CITATION:	*The Queen v Rolfe (No 3)* [2021] NTSC 46
PARTIES:	THE QUEEN
	v
	ROLFE, Zachary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	21942050
DELIVERED:	22 June 2021
HEARING DATE:	22 June 2021
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Crown:	S Callan SC
Accused:	L Officer
Producing Party:	Ray Murphy

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Tindall Gask Bentley
Producing Party:	Ray Murphy & Associates

Judgment category classification:	C
Judgment ID Number:	GRA2109
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Rolfe (No 3) [2021] NTSC 46
No 21942050

BETWEEN:

THE QUEEN

AND:

ZACHARY ROLFE

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered on 22 June 2021)

[1] The accused is charged with murder arising out of a shooting incident which took place in the community of Yuendumu on 9 November 2019. The incident took place during the attempted arrest of the deceased. On the day following the incident, Ray Murphy, a legal practitioner based in Darwin, was retained by the Northern Territory Police Association to provide advice to other members of Northern Territory Police who had been involved in the operation. The accused was subsequently charged with the murder of the deceased.

[2] On 15 February 2021, the Crown caused the issue of a subpoena requiring Mr Murphy to produce:

> Any communications, documents, draft statements and file notes of any conversation between Ray Murphy and police officers Julie Frost, Adam Eberl, James Kirstenfeldt, Anthony Hawkings [*sic*] and Adam Donaldson regarding the deployment of the Immediate Response Team to Yuendumu on 9 November 2019, the planning and any briefings relating to the arrest of Charles Arnold Walker (a.k.a. "Kumanjayi Walker") and the shooting of Kumanjayi Walker on 9 November 2019.

[3] The documents in Mr Murphy's possession, custody and control falling within the scope of the subpoena have been produced to the Supreme Court Registry, subject to an objection to production on the ground that they are subject to legal professional privilege. During the course of the pre-trial hearing processes, it was agreed by the parties and Mr Murphy that the court would inspect the documents and make a ruling on the claim for privilege following that inspection. Having inspected the documents, the court sought and received submissions from the parties on a number of aspects of the claim for privilege.

Relevant statutory provisions

[4] Part 3.10, Division 1 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("the *ENULA*") deals with client legal privilege, which was ordinarily referred to under the common law as "legal professional privilege". Section 117 of the *ENULA*:

(a) defines "client" to include, relevantly, "a person or body who engages a lawyer to provide legal services or who employs a lawyer, (including under a contract of service)"; and

(b) defines "lawyer" to mean, relevantly, "an Australian lawyer".

[5] Although Mr Murphy was retained by the Police Association, there is no doubt that each police officer who engaged him to provide legal advice under that retainer was a "client" for these purposes. The Dictionary to the *ENULA* defines "Australian lawyer" with reference to s 5(a) of the *Legal Profession Act 2006* (NT). There is no dispute that Mr Murphy is an "Australian lawyer" for these purposes.

[6] Section 118 of the *ENULA* is a statutory statement of the common law rule that legal professional privilege protects communications between client and lawyer if made for the dominant purpose of obtaining legal advice. It provides:

> **Legal advice**
>
> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) a confidential communication made between the client and a lawyer; or
>
> (b) a confidential communication made between 2 or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

[7] Section 119 of the *ENULA* is a statutory statement of the common law rule that legal professional privilege protects communications between the client or lawyer and a third party if the dominant purpose of the communication is in contemplation of, or for use in, existing or anticipated litigation. It provides:

Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

[8] For each of those provisions, the term "confidential communication" is defined in s 117 of the *ENULA* to mean, in essence, a communication made in such circumstances that the maker or the recipient "was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law". Similarly, the term "confidential document" is defined to mean a document prepared in such circumstances that the person who prepared it or the person for whom it was prepared was under the same form of express or implied obligation.

[9] For the purposes of s 118 of the *ENULA*, the term "Australian or overseas proceeding" is defined in the Dictionary to mean "a proceeding (however described) in an Australian court or a foreign court". The term "Australian court" is defined in turn to include, in addition to those institutions which would ordinarily be described as a

court, "a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence".

