SUPREME COURT OF QUEENSLAND

CITATION:	*R v QVA* [2017] QSC 281
PARTIES:	**THE QUEEN** (applicant) **v** **QVA** (respondent)
FILE NO:	SC No 1245 of 2016
DIVISION:	Trial Division
PROCEEDING:	Ruling
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	3 and 6 November 2017
JUDGE:	Burns J
ORDER:	**The order of the court, pursuant to s 21AZ of the *Evidence Act* 1977 (Qld), is that:** **1. the original recording of the evidence of [the child witness] taken before me on 31 October 2017 be edited by deleting the passages indicated by yellow highlighting on pages 30, 31, 32, 33 and 37 of the attached transcript entitled "Pre-recorded evidence marked to show edits"; and** **2. such editing be carried out by a person nominated by the Principal Registrar to do so.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – RELEVANCE – PARTICULAR CASES – where the accused was charged on indictment with two counts of murder – where the evidence of a child witness was pre-recorded pursuant to s 21AK of the *Evidence Act* 1977 (Qld) – where the deceased persons were the accused's former wife and her partner – where the child witness was the child of the accused and his former wife – where the child witness had been interviewed by investigating police – where the child witness gave an account of inappropriate sexual behaviour on the part of the deceased male in the police interview – where the recording of the police

interview with the child witness was led by the Crown at the trial pursuant to s 93A of the *Evidence Act* – where, at the hearing conducted pursuant to s 21AK of the *Evidence Act*, the child witness was cross-examined about the account – where the child witness described various acts of sexual abuse at the hands of her mother's partner – where the child confirmed that she had not told her father about any of these acts – where the Crown made an instanter application pursuant to s 21AZ of the *Evidence Act* to edit the recording – where the Crown contended that the account advanced in cross-examination was inadmissible as it could not inform any relevant belief on the part of the accused – where counsel for the accused submitted that the challenged evidence was no more than an elaboration of the child's earlier account and therefore admissible on the basis that it went to prove the accused's state of mind – whether the allegations made by the child in cross-examination were known to the accused – whether the challenged evidence could be relevant to an issue likely to arise at the trial – whether the challenged evidence is admissible

Criminal Code 1899 (Qld), s 271, s 272, s 304
Evidence Act 1977 (Qld), s 21AK, s 21AL, s 21AM, s 21AZ, s 21AZ(1), s 21AZ(2), s 93A, s 99

De Gruchy v The Queen (2002) 211 CLR 85; [2002] HCA 33, cited
Dyers v The Queen (2002) 210 CLR 285; [2002] HCA 45, cited
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, cited
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, followed
Pollock v The Queen (2010) 242 CLR 233; [2010] HCA 35, cited
R v Ellem (No 1) [1995] 2 Qd R 542, cited
R v Gibb and McKenzie [1983] 2 VR 155, cited
R v H [1999] 2 Qd R 283; [1998] QCA 348, cited
R v Masters [1987] 2 Qd R 272, followed
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Nijamuddin [2012] QCA 124, cited
R v PP (2002) 135 A Crim R 575; [2002] VSC 523, cited
R v Reid [2007] 1 Qd R 64; [2006] QCA 202, cited
Re Knowles [1984] VR 751, cited
Richardson v The Queen (1974) 131 CLR 116; [1974] HCA 19, cited
Whitehorn v The Queen (1983) 152 CLR 657; [1983] HCA 42, cited

COUNSEL: G P Cash QC for the applicant
D L Brustman QC for the respondent

SOLICITORS: Director of Public Prosecutions (Qld) for the applicant Howden Saggers Lawyers for the respondent

[1] The accused was charged on indictment with two counts of murder. His trial commenced on 6 November 2017 and, 10 days later, the jury acquitted him of both counts as well as the alternative verdicts of manslaughter.

