R v Hair [2009] NTSC 9

PARTIES:	THE QUEEN
	v
	BRENDON ANDREW HAIR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20713307
DELIVERED:	25 March 2009
HEARING DATES:	24 March 2009
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMNAL LAW – practice – evidence – failure by Crown to call witness – witness unreliable – defence wish to cross-examine witness – defence agree witness is unreliable – whether grounds for stay made out – stay refused

Citations:
Referred to:
R v Apostilides (1984) 154 CLR 563
R v Busson (2007) SASC 179, unreported
R v Kneebone (1999) NSWCCA 279
R v Russell-Jones (1995) 3 All ER 239
Whitehorn v The Queen (1983) 152 CLR 657

REPRESENTATION:

Counsel:

Plaintiff:	T Berkley
Defendant:	P Elliott

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	

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

R v Hair [2009] NTSC 9
No. 20713307

BETWEEN:

THE QUEEN
Plaintiff

AND:

BRENDON ANDREW HAIR
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 25 March 2009)

[1] This is an application by the accused, Brendan Andrew Hair, for a stay of proceedings. Mr Hair is facing eight counts. His trial is due to commence shortly.

[2] Count 1 relates to possession of child abuse material. Counts 2 and 3 relate to distributing child abuse material to persons unknown. Counts 4, 5, 6, 7 and 8 are all possession counts.

[3] Counts 4, 5, 6 and 7 all relate to possession on the same date but relate to different material in different locations.

[4] Count 8 relates to an entirely different possession count and alleges a different date entirely.

[5] The application is based upon the position of the Crown in relation to the witness, Pauline Monica Myles, who is the accused's former wife. The evidence that Myles gave at the committal hearing related amongst other things to finding discs containing child abuse material in a safe in the accused's room which she accessed, and which she said she opened on a computer in the room. Subsequently she informed the police about this and, as a result of that, inquiries were made, search warrants obtained and various material found.

[6] Both parties agree that Ms Myles is an unreliable witness. However the accused wishes that Ms Myles be called by the Crown in order to cross-examine her, as I understand it, with a view to showing that she had a motive for wanting to place the child abuse material in the accused's possession without his knowledge and the opportunity to do so, at least in relation to some of the counts.

[7] The prosecutor tells me he has made a decision not to call Ms Myles and he has given me the reasons which are now on the transcript and which I will not now go into in any detail. Suffice it to say that I consider that the reasons are probably good reasons for not calling her.

[8] As Mr Elliott for the accused said, the case is rather an unusual one in that it would appear that the only way that the accused believes that he can raise

the possibility at trial that this material was planted by Ms Myles is for her to be called and cross-examined about that possibility.

[9] Mr Elliott was careful to say that he had no instructions that it was Ms Myles who put the material there. I understand that his client's position is that he did not put it there and therefore somebody else did.

[10] The evidence at the committal hearing was that Ms Myles was able to access the safe. She said initially that she knew the code to access the safe. Later she said that although she did not exactly know it because the code changed from time to time, she guessed what the code number was because it was a number which the accused used on other occasions as his PIN number whenever he needed a code number.

[11] In any event, the prosecutor has declined to call her and the question is whether, bearing in mind that Ms Myles is a witness who gave evidence at the committal, I ought to stay the trial as being unfair.

[12] Applications of this kind are quite rare. I know of only one similar case where an application for a stay was brought unless the prosecution presented a particular witness to the Court for cross-examination by an accused. It is not suggested, as I understand Mr Elliott, that the witness would be brought by the Crown to give evidence for the Crown; simply that the witness should be made available for cross-examination by counsel for the accused.

[13] The case to which I refer is *R v Busson*[1]. It is an unreported decision of Bleby J in the Supreme Court of South Australia. In that particular case the person whom the accused wished to cross-examine was a person who had originally been jointly presented with the accused on a charge of murder. The witness eventually pleaded guilty to the charge of murder and the accused wished the Crown to call the witness, whose name was Slade, for the purposes of cross-examining him.

[14] The application was refused on the basis that the judge did not think that the interests of justice required the prosecution to call Slade and that there was no justification for staying the proceedings unless and until the prosecution indicated that they would call Slade. I thought that rather odd. In any event, that was the ruling and the learned judge referred to the relevant authorities including *R v Apostilides*[2], *Whitehorn v The Queen*[3] and so forth.

[15] That the application is a proper one, I think, cannot be denied in the sense that the application has been made prior to trial and I see in the case of *R v Kneebone*[4], again an unreported judgment, this time of Greg James J with whom Spigelman CJ agreed, where it was said that should there be a problem as to whether a witness should be called or not, a ruling should be sought preferably in advance or alternatively immediately at the trial[5].

