R v Ashley [2014] NTSC 26

PARTIES:	The Queen
	v
	Ashley, Darren Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21218788
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JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE – Hearsay – Exception to hearsay rule – "available to give evidence" – exculpatory statements by accused.

JURIES – jurors note – application to discharge jury – reasonable apprehension of bias – jury directed – jury not discharged.

Evidence (National Uniform Legislation) Act (NT) 2011, ss 59, 65, 66.

R v Crisologo (1997) 99 A Crim R 178; *R v Parkes* (2003) 147 A Crim R 450; *Dupas v The Queen* (2010) 241 CLR 237; *Webb v The Queen* [1993-1994] 181 CLR 41; *Smith v The State of Western Australia* [2014] HCA 3, (12 February 2014), referred to.

REPRESENTATION:

Counsel:

Prosecution:	D Morters
Accused:	A Elliott

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Robert Welfare

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Ashley [2014] NTSC 26
No. 21218788

BETWEEN:

THE QUEEN

AND:

DARREN ANTHONY ASHLEY
Accused

CORAM: BLOKLAND J

REASONS FOR RULINGS

(Published 3 July 2014)

Introduction

[1] These are the reasons for two rulings given during the course of a trial in Alice Springs. Reasons for pre-trial rulings unrelated to these issues were published on 24 April 2014.[1]

[2] These issues arose when the accused was on trial for the murder of Kirsty Ashley.

(i) The Admissibility of Certain Exculpatory Statements made by the Accused to other witnesses to be called by the Crown

[3] Some brief history is required to understand the context of this ruling. When the accused was interviewed by police on 15 May 2012, in short, as

[1] [2014] NTSC 15.

well as denying his own involvement, he told police of his belief that one Kim Christenson or bikies associated with Kim Christenson were the deceased's likely killers. He also spoke of the threat to his own life from those same persons, and of suspicious incidents involving unknown persons at his block at Lillicrap Road, Ilparpa.

[4] References were made by some witnesses to Kim Christenson in their evidence during the course of the trial. For example, Heather Steadman and Arial Ashley were asked about whether either of them had heard the deceased speak of Kim Christenson. Justin Rennie was asked about whether he knew of Kim Christenson or whether he knew if the accused knew of him.

[5] The Crown sought to exclude a portion of the evidence of three witnesses about what the accused had told them about persons behaving suspiciously around him. The Crown submitted this was inadmissible hearsay or was in contravention of the rule excluding credibility evidence about a witness.[2] The evidence, if accepted, was potentially exculpatory and relevant to an aspect of the defence case. The subject evidence was contained in the Crown's disclosed brief.

[6] Those portions of evidence objected to were as follows:

[2] Part 3.7, *UEA* (NT).

(a) Statements by Jaryn Ashley contained in the Child Forensic Interview dated 15 May 2012 when Jaryn Ashley told police:[3]

> Ah, there was something weird that happened a few weeks ago, my dad told me, exactly what happened.
>
> He was in the shower and he heard somebody come into the demountable, while he was in the shower and the shower like you can hear it really loud. He just thought it was me but he came over to the caravan and I was still asleep so he went looking and there was no one there. So someone walked in there while I was asleep and he was in the shower.
>
> Um … not sure how long ago that was. Maybe a week.
>
> Nah, he's had some trouble with his brother before, but that's all resolved now, so.

(b) The following part of Jacinta Ashley's statement to police of 15 May 2012:

> Dad was also sounding like he was being quite paranoid. He told me that on the night he left he was in the shower and heard loud footsteps in his house which had worried him.

(c) The following part of David Wallace's statement to police of 15 May 2012:

> During one of the phone calls with Darren he told me that he was threatened by a biker looking fella with a gun. He said a car arrived and there were a few people in it but only one got out threatening him. He said that he thinks that Kim, I am not sure of his surname, sent this bloke to threaten him. Kim is an ex-partner of Darren's younger sister and is in a bike group either the Descendants or the Comancheros motor cycle club.

[3] Police questions are excluded here.

[7] Clearly this evidence to be given by these three witnesses is hearsay within the definition of s 59 *UEA* as the statements amount to previous representations communicated by the accused to the respective witnesses and would be used to prove the existence of the facts asserted. The focus of the argument at trial was whether these statements fell within an exception to the rule prohibiting hearsay.

