R and Stokes [2000] NTSC 38

PARTIES:	THE QUEEN and TREVOR JOHN STOKES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC9919706
DELIVERED:	8 June 2000
HEARING DATES:	30 May 2000
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Crown:	Rex Wild, QC with J Martin
Defendant:	Jon Tippett

Solicitors:

Crown:	Director of Public Prosecutions
Defendant:	Dalrymple and Associates

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R and Stokes [2000] NTSC 38
No. SCC9919706

BETWEEN:

THE QUEEN
Crown

AND:

TREVOR JOHN STOKES
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 8 June 2000)

Mildren J*:*

Facts

[1] The Crown case is that Greg Bebensee was murdered by the accused in Packard Place, Darwin shortly prior to 3:30 am on the morning of Sunday 6 June 1999. The motive was robbery. At the time of his death he had with him his wallet. This was produced by Stokes to Lee McLaughlin shortly after the killing at Shady Glen Caravan Park. It was hidden the next day at Howard Springs but recovered by police, with McLaughlin's assistance, in August 1999. Both Stokes and McLaughlin were short of cash at the

relevant time. On the day following the murder, Monday 7 June, they left the caravan park and travelled to Katherine and then to Kununurra.

[2] Stokes confessed the killing to McLaughlin. Initially he said that he had killed the man following a scuffle and disagreement at Shenannigans Irish Pub Restaurant & Bar involving a girl. Subsequently, whilst at Kununurra, he told McLaughlin that he had moved the car (which had been parked in Mitchell Street) to the top of the Esplanade and removed the hammer from the boot and then walked around until he found someone to mug. Bebensee was that person.

[3] It is submitted that the expressions "mug" and "roll" may be used interchangeably as colloquial expressions meaning to assault and rob: see *The Macquarie Dictionary* (Revised Ed., 1985); *Collins English Dictionary* (4th Australian Ed., 1998): *The Macquarie Thesaurus* (1984); *Short Statement of Facts* presented by the Crown on previous *voir dire* hearing.

[4] In support of the Crown's case which depends largely on the account of Lee McLaughlin and his attribution to the accused of a confession (supported by other material) the Crown relied on the evidence of Christopher Roy Cathcart. The defence oppose the calling of this evidence.

[5] The witness, Christopher Cathcart, can give evidence insofar as the previous submissions are concerned to the following effect:

> During the evening of Saturday 5 June and Sunday 6 June 1999, while he was in Shenannigans, Trevor Stokes approached him and said, "There is a guy with a wallet full of cash, help me roll him". He did not see the person Stokes was talking about. He declined to be involved. It was after Lee McLaughlin and Scott Cathcart had left the Bar. It was about a half-hour before closing time. A short time after, Stokes repeated the suggestion. Cathcart said "No, fuck off".

Defence objections

[6] **Hearsay**

Mr Tippett for the accused referred to *Walton v The Queen* (1988-89) 166 CLR 283. However, that was a case involving a statement made by the deceased as to her own state of mind, not made in the presence of the accused and is distinguishable on that basis. A statement by the accused going to his own state of mind is not hearsay. Evidence of an accused's state of mind is always admissible if it is relevant to the charge.

[7] **Not relevant to the charge**

Mr Tippett submitted that the evidence was not relevant because the intention exhibited, if the words were spoken to Cathcart, an intent to rob someone else, not the deceased, and do not indicate an intent to kill. The Director of Public Prosecutions submits that it is highly relevant because:

(a) both the accused and the deceased were in the bar that evening;

(b) it shows the accused, whom the Crown allege was short of money, planned to rob someone;

(c) the accused was prepared to use force - this is plain from the use of the word "roll" and from the fact he thought he needed assistance;

(d) the intent formed was repeated later in the evening when the accused again approached Cathcart.

(e) the deceased's death occurred early that morning - only a matter of a few hours later - and he was robbed of his wallet;

(f) the Crown does not have to rely on intent to kill to obtain a conviction for murder;

(g) the Crown can lead other evidence showing that the accused committed the robbery and the murder.

Conclusion

[8] The evidence is relevant as to motive and intent and is therefore admissible: see *Plomp v The Queen* (1963) 110 CLR 234 at 242, per Dixon CJ and at 247-256 per Menzies J. It is also a piece of circumstantial evidence which, together with other evidence the Crown proposes to lead, is admissible to see whether the inference the Crown wishes to draw - that the accused was the person who robbed and murdered the deceased - can be drawn: see *Chamberlain v The Queen* (1983-4) 153 CLR 521 at 535-36. The evidence goes beyond mere disposition, or propensity.

[9] I have considered Mr Tippett's point that the evidence of an intent to rob is not about an intent to rob and murder the deceased. In my opinion, that

matters not. The evidence, if accepted, does not show that the defendant only wanted to rob a particular person and no one else. It would be open to a jury to conclude that he wanted to rob somebody - the precise victim did not matter - because he needed money. That intent is also relevant to the charge of murder because of s162(1)(b) and 162(3) of the *Criminal Code*. It is sufficiently proximate in time and place to be probative and relevant: c.f. *R v Wilson* (1970) VR 693 at 695-6, and in the circumstances, goes beyond mere disposition or propensity: see *Harriman v The Queen* (1989) 167 CLR 590 at 593-4.

[10] The Crown submits it is admissible as part of the *res gestae*. I do not accept this. The *res gestae*, i.e. the killing and robbing of the deceased, took place at least some hours later. I do not think it is admissible in accordance with the reasoning of Lord Wilberforce in *Ratten v R* (1972) AC 378 at 389-90, as the drama leading up to the climax had not yet begun: see also *Pollitt v The Queen* (1991-92) 174 CLR 558 at 582-3 per Brennan J.

[11] There are no grounds for excluding the evidence in the exercise of discretion. The evidence will be admitted.

Other Issues Raised

[12] Mr Wild QC, conceded the statement by the accused, "If only they knew who they were talking to", was relevant only to credit and is inadmissible at this stage, but may become admissible at a later stage depending on the course of the trial. No ruling is required at this time.

[13] The statement in Kununurra where Stokes said, "There are a lot of drunks about tonight", requires no ruling at this time as Mr Wild QC was going to review his position in relation to that matter.

[14] The statement that the accused was "Sleeping with a steak knife tonight also requires no ruling at this time as Mr Wild QC was going to review his position in relation to that matter.

[15] The ruling on the statement by Stokes to Cathcart "We are going to Cairns", is reserved to a later stage of the trial.

[16] Joy Kuhl's evidence regarding blood in the car does not call for a ruling at this stage.

[17] The question of whether or not the Crown ought to call Colin Pierce is also reserved for later in the trial.