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[1] (2007) SASC 179, unreported
[2] (1984) 154 CLR 563
[3] (1983) 152 CLR 657
[4] (1999) NSWCCA 279
[5] see para [56]

[16] The relevant principles are stated in *R v Apostilides*[6]. As that case makes clear, the responsibility for deciding which witnesses the Crown intends to call is a responsibility which the prosecutor alone bears. As the trial judge, I may, but I am not obliged to question the prosecutor in order to discover the reasons which would have lead the prosecutor to decline to call a particular person.

[17] I am not called upon to adjudicate the sufficiency of those reasons. Nevertheless the reasons have been given. As I say, I am not called upon to adjudicate the sufficiency of those reasons.

[18] The third proposition is that whilst at the close of the Crown case I may properly invite the prosecutor to reconsider such a decision and to then have regard to the implications as they then appear to me at that stage of the proceedings, I cannot direct the prosecutor to call a particular witness.

[19] But I may, when charging a jury, make such comment as I then think appropriate with respect to the effect which the failure of the prosecutor to call the witness, would appear to have had on the course of the trial. That comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks fair and proper to divulge to me as the trial judge.

[6] (1984) 154 CLR 563

[20] Save for the most exceptional circumstances, I as the trial judge, should not myself call persons to give evidence and it is not suggested in this case that I should.

[21] One of the observations made by the Court in the joint judgment of five justices, namely, Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ is this[7]:

> "A decision whether or not to call a person whose name appears on the indictment or from whom the defence wish to lead evidence must be made with due sensitivity to the dictates of fairness towards an accused person. A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence. In most cases where a prosecutor does not wish to lead evidence from a person named on the indictment but the defence wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defence and then, if necessary, be re-examined."

[22] I take it from that that it should only be in a relatively rare case that the prosecutor would not make available to the defence a witness who the defence wishes called, particularly a witness whose evidence was given at the committal.

[23] Nevertheless it is the prosecutor's decision not to call this particular witness and I can understand the reasons why.

[24] It was said by Greg James J in the case of *R v Kneebone*[8], to which I have previously referred, there is an advisability, if not a necessity, for a

[7] at page 576

conference by a prosecutor before a decision is made not to make the witness available. The prosecutor has told me in this case that he has not examined the witness again since the committal but he has given reasons why he has made his decision not to call the witness and it is clear that counsel for the accused is also of the view that the witness is unreliable.

[25] I do not think therefore that the failure of the prosecutor to conduct a further conference is necessarily important in this particular case.

[26] The other thing that needs to be observed is that this is not a case where the prosecutor has decided not to call the witness on the basis that her evidence would be unreliable and that her evidence would unfairly assist the defence. On the contrary, the evidence, if called, has a danger attached to it which is quite different. The danger is that the evidence would unfairly assist the Crown. So that places the case in a somewhat exceptional position as well, not that in principle it makes any difference. If the witness is plainly untruthful then the prosecutor, provided he believes that that is so on reasonable grounds, should not call the witness.

[27] So much is evident from the Bar rules as well. Referring to the New South Wales Bar Rules, as they then existed, Greg James J referred to a rule that a prosecutor is not obliged to call evidence from a particular witness if the prosecutor believes on reasonable grounds that the testimony of that witness

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[8] [1999] NSWCCA 279 at [49] and [51]

is plainly untruthful or is plainly unreliable by reason of a witness being in the camp of the accused[9].

[28] Plainly the witness is not in the accused's camp. On the contrary. The witness is, so it is said, plainly unreliable and I think in those circumstances the witness ought not to be called.

[29] It was suggested however that the witness ought to be made available for cross-examination by the accused. I do not think that that is so. If the witness is unreliable then the witness is unreliable and it would not be right for an unreliable witness to be called solely for the purpose of attempting to destroy the Crown case through suggestions of the kind which are proposed in this particular case.

[30] Again in the case of *R v Kneebone*[10], to which I have referred, there is reference to a number of propositions laid down by the Court of Appeal in England in *R v Russell-Jones*[11]. One of the passages to which Greg James J referred is paragraph 7 of the propositions laid down by the Court of Appeal which reads:

> "A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken."

[9] *R v Kneebone* [1999] NSWCCA 279 at [44]
[10] [1999] NSWCCA 279 at [46]
[11] (1995) 3 All ER 239

[31] I think, although that proposition dealt with a slightly different point, that this proposition applies equally here. The purpose of cross-examination of this witness is to suggest that this witness was the person who placed the material in the safe. There is no evidence in fact that this occurred. The witness is most unlikely to agree to it but even if she did agree to it, given that she is a totally unreliable witness and both parties say she is unreliable, it would be unfair to the Crown for such an admission to be put before the jury.

[32] In the circumstances, I refuse the application.
