious. It allows a review of a conviction or a sentence after all the usual appeal processes have been utilised, where there is a doubt or question as to the convicted person's guilt (see s 77(2) and (3)). Section 86 states in effect that the court deals with the matter and therefore has the same powers as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act and that Act applies accordingly.

The grounds of appeal fell into two categories:

1. the consideration of new or fresh evidence; and
2. a focus on what occurred at trial so as to argue that there was a miscarriage of justice due to the admissibility and/or unreliability of the identification evidence.

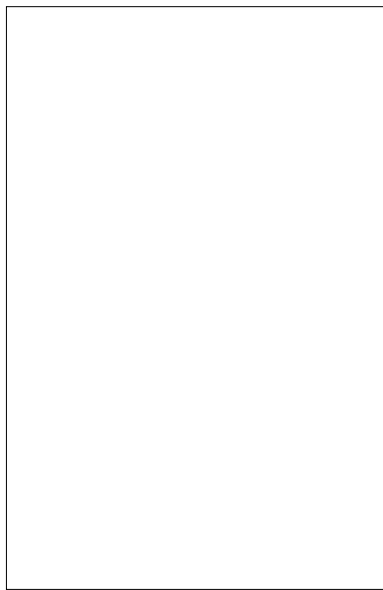
A verdict of acquittal was sought.

The Court of Criminal Appeal essentially found that the fresh or new evidence was so cogent that it did not need to consider the issue as to the admissibility of the identification evidence. What was this evidence?

Before answering this question it is important to understand what the Crown case was against Mr McDermott. There were four main points. First, the Crown relied upon the identification of a car whose tyre tracks were found just outside the store, ie that it was a Essex Tourer, about a 1924 model, belonging to a Mr Jack Parker, and there was evidence that the car was used by Mr McDermott and a friend of his Geoffrey McKay. It was alleged that they murdered Mr Lavers while using the car. Second, there was evidence which identified Mr McDermott using the car at about the time the murder was said to have taken place. Third, the Crown relied upon what was said to be a confession by McDermott. Fourth, the Crown demonstrated that a statement made by Mr McDermott that he had been shearing at the relevant time, his alibi, was incorrect.

Essentially the Court of Criminal Appeal relied upon the following to come to the decision that a verdict of acquittal should be entered: First, the 1951 royal commission had before it evidence, being fresh evidence, that the car could not have been an Essex Tourer - i.e. there was fresh evidence from the manufacturer that the tyre width of the Essex Tourer was only 54 and 7/8 inches whilst the tyre tracks outside the store were 56 inches. Accordingly the royal commission found that the tyre tracks could not have been made by an Essex car and so could not have been made by Mr Parker's car. The NSWCCA also noted that there was evidence that a car answering the description of Mr Parker's was seen in Yass at 8.00am on 5 September 1936.

Second, the reliability of identification evidence (including based upon photographs taken nine years after the events in question), linking Mr McDermott to



Itinerant rural worker Fred McDermott (pictured) on his way to the Grenfell courthouse for the committal hearing. Photo: Newspix

the murder, was further undermined by the evidence of a Mr Kelly at the royal commission to the effect that the persons in the car (alleged by the Crown to be the Essex Tourer) he sold petrol to at the time of Mr Laver's disappearance did not answer the description of Mr McDermott.

As stated above the Crown had relied upon an alleged confession. This was to the effect that one drunken night, in a heated conversation with his companion, Florrie Hampton, she told him to shut up as he was just 'a damn murderer ...you murdered Lavers...you cut him up..' to which Mr McDermott said 'I didn't. It was we not I.' Also, that on another occasion, during a quarrel, Miss Hampton said to Mr McDermott 'You killed Lavers for seven gallons

of petrol. And put his body in the car and drove out to the old Grenfell sheepyards, cut it up with an axe and buried it' to which he said 'Yes of course I killed Lavers for seven gallons of petrol, put his body in the car and drove out to the old Grenfell sheepyards, cut it up with an axe and buried it'. In relation to this issue the court noted that the circumstances surrounding the discovery of the body in 2004, in a cave about 120 metres up Birangan Hill, and where there had been expert evidence that the body had not been cut up with an axe, bore no resemblance to the confession such that 'there was no basis for believing that when Mr McDermott made the so called confession, he was accurately recording what occurred' at [67].

In relation to the false alibi, the court said that '...the new and fresh evidence indicates that there was no material which on any reliable basis connected him with the murder.' Accordingly, it was held that if all this evidence was available at the trial the only verdict a jury could reach would be an acquittal and therefore there had been a significant miscarriage of justice. A verdict of acquittal was entered. Hall and Button JJ agreed with Chief Justice Bathurst.