[2] In advance of the trial, the evidence of a child witness was pre-recorded at a hearing presided over by me on 31 October 2017 and conducted pursuant to s 21AK of the *Evidence Act* 1977 (Qld).[1] Then, on 3 November, the Crown made an instanter application for an order pursuant to s 21AZ of the Act to approve the editing of the recording to excise part of the evidence which the child gave under cross-examination. After hearing argument, I ordered that the recording be edited in the respects the Crown had sought and indicated that I would publish my reasons in due course.

[3] On the first morning of the trial, and before the jury was empanelled, the learned Crown prosecutor, Mr Cash QC, made a further application. It was for the evidence elicited from the child in re-examination to be excised, something that had been overlooked when he made his application on 3 November. The re-examination was solely related to the parts of the cross-examination that had been ruled out. Mr Brustman QC for the defence did not oppose the making of a further order to that effect in light of my ruling, but sought to reinstate part of the cross-examination of the child for a reason that he had overlooked advancing when the application was argued. That course was not opposed by the Crown. There being oversight on both sides of the record, I set aside the order made on 3 November and, in lieu, approved the editing of the recording in these further respects, that is to say, to delete the re-examination and reinstate a portion of the cross-examination.

[4] Those matters made clear, what follows are my reasons for acceding to the Crown's application to approve the editing of the recording.

The issues at trial

[5] The deceased were the accused's former wife, whom I shall refer to in these reasons as H, and her partner, whom I shall refer to as J. They died during an incident that occurred on 20 January 2015 at their home on the Gold Coast. The accused lived in the same suburb, but some streets away from the house occupied by H and J. It was the Crown case that, on the evening in question, the accused drove to the house, parked on the street and walked to the front door. He had it in mind to speak to H about issues concerning their daughter, and she is the witness whose evidence was the subject of this application. The accused met H outside the front entrance to the house. There was a brief exchange, following which she returned inside

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1 The evidence contained in such a recording or in "a lawfully edited copy of the recording" is admissible at the trial "as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court": s 21AM of the *Evidence Act*. However, once played, the recording should be marked for identification rather than as an exhibit in the trial (*Gately v The Queen* (2007) 232 CLR 208) and should not be given to the jury for the purpose of their deliberations: *R v Nijamuddin* [2012] QCA 124 at [44]-[47]. To be contrasted is a recording admitted pursuant to s 93A. It will be received as an exhibit at the trial but is ordinarily not given to the jury unless, for example, the parties consent: *R v H* [1999] 2 Qd R 283 at [18] per McMurdo P. Section 99 confers a discretion on the court to withhold such an exhibit from the jury room where "it appears to the court that if the jury were to have [it] with them during their deliberations they might give the [recording] undue weight".

while the accused waited outside in a patio area. A short time later she reappeared, armed with a knife. She lunged at the accused with the knife but he managed to disarm her. In the struggle that followed, both H and J (who either joined in the attack or came to H's aid) were stabbed to death by the accused.

[6] It was not in dispute that the accused killed H and J. Instead, at the time when the application was argued, it was apparent that the real issue before the jury would be whether the Crown has satisfied them beyond reasonable doubt that the killings were unlawful. That in turn would require the jury to consider whether the Crown had excluded all available defences beyond reasonable doubt and, in particular, self-defence under either or both of s 271 and s 272 of the *Criminal Code* 1899 (Qld). Furthermore, it was in prospect at the time of the argument that, if the partial defence of killing on provocation under s 304 of the *Code* was raised on the evidence, the jury would also be required to consider whether the accused had proved on the balance of probabilities that such an excuse operated so as to reduce any verdict of murder to one of manslaughter only.

Some context

[7] As mentioned, the child witness was the daughter of the accused and H. At the time of the killings, she was 13 years of age and living with the accused and his new partner. She was interviewed by the investigating police two days later and the interview was recorded. The recording was then led by the Crown at the trial pursuant to s 93A of the *Evidence Act*.