[8] The exception to the hearsay rule in s 65 *UEA* in criminal proceedings may be enlivened if the maker of a previous representation, here the accused, is "not available". The exception to the hearsay rule in s 66 *UEA* in criminal proceedings may be enlivened if the maker (1) "is available to give evidence" and (2) "has been or is to be called" to give evidence. Both sections provide that additional requirements be met before hearsay can be admitted. Those requirements are not material here.

[9] The admission of evidence in exception to the hearsay rule under s 65 or s 66 turns on the question of the availability of a witness, or a proposed witness to give evidence. I acknowledge that neither section sits comfortably in circumstances where the accused is the person who made the previous representations sought to be led in evidence. This is because, as pointed out strongly on behalf of the Crown, as matter of trial procedure and respecting a fundamental right enjoyed by accused, it cannot be said that an accused is "available" to give evidence "or is to be called" (in terms at least of s 66(2) *UEA*) until an accused formally elects to give evidence. On the

Crown's argument the evidence to be called in exception to the hearsay rule may then be called in the defence case, once the accused has given evidence.

[10] I acknowledge the strength of the Crown's argument, particularly as it resonates with how rebutting an allegation of recent invention might traditionally have been dealt with. If the evidence was to be admitted in exception to the hearsay rule, it may of course additionally be used to assess the truth of the facts asserted.

[11] On being told by counsel for the accused that the accused *would* be giving evidence, it seemed the accused should be regarded as a witness *available* to give evidence as the Court was assured he was *to be called*. While the underlying procedural point raised on behalf of the Crown is firmly acknowledged, there is nothing in the *UEA* to indicate that hearsay evidence of a representation made by an accused, notwithstanding its exculpatory nature, should be treated any differently from previous representations made by other witnesses.

[12] If all evidence of this kind can be admitted only *after* an accused has given evidence, there may be residual procedural difficulties. Jaryn Ashley's evidence is a case in point. The material sought to be excluded by the Crown in the prosecution case would then in theory be called after the accused gives evidence. This would require a child witness to be called twice, in addition to his participation in the Child Forensic Interview. Adoption of a procedure leading to such a result should ideally be avoided.

[13] I was persuaded the exception provided in s 66 *UEA* could apply in these circumstances. The dictionary, clause 4(1) of the *UEA* Dictionary provides "a person" is taken not to be available to give evidence about a fact if: (relevantly) (b) "the person is, for any reason other than the application of section 16 (competence and compellability – judges and jurors), not competent to give the evidence."

[14] An accused is not competent to give evidence as a witness for the prosecution[4] but of course is competent to give evidence in their own case. The language of s 66 does not require that a proposed witness be compellable; clearly an accused is not. Given the emphatic statement at the time of argument on this point that the accused would give evidence, it seemed appropriate to consider him "available" to give evidence as he was "to be called".

[15] In *R v Crisologo*[5], Simpson J (with whom Hunt CJ at CL and James J agreed) held that statements made by an accused person to others at an earlier relevant time are a precise counterpart of complaint evidence admitted in sexual assault and other cases. The same principles concerning admission apply as between admission of complaint evidence and evidence of relevant out of court statements by an accused that otherwise comply with s 66 *UEA*.[6] Like complaint evidence, if admitted, it is, since the

[4] Section 17(2) *UEA*.
[5] (1997) 99 A Crim R 178.
[6] *R v Crisologo* (1997) 99 A Crim R 178 at 188-189.

commencement of the *UEA*, admitted as evidence of the truth of what was said.

[16] Broadly, the approach by Ipp J[7] in *R v Parkes*[8] influenced the ruling made here, although it was approached with a degree of caution as that decision concerned the Court of Criminal Appeal (NSW) discussing with hindsight the position after trial. Ipp J summarised the position as follows:[9]

> "Availability," in the sense the term is used in s 65 and s 66, concerns the availability of a witness to be called to give evidence and to be cross-examined. That is, availability to testify about the veracity of representation previously made by the witness to another person. In the present circumstances, the critical aspect of the appellant's availability is whether he would notionally be available, as part of his case, to confirm that the statement he had made to Jenkinson was true. The appellant was, in fact, so available. In the circumstances, in my opinion, the appellant was available to give evidence within the meaning of s 66(1). In other words, the appellant was available, as part of his case (albeit not as part of the Crown case) to give evidence about the representation he had made to Jenkinson.

