R v Buttery & Ors [2012] NTSC 103

PARTIES:	THE QUEEN v BUTTERY, Bronwyn, MALYSCHKO, Christopher and GRIEVE, Zak
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21140102, 21136198 and 21136195
DELIVERED:	21 December 2012
HEARING DATES:	14 November 2012
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Criminal Law – Evidence – Defence of Provocation - whether evidence by a third party of the accused's statements to a third party about violence inflicted or threats made by the deceased toward the accused admissible - whether evidence of the victim's violent reputation admissable.

Criminal Code (NT)

HML v The Queen (2008) 235 CLR 334; *Kirby v The Queen* (1973) 129 CLR 460; *Osland v The Queen* (1997) 95 A Crim R 479; *R v Connolly* (1991) 2 QdR 171; *R v Ellem* (No 1) (1995) 2 QdR 542; *Re Knowles* (1984) VR 751; *Stuart v The Queen* [2010] NTCCA 16, followed.

Osland v The Queen (1998) 197 CLR 316; *R v Ivanovic* [2005] VSCA 238; *Walton v The Queen* (1997-1998) 166 CLR 283, referred.

REPRESENTATION:

Counsel:

Crown:	L Taylor SC and M Thomas
First Defendant:	R Wild QC
Second Defendant:	J Adams
Third Defendant:	J Tippett QC

Solicitors:

Crown:	Director of Public Prosecutions
First Defendant:	Da Silva Hebron
Second Defendant:	Louise Bennett
Third Defendant:	Maleys

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

R v Buttery & Ors [2012] NTSC 103
No. 21140102, 21136198 and 21136195

BETWEEN:

The Queen
Crown

AND:

Bronwyn Buttery, Christopher Malyschko and Zak Grieve
Defendants

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 21 December 2012)

[1] Each of the accused had been indicted to stand trial for the murder of Raffaeli Niceforo on or about 24 October 2011 at Katherine. The accused have each pleaded not guilty. Mrs Buttery pleaded guilty to manslaughter, but not guilty to murder. That plea was not accepted in full satisfaction of the indictment by the Crown and the matter has proceeded to trial.

[2] It is anticipated that Mrs Buttery will seek to have the partial defence of provocation under section 158 of the *Criminal Code* left to the jury and that the accused, Malyschko, will seek to raise self-defence under section 43BD

of the *Criminal Code* and / or will seek to have the partial defence of provocation under section 158 of the *Criminal Code* left to the jury.

[3] The Crown case is that Mrs Buttery had been in a relationship with the deceased, which begun in 2007 in Adelaide. Subsequently, the deceased moved to Katherine as did Mrs Buttery in 2008. They purchased the Waterworks Drycleaning and Laundry business in Third Street, Katherine. The business was purchased solely in Mrs Buttery's name apparently because the deceased was bankrupt. The Crown accepts that the relationship between Mrs Buttery and the deceased was somewhat volatile and that, in June 2011, Mrs Buttery moved out of the unit which she was sharing with Mr Niceforo and obtained a domestic violence order against the deceased, the terms of which were a full non-contact order relating to both herself and to her son, the accused – Christopher Malyschko. Subsequently, that order was varied to allow contact and Mrs Buttery resumed the relationship for a brief period of time. On 20 September 2011, the relationship ended as a result of an incident which occurred at the Waterworks laundromat. As a result of that altercation, the deceased was arrested on 20 September and charged with one count of aggravated assault and with three counts of breaching the domestic violence order. The deceased was granted bail.

[4] On 20 September 2011, an application was made to vary the domestic violence order made on 2 June, but that application and the charges laid on 20 September were adjourned on 20 October to the Katherine Magistrates Court on 17 September 2011. On 20 October 2011, the deceased's bail was

varied to prevent him from approaching, contacting or remaining in the company of either the accused, Buttery, or the accused, Malyschko, except through a lawyer for business requirements. At that stage, there was a dispute between Mrs Buttery and the deceased concerning the division of property.

[5] The Crown case is that, on or about 24 September 2011, Mrs Buttery engaged others through her son, Malyschko, to murder the deceased. Some $15,000.00 was to be paid to those who will carry out the murder. The plan to execute the murder was formulated by the accused, Malyschko, with the assistance of the accused, Grieve, and a third person by the name of Darren Halfpenny, who has already pleaded guilty to the deceased's murder and has been sentenced.

[6] The case for Mrs Buttery and for the accused, Christopher Malyschko, is expected to be that the deceased was a violent person who had threatened to kill Christopher Malyschko. It is proposed by the Crown that they call evidence concerning convictions of the deceased for various offences which the deceased had committed between October 1999 and subsequently, and also the facts and circumstances relating to the domestic violence orders are intended to be led as well.