[10] Both ss 118 and 119 of the *ENULA* are *ex facie* limited in their application to adducing evidence. Section 131A of the *ENULA* gives those provisions an extended operation to a "disclosure requirement", which is defined to mean, so far as is relevant for these purposes, "a process or order of a court that requires the disclosure of information or a document and includes … a summons or subpoena to produce documents". The operation of the extension provision is that if a person is required by a disclosure requirement to produce a document or other information of a kind referred to in Division 1, the court must determine any objection by applying the provisions of Part 3.10 *mutatis mutandis* as if the objection to producing the document were an objection to the adducing of evidence.

The nature of the documents

[11] The documents falling within the scope of the subpoena may be described generally as follows (to the extent possible without defeating the claim for privilege):

(a) Typed records described as "Case Notes", which appear to form part of a computerised recording and billing application, recording:

11 November 2019

(i) a telephone attendance on Julie Frost ("Frost") including instructions from the client, the legal advice provided to the client in relation to the request, and the recommendations made to the client concerning future conduct;

(ii) a telephone attendance on the Vice President of the Police Association advising in relation to the position with contact from Frost, Adam Eberl ("Eberl") and Anthony Hawkins ("Hawkins");

(iii) a telephone attendance on Frost;

(iv) a telephone attendance on Eberl;

(v) a telephone attendance on Hawkins;

12 November 2019

(vi) a telephone attendance on Eberl including instructions from the client, the legal advice provided to the client, and the recommendations made to the client concerning future conduct;

(vii) a telephone attendance on Hawkins including instructions from the client, the legal advice provided to the client, and the recommendations made to the client concerning future conduct;

13 November 2019

(viii) a telephone attendance on Hawkins including instructions from the client, the legal advice provided to the client, and the recommendations made to the client concerning future conduct;

(ix) telephone attendances on Hawkins, Eberl, James Kirstenfeldt ("Kirstenfeldt") and Adam Donaldson ("Donaldson") providing legal advice;

21 November 2019

(x) telephone attendances on Donaldson and Kirstenfeldt;

(xi) a telephone attendance on Southern Field Officer of the Police Association;

(b) A handwritten file note recording a telephone attendance on Frost on 11 November 2019.

(c) A series of email communications between Mr Murphy and Frost on 6 and 7 January 2020.

(d) An email communication between Mr Murphy and Hawkins on 7 January 2020.

The claim for privilege

[12] Those communications fall into two broad categories. Each category gives rise to different considerations in terms of the existence of the privilege and any exemption from disclosure.

Communications between Mr Murphy and his clients

[13] There is no doubt that that the telephone attendances and email communications between Mr Murphy and the police officers by whom he was engaged to provide legal advice were confidential communications made between the client and a lawyer for the dominant purpose of providing legal advice to the client. Subject to one qualification discussed below concerning potential waiver, there is no doubt that they are not subject to the disclosure requirement under the subpoena.

Communications between Mr Murphy and the Police Association

[14] The records and communications referred to in categories (a)(ii) and (xi) above are between Mr Murphy and officers of the Police Association. As described above, Mr Murphy was retained by the Police Association to provide legal advice to the police officers involved in the incident. Each of those police officers is properly characterised as the "client" for the purposes of the claim. The Police Association was not a client in the sense of it receiving legal advice in respect of its own personal interests. The Police Association is perhaps best characterised as an agent of the officers in the more general sense of that term.

[15] Under the second limb of the privilege in s 119 of the *ENULA* (in combination with the extension effected by s 131A of the *ENULA*), the communications with the Police Association will be exempt from the

disclosure requirement under the subpoena if they were confidential communications for the dominant purpose of the client being provided with professional legal services relating to an existing, anticipated or pending proceeding in which the client is or may be a party. There is no doubt that the communications were for the sole purpose of the client being provided with professional legal services. However, there were no proceedings then in train.

[16] Despite that, at the time of the communications there was a very real possibility that the clients might be subject to some form of criminal or disciplinary proceeding. It may be noted in that respect that an Australian proceeding is defined broadly to include a proceeding (however described) before a person or body authorised by an Australian law to hear, receive and examine evidence. In order for proceedings to be "anticipated", there does not need to be a certainty, or even a likelihood, that they will be commenced. Similarly, that analysis does not require an examination of whether there were reasonable grounds for the commencement of proceedings. All that is required is that they be anticipated, and it was that anticipation which led to Mr Murphy's engagement.