[17] It was understood at the time of making this ruling that the Crown would not suffer the disadvantage of being unable to cross examine the accused as to the veracity of the representations, given the assurance the accused would give evidence. As a safeguard, it was indicated that if the accused did not give evidence in accordance with the stated intention to do so, remedial rulings would be made.

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[7] With whom Bell J agreed; Hulme J dissented on the point.
[8] (2003) 147 A Crim R 450.
[9] At para 50.

[18] Regrettably, as the accused was unsuccessful in an application to have the jury discharged in response to a juror's note (discussed below), Counsel for the accused advised the court later in the trial that the accused would not give evidence. As a consequence, during summing up, the jury were directed to disregard the evidence initially admitted as set out above.

(ii) Ruling Refusing to Discharge the Jury after Receipt of a Juror's Note

[19] On 21 May 2014, I received a note from a juror. I disclosed the contents of the note to Counsel. The juror had requested the note be kept confidential, hence it is not reproduced here, but the note is filed should it be required for review in another place. The Court was closed to receive submissions out of respect for the request on the part of the juror for the note to remain confidential.

[20] After hearing submissions on 21 May 2014, I indicated I would not discharge the jury as requested on behalf of the accused and would continue the trial, however, I indicated I would continue to consider the matter and take into account any further authorities if the parties chose to provide them.

[21] Extremely detailed further written submissions were received from Counsel for the accused. After reading those submissions I confirmed the decision to decline to discharge the jury.

[22] Notwithstanding the juror's note raised an issue of concern, it was appropriate in my opinion to give directions to the jury reminding the jury

of the presumption of innocence, the need to be impartial and the duty to keep an open mind until all of the evidence was heard as well as addresses and the summing up. It is considered to be "akin to a species of a constitutional fact that the jury acts on the evidence and in accordance with directions.[10]

[23] I appreciate the test is that as set out in *Webb v The Queen*,[11] namely, whether the circumstances are such that a fair minded observer would have an apprehension of lack of impartiality on the part of the jurors and that despite a warning, the circumstances give rise to a reasonable apprehension on the part of a fair minded and informed member of the public that the juror or jury will not discharge their task impartially. The test in *Webb's* case was affirmed in *Smith v The State of Western Australia*.[12] The matters raised here were raised during a completely different stage of the proceedings than in *Smith v The State of Western Australia,* concerning the discovery, post-verdict of a juror's note. In this case it is not helpful to determine this matter solely by reference to the "exclusionary rule". That rule does not extend to evidence from sources outside of the members of the jury. Clearly the matters raised in the note were not external to members of the jury or jury room. The matters raised, although not formally part of deliberations at the end of the trial, were part of confidential jury discussions.

[10] *Dupas v The Queen* (2010) 241 CLR 237 para [28].
[11] [1993-1994] 181 CLR 41.
[12] [2014] HCA 3, (12 February 2014).

[24] The focus here was whether a fair minded person would reasonably apprehend lack of impartiality. It must be remembered the note is the reported impression or perceptions of one juror in relation to some other jurors. No other juror joined in the note or wrote a similar note. There was no indication of coercion or other misconduct. The juror who wrote the note may be regarded as appropriately sensitive to and would keenly observe the directions concerning the presumption of innocence. The juror can obviously well articulate the directions given on that topic and related issues. Not all members of the public who then become jurors necessarily express themselves in the same articulate way, whether that be in the jury room or not. The note must also be seen in the context of a relatively lengthy trial and what could only be described as a strong Crown case. The note reports internal jury discussions. It is not appropriate to speculate on the dynamics of those discussions.

[25] Although the contents of the note were enough to raise concerns, in my opinion it was the type of matter appropriately dealt with by direction. Having given the jury further lengthy directions, shortly after receiving the note, and again during summing up, a fair minded observer could be in no doubt that the jury followed those directions and determined the issues impartially. It must be remembered that directions relevant to the matters raised in the note were given both orally and in writing at the commencement of the trial; shortly after the note was received and during

summing up. The jury received at least four sets of relevant directions on the points raised in the note.

[26] It may be noted that no further concerns over the balance of the trial were raised by the juror or any other juror after the direction was given in response to the note.

[27] The collective knowledge of, in this case, 14 people and the diversity of experience that goes with this works as a safeguard against one opinion dominating discussion in the jury room.[13] It is this collectiveness and diversity which underpins the function of the jury in our criminal justice system.

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[13] At the time of note from juror there were 2 reserve jurors.