[7] The Crown has declined to lead evidence of a prior conviction in 1992 of the deceased for assault occasioning bodily harm on the basis that the deceased at that stage was only 21 years of age and it occurred 15 years before Mrs

Buttery and the deceased begun their relationship. The conviction was 19 years old at the time the deceased was killed and the Crown submits that this is irrelevant to the facts in issue in this trial. No submission was made by counsel for the accused that this evidence should be led.

[8] It is common ground that the kinds of evidence which the parties wish to lead fall into the following categories:

1. The actual knowledge which either Mr Malyschko or Mrs Buttery had of the deceased's acts of violence.

2. Evidence of the deceased's reputation for violence which may be within the knowledge of the accused.

3. Evidence of the deceased's reputation for violence which may not be within the accused's knowledge.

4. Statements by the accused, Mrs Buttery, made to others before the killing as to Mrs Buttery's beliefs concerning the deceased's violence.

5. Statements made by Mrs Buttery to a friend about certain marks around her throat which were allegedly caused by the deceased.

[9] As I understand it, the Crown intends to rely upon certain medical records relating to Mrs Buttery and certain injuries which she received apparently for the purpose of showing that, at the time, Mrs Buttery made no complaint to the doctors concerned that she was assaulted by the deceased.

[10] It is common ground that evidence of bad character of the deceased is admissible, if relevant. The Crown accepts that if Mrs Buttery or Mr Malyschko knew of the deceased's history or reputation for violence, that evidence would be relevant to the assessment of the degree and nature of the accused's apprehension of danger and to the assessment of who is the aggressor. The Crown also accepts that, even if the accused did not know the deceased's history or reputation, the evidence may still be relevant to the jury's assessment of who was the aggressor at the relevant time: see *R v Ellem (No 1)*[1] and *Re Knowles*.[2]

[11] I agree with the submissions of the Crown that evidence of a statement made by Mrs Buttery to a third person as to the source of the marks on her neck is inadmissible as hearsay and, because of this, self-serving. Such evidence will not be admitted.

[12] As to the evidence concerning the medical records, if the sole purpose of tendering the records is to show that no complaint was made, in my opinion, the tendering of the medical records are inadmissible for that purpose. Evidence of a complaint is only admissible as an exception to the hearsay rule in very limited circumstances. At common law, it is confined to cases where the complainant is the victim of a sexual assault.[3] Otherwise, evidence of a complaint is not only inadmissible hearsay, it is an attempt by

[1] (1995) 2 QdR 542.
[2] (1984) VR 751.
[3] *Kilby v The Queen* (1973) 129 CLR 460 at 471-472.

the witness to lift himself by his own bootstrap to enhance his own credit.[4] Similarly, evidence of non-complaint is not admissible in the Crown case because that evidence is relevant only to the accused's credit. It is a matter, however, which could be the subject of cross-examination of the accused[5] and, in that event, it will be open to counsel for the accused to re-examine on that issue. However, it would not be open to the defence to lead evidence as to why there was no complaint made in chief because that would violate the "bolster rule".[6]

[13] The other area of dispute is evidence by a third party of the accused's statements to a third party about violence inflicted upon that accused by the deceased, or about threats the deceased allegedly made to that accused given by that third party. This is objected to as hearsay and, therefore, inadmissible. Plainly, the evidence cannot be led for the purpose of proving the truth of the complaints as that would be hearsay, but it was submitted that the evidence could be led if it showed the state of mind of the accused at the time the statement was made if that state of mind was relevant to the accused's state of mind at the time of the homicide. Reliance was placed by Mr Adams on *Walton v The Queen* and, in particular, the opinion of Mason CJ,[7] where his Honour said:

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[4] *R v Connolly* (1991) 2 QdR 171 at 173-174.
[5] See *Osland v The Queen* (1997) 95 A Crim R 479 at 501 (Full Court of the Supreme Court of Victoria).
[6] *HML v The Queen* (2008) 235 CLR 334 per Heydon J; *R v Connolly* (1991) 2 QdR 171 at 173-174; *Stuart v The Queen* [2010] NTCCA 16.
[7] (1997-1998) 166 CLR 283 at 288.

> "The hearsay rule applies only to out-of-court statements tendered for the purpose of directly proving that the facts are as asserted in the statements. Generally speaking, evidence of out-of-court statements relied on for another purpose is not excluded by the rules. Thus, evidence of a relevant out-of-court statement is admissible evidence of the maker's knowledge or state of mind when he made the statement in a case where such knowledge or state of mind is a fact in issue or a fact relevant to a fact in issue: *Reg v Blastland*. Similarly, a person's statements or declarations and accepted means of proving his intentions in circumstances where it is material to prove what those intentions were."

