SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rousetty* [2003] QCA 12
PARTIES:	**R** v **ROUSETTY, Michael Anthony** (appellant)
FILE NO/S:	CA No 292 of 2002 SC No 54 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	31 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2003
JUDGES:	Davies and McPherson JJA and Mullins J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Appeal against conviction for murder dismissed.** **2. Set aside conviction as an accessory after the fact.**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR UNSUPPORTABLE VERDICT - where appellant convicted of murder - where new trial ordered on the basis of fresh evidence of prior inconsistent statements - whether jury's verdict was unsafe and unsatisfactory
COUNSEL:	A J Rafter for appellant R G Martin for respondent
SOLICITORS:	Legal Aid Queensland for appellant Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The appellant was convicted after a trial on 20 August 2002 of the murder of Jason Matthew Tyler on 20 August 1995. The appeal is against that conviction. He had previously been convicted of that murder after an earlier trial but that conviction was set aside by this Court which

also ordered a new trial on 12 May 2000. The sole basis upon which this Court made those orders was the production of fresh evidence of prior inconsistent statements by a material Crown witness, Sainsbury which, though it did not convince this Court upon its own view of that evidence that there had been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, it was, in the Court's view, properly capable of acceptance and sufficiently cogent that, if believed it would be likely to produce a different verdict. This was the evidence of Tracey Hancock who swore an affidavit and gave oral evidence before this Court.

Ms Hancock did not give oral evidence at the appellant's second trial which gave rise to the conviction the subject of this appeal. She was by then in America and apparently unwilling to return to Australia. By agreement the affidavit which she had filed in this Court and the transcript of her oral evidence in this Court was admitted into evidence in the trial.

The sole ground of appeal is that the verdict was unsafe and unsatisfactory. In particular, it is said, a reasonable jury would not have been able to convict the appellant of the offence of murder if proper weight had been given to these matters:

1. the prosecution case substantially rested on the jury accepting the evidence of Sainsbury and Klarfeld;

2. the evidence of Sainsbury and Klarfeld should not have been considered by the jury in all the circumstances as being reliable on the basis of -

   (a) the undertakings that were issued to them by the Attorney-General.

   (b) the many inconsistencies evidenced in the testimony of Klarfeld and Sainsbury which would have caused a reasonable jury to doubt their veracity.

There were some facts in this case which were undisputed or at least indisputable. The murder victim, Tyler, was employed as a security guard at the Nest Nightclub near Cairns. He was working in that club on the night of 19 August 1995. His de facto partner Ms Shinnick-Spoor also worked at that nightclub. Between 