[17] That leaves the question whether each of the communications between Mr Murphy and the Police Association was a "confidential communication". As described above, that requires that the communication be made in such circumstances that the maker or the

recipient was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law. It is well recognised that communications made in the course of certain categories of relationship have the quality of confidence. Examples include doctor and patient, psychologist and client, cleric and communicant, social worker and client, journalist and source and spousal communications. However, the categories of relationship in which communications might be considered confidential are not closed, and it is necessary to focus on the quality or nature of the relationship, rather than simply on the precise nature of the obligation to preserve the confidence.

[18] As is apparent from the definition of "confidential communication" in s 117 of the *ENULA*, it extends to any communications and records of them made in circumstances where one of the parties is under an obligation (whether legal, ethical or moral) not to disclose them. In the application of that test, there can be no doubt that a third-party communication between a professional association with the role of protecting the interests of its members, and a legal practitioner retained by that association to provide legal advice to certain of those members, has the necessary quality of confidence where its subject matter involves the provision of that advice. Accordingly, the two communications between Mr Murphy and the Police Association are exempt from the disclosure requirement under the subpoena.

[19] Even if I am wrong in that conclusion, each of the computerised file notes of those communications with officers of the Police Association is a "confidential document" prepared by Mr Murphy for the dominant purpose of providing legal advice to his client. On that characterisation, they also attract client legal privilege under the terms of s 118 of the *ENULA*.

Possible waiver

[20] The records and communications referred to in categories (c) and (d) above constitute a record of what the respective clients told Mr Murphy in relation to the shooting incident in the course of the professional relationship, and a request by Mr Murphy for the clients' consent to provide that record to the Police Association. Although it is not apparent from the records and communications that the material was in fact provided to the Police Association, the most likely and reasonable inference is that it was. That raises the question whether there has been a loss of client legal privilege by reason of waiver.

[21] Section 122 of the *ENULA* deals with loss of privilege due to what is described at common law as waiver. It provides:

> **Loss of client legal privilege – consent and related matters**
>
> (1) ….
>
> (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would

result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(4) ….

(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:

(a) the substance of the evidence has been disclosed:

(i) in the course of making a confidential communication or preparing a confidential document; or

….

(b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) ….

[22] Even if it was the case that the records and communications referred to in categories (c) and (d) were disclosed to the Police Association, there was no consequential loss of client legal privilege. The operation of s 122 of the *ENULA* is predicated on the client acting in a way that is inconsistent with the maintenance of the privilege. That is consistent with the common law principles, under which the courts will impute an intention to a party to waive privilege only where the actions of a party

are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect: see, for example, *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at [152]. The drawing of such an imputation will ordinarily require a person to make an assertion or bring a case which is either about the contents of a privileged communication, or which necessarily lays open the confidential communication to scrutiny. An inconsistency thereby arises between the act and the maintenance of the confidence, and allowing the claim to proceed without disclosure of the communication will ordinarily give rise to forensic unfairness.

[23] For that reason, a voluntary disclosure of privileged communications to a third party will not necessarily waive privilege: see, for example, *Mann v Carnell* (1999) 201 CLR 1; *Goldberg v Ng* (1995) 185 CLR 83. Whether it does will depend upon the nature and circumstances of the disclosure. In this particular case, there was no inconsistency between the maintenance of the privilege by the police officers concerned, and the communication of their instructions to the Police Association. As already stated, the Police Association was properly characterised as their agent in the general sense, the police officers have not made any case or assertion about the matter, and the maintenance of the privilege gives rise to no specific unfairness. To the extent it might be considered necessary to identify some provision within s 122 of the *ENULA* expressly exempting the disclosure from a loss of privilege, the

communication between Mr Murphy and the Police Association (if there was one) was "confidential" in the relevant sense.

Ruling

[24] The documents in Mr Murphy's possession, custody and control falling within the scope of the subpoena issued on 15 February 2021 are exempt from the disclosure requirement on the basis that they are subject to client legal privilege pursuant to ss 118, 119 and 131A of the *ENULA*.

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