[8] During the interview, the child was questioned about a period of approximately two years when she lived with H and J. She then spoke of leaving to live with the accused and his partner. Asked why she left, the child said that the accused had "found out from a police woman that [J] was a paedophile".[2] Later, she said that J would "always like touch me and stuff".[3] She added that she had complained to her mother about it but nothing was done. The child then gave a description of the "touching". It was "over [her] skin and stuff" and grabbing outside her clothing.[4] She said that she did not feel comfortable around J but did not initially tell her father that she felt this way. There was then this exchange:

> "POLICE: Okay, so basically you had some concerns about [J] and then later on you've talked to dad is that right?
>
> CHILD: Yeah sort of.
>
> POLICE: When you were older?
>
> CHILD: Yeah.
>
> POLICE: Okay. So back in grade six did you know why you were going back to live with dad?
>
> CHILD: Um when dad got me, he showed me like a file of [J] and told me all

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2 Transcript of interview, p 7-8.

3 Ibid p 9.

4 Ibid p 9-10.

this stuff about him.

POLICE: Okay so he told you once you were back with him?

CHILD: Yeah.

POLICE: Okay and did you then tell dad about anything that had happened with [J]?

CHILD: Um we went to the Police Station.

POLICE: Oh you did go to the Police Station?

CHILD: Yeah.

POLICE: Okay yep, and did you talk to anyone about it?

CHILD: Yeah I spoke to um a lady.

POLICE: Okay was it sort of like this or?

CHILD: Yeah.

POLICE: Yep okay, so that was when you were in [primary school]?

CHILD: Yeah.

POLICE: Okay, so you have spoken to somebody about that stuff?

CHILD: Yeah and dad took, like take me to someone that I could like speak to.

POLICE: Like a counsellor or something?

CHILD: Yeah."[5]

[9] Material available to the Crown and provided to the defence confirms that the accused did take the child to the police to complain about J in March 2012. In addition, the Crown obtained a copy of a report from the psychologist who provided counselling to the child.[6] The report is dated 26 June 2012 and reveals that the accused attended with the child on three occasions in May 2012. She gave a history of "inappropriate sexual behaviour" on the part of J over the preceding two years. She had been required to shower naked with him and, on other occasions, he would get into bed with her. At the time of my ruling, it was unclear how much (if any) of this information had actually been relayed to the accused by the psychologist.

[10] There was in any event other evidence in the Crown case to support the conclusion that, in early 2012, the accused became aware that J was known by another name and had previously been convicted in South Australia of the rape of a five year old child for which he was sentenced to a term of imprisonment. On learning this, the accused took immediate steps to remove the child from H and J. As soon as she was in his care, the accused established from his

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5 Transcript of interview, p 10-11.

6 Exhibit 2 on the application.

daughter that she had been the subject of inappropriate touching by J. He then reported the matter to police and, not long after, engaged the psychologist to whom I have referred. The accused subsequently confided in others about what he had ascertained, a number of whom were Crown witnesses. For example, according to a police statement obtained from one such witness, a former friend of H, the accused told her that:

> "[The child] had had counselling and it came to light that [J] had interfered with her – showered naked with her, and lay in bed with her rubbing her belly. He wouldn't tell me anymore than that so I respected his and [the child's] privacy and was happy that things had finally settled for him and the children."

The challenged evidence

[11] Before the evidence was taken at the pre-trial hearing on 31 October 2017, Mr Cash QC advised the court that, based on discussions with Mr Brustman QC, he anticipated the child would be cross-examined about "what she says actually happened between her" and J.[7] However, Mr Cash made it plain that, although he did not intend to object to that line of questioning during the pre-record, by not objecting, the Crown did not necessarily accept that such evidence would be "relevant on the trial".[8] Mr Brustman countered, submitting that the evidence would be relevant to the accused's state of mind as it bore on the operation of the defences to which I have earlier referred.[9] During the short preliminary argument that ensued, Mr Brustman was asked how "whatever occurred between the deceased man and [the child witness could be] relevant to your client's defence", to which Mr Brustman responded:

> "It would be irrelevant if my client was utterly [unaware] of it, but the fact of the matter is he was aware of it and there are very many facts in this case which have to do with that".[10]

[12] Mr Cash QC accepted that he could not object to evidence going to the accused's state of mind regarding what had gone on between the child and J[11] but evidence from the child about particular acts of abuse could only inform the accused's mind if she had told her father about them. Clearly, whether that was so was something that could be explored in the cross-examination to come.