[14] Counsel for the Crown referred me to the decision of the High Court in *Osland v The Queen*.[8] It is perhaps important to remember precisely what it was that was in issue in that case. *Osland* was a battered-wife-syndrome case. Counsel for the accused sought to elicit evidence from a witness called by the Crown of a statement which the accused had made in late 1983 or early 1984, in which the accused said she had left Western Australia and moved to Victoria "to get away from [the deceased]". This was to be followed by further questions directed to eliciting what the witness recall the accused gave as her reasons for wanting to "get away from [the deceased]".

[15] The Full Court said in relation to that:[9]

> "The trial Judge excluded the evidence as hearsay and, in our view, it was right to do so. It was said below that the evidence has been led to prove the state of the mind of the applicant in 1983 to 1984 and it is clear, therefore, that it has been led to prove the truth of the contents of the out-of-court assertions made by the applicant to the witness. It was, therefore, hearsay and inadmissible."

[8] (1998) 197 CLR 316 at 381 per Kirby J and at 412 per Callinan J.
[9] (1997) 95 A Crim R 479 at 501.

[16] It was in the light of this ruling that the matter was commented upon by two Justices of the High Court in *Osland v The Queen*. Kirby J said:[10]

> "The appellant argued before this Court that the trial Judge had erred in refusing to admit hearsay evidence of what the appellant had told others about the violence inflicted on her by the deceased and the threats which he allegedly made to her. Such evidence was rightly rejected. The cases relied upon by the appellant to justify the admission of the hearsay evidence are distinguishable. Such cases apply where the evidence falls into the *res gestae* exception, relates to the state of mind of the deceased or where there is direct evidence as to the deceased's violent character."

[17] Callinan J said:[11]

> "The submission finally made, that some evidence objected to as hearsay, was wrongly rejected. That evidence (mainly of prior consistent complaints) apparently intended by the appellant's counsel as a pre-emptive strike against a possible line of questioning by the Crown was rightly rejected, although much of it, in any event, later found its way into the evidence."

[18] The point of distinction which counsel for the accused made is that if the evidence is not relied upon as proof of the truth of the facts being asserted, but only evidence as to the accused's state of mind, then it may be admissible if the accused's state of mind at that time was relevant. In this case, there is evidence also that at the time that at least one of the statements was made, the accused who made the statement was seen by the witness to be distressed. In my opinion, the evidence of the accused's distress would be admissible evidence because it is something which the witness directly observed Such evidence may have a tendency to

[10] At 197 CLR 316 at 381 para 172.
[11] At p 412 para 255.

corroborate the accused's evidence, it is later given by the accused in evidence, that she was fearful of the deceased's violence towards her, and the statement made to the third party should be admitted to give that evidence context. It is not, however, evidence of the truth of the facts therein asserted; it is only of the accused's state of mind or her belief at the relevant time.

[19] The other authority to which we were referred by counsel for the Crown, *R v Ivanovic*,[12] raised a similar issue. The principal reason for rejecting the evidence in that case was because the assertions which were sought to be led concerned a potential threat from an unidentified person for reasons which were also unidentified and were, therefore, simply incapable of bearing on the probabilities that the appellant's state of mind when confronted by the deceased was out of fear. Thus, the connection sought to be made between the statements some time earlier and the events which occurred at the time of death was mere speculation.

[20] Finally, I have been asked to rule on the inadmissibility of the statements given by the accused, Mr Malyschko, and by the accused, Mrs Buttery, to the police which formed the basis of the charges which were brought but remained unresolved in the Katherine Magistrates Court at the time of the deceased's death. Counsel for the Crown objected to the tender of those statements by counsel for the accused. As presently advised, I am unable to see how those statements are admissible, although much would depend on

[12] [2005] VSCA 238 at [42-51].

the way the evidence unfolds. As the jury will already have had before them the fact that the accused was arrested, charged and bailed and that he had the terms of his bail altered, this is clearly evidence that may be led to prove that the accused, Mrs Buttery, and the accused, Mr Malyschko, had a belief that they were in danger of the accused perpetrating violence upon them. The accused cannot tender through a third party evidence as to the nature of the allegations made against the deceased as that would clearly be hearsay. However, depending upon the way the evidence unfolds, it may be that the evidence contained in those statements will become admissible in another way, but I will leave discussion of that topic until such time as it arises.