[13] The child was then called to give evidence. In accordance with various directions that were made pursuant to s 21AL of the *Evidence Act* to facilitate the taking of her evidence, she was in a room separate from the courtroom, her evidence was given by use of an audio visual link between that room and the courtroom, there was a support person sitting with her in the room but no other person, all non-essential persons were excluded from the courtroom and, although the accused was present, he could not be seen by the child on her monitor.

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7 Transcript (31 October 2017), 1-9.

8 Ibid.

9 Ibid.

10 Ibid 1-10.

11 Ibid 1-11.

[14] Under cross-examination, the child confirmed that J touched her when she was in the shower and said that this happened on almost every occasion when she was left alone with him. She said that J would get into the shower with her, touch her "down there"[12] and, afterwards, rub Vaseline on her.

[15] The child was then asked what she meant by her reference to "down there". She responded in terms describing a number of acts of sexual abuse including cunnilingus. She also described a number of other acts that she said occurred outside of the shower including attempted anal intercourse.

[16] Further questioning of the child established that she had not told her father about any of "these things".[13] She said that she did not "want to make him angry".[14] In re-examination, it was clarified that, although her father had later "found out" about the allegations summarised above at [14], the child had not told him "about any of the other things that you've spoken about today",[15] that is to say, the acts referred to above at [15].

Consideration

[17] A recording of a child's evidence under s 21AZ of the *Evidence Act* may not be "edited or otherwise changed in any way": s 21AZ(1). However, by s 21AZ(2), the presiding judicial officer may approve the editing or change of a recording "in a stated way". It was this provision pursuant to which the Crown sought the excision of the evidence of the acts summarised at [15] as well as the re-examination related to that evidence. No objection was taken to the evidence summarised at [14].

[18] The Crown submitted that the challenged evidence was inadmissible. The point was again made that the evidence might be admissible if it in some way informed a relevant belief on the part of the accused, but the child confirmed that she had not told her father about any of the acts about which that particular evidence was concerned. The evidence could only go to whether the allegations the child made about J were true however that, it was submitted, was irrelevant. For the accused, it was argued that the evidence was "no more than an elaboration" of the account she gave to the police, the latter being "but a benign version" of the former.[16] It was therefore submitted to be admissible because it went to proof of the accused's state of mind. Further, it was contended that the child's "complete account" was "inherently essential to the Crown's unfolding of the case" and, for that reason, the recording should remain intact.[17]

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12 Ibid 1-30.

13 Ibid 1-33.

14 Ibid.

15 Ibid 1-37.

16 Outline of submissions on behalf of the defence, par 4 and par 5.

17 Ibid par 10, citing *Richardson v The Queen* (1974) 131 CLR 116 at 119, *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 and 674-675 and *Dyers v The Queen* (2002) 210 CLR 285 at 292-293.

[19] As Thomas J observed in *R v Masters*,[18] the expression, "evidence of state of mind", is a "loose expression capable of comprehending evidence of knowledge, belief or intent".[19] In a case such as this where the charge is murder and both self-defence and killing on provocation might be raised by way of defence, such evidence may legitimately bear upon any number of issues. The most obvious is the mental element of the offence of murder, requiring the Crown as it does to prove beyond reasonable doubt that the accused intended by the act alleged to cause death to either kill or cause grevious bodily harm to the deceased. On that issue, evidence, for example, of a history between the accused and the deceased might be revealing of a desire on the part of the former to harm the latter and, thus, to establish motive from which a jury might properly infer intent.[20] In the context of self-defence, a belief on the part of the accused that he could not preserve himself from death or grievous bodily harm other than by the use of certain force will, if based on reasonable grounds, loom large.[21] So, too, will the effect on the accused's mind of the provocative act said to give rise to any claim to the operation of the partial defence of killing on provocation.[22]

[20] Of the issues just discussed, and confining the analysis to the count concerning the death of J, evidence that the accused believed at the time of the act causing death that J had sexually abused his daughter might be relevant, and therefore admissible at the trial, if it goes to the proof of a motive on the accused's part to cause serious harm to J. So, too, might such evidence bear upon the question whether there was a sudden and temporary loss of self-control on the part of the accused amounting to provocation. It is, however, less easy to see how such evidence could relevantly inform a belief on the part of the accused that he could not preserve himself from death or grievous bodily harm other than by stabbing J. In that regard, evidence is sometimes admitted regarding the accused's belief as to the physical prowess or aggressive disposition of the deceased.[23] That may be evidence the accused gives based on his past dealings with the deceased or it may be based on what the accused had been told about the disposition of the deceased by others. In all such cases, the evidence is admitted to prove what the accused believed and not the truth of the matters believed. But, here, the challenged evidence says nothing at all about whether J was, in the belief of the accused, some sort of firebrand.

[21] Be that as it may, before the particular acts of abuse about which the challenged evidence was concerned can be capable of informing the accused's mental state regarding any of these issues, the making of those allegations by the child witness must have been known by the accused. Although such knowledge could have been derived from direct communications with

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18 [1987] 2 Qd R 272.

19 Ibid 274.

20 See *R v Masters* [1987] 2 Qd R 272 at 276; *De Gruchy v The Queen* (2002) 211 CLR 85 at [28]; *R v Reid* [2007] 1 Qd R 64 at [76]-[77].

21 See *R v Masters* [1987] 2 Qd R 272 at 274.

22 See *Osland v The Queen* (1998) 197 CLR 316 at 326 and 337; *R v Mogg* (2000) 112 A Crim R 417 at 424-425; *Pollock v The Queen* (2010) 242 CLR 233 at [43]-[52].

23 See *R v Masters* [1987] 2 Qd R 272 at 274.

his daughter or from others who communicated with her regarding the allegations, she did not speak to her father about them and nor did anyone else. As such, the challenged evidence cannot properly be regarded as relevant to any issue likely to arise at the trial. The bad character of a deceased is not an issue in a criminal trial and, subject only to one exception,[24] neither is evidence of that person's general disposition.[25]

[22] As to the further arguments advanced by the defence, it is not to the point to submit that the challenged evidence was "no more than an elaboration" of the account she gave to the police because it is that very elaboration which was outside the knowledge of the accused. Nor can it be accepted as a ground for admissibility that the evidence is "inherently essential to the Crown's unfolding of the case". The authorities cited in support of that submission[26] concern the settled proposition that the Crown is obliged to call all available witnesses unless there is some good reason not to do so.[27] That obligation arises from the basic requirement of the adversary system of criminal justice that the prosecution, representing the State, must act "with fairness and detachment and always with the objective of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one".[28] They say nothing to compel the receipt of evidence that is irrelevant to any issue at the trial.

[23] The challenged evidence is inadmissible.

Conclusion

[24] For these reasons, on 3 November 2017, orders were made pursuant to s 21AZ of the *Evidence Act* approving the editing of the recording to excise parts of the evidence which the child gave under cross-examination and all of the re-examination.

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24 Evidence of the deceased's general reputation for violence is admissible to show whether it was more likely that he was the aggressor, regardless of the knowledge of the accused as to that reputation: *R v Gibb and McKenzie* [1983] 2 VR 155 at 170-171; *Re Knowles* [1984] VR 751 at 768; *R v Ellem (No 1)* [1995] 2 Qd R 542 at 546-547; *R v PP* (2002) 135 A Crim R 575 at [6]. It should however be noted that the correctness of this proposition has been seriously doubted in at least one decision of the Court of Appeal: *R v Mogg* (2000) 112 A Crim R 417 at 431 per Thomas JA (with whom Wilson J agreed).

25 See *R v Mogg* (2000) 112 A Crim R 417 at 431.

26 Noted above at footnote 17.

27 See *Dyers v The Queen* (2002) 210 CLR 285 at 293.

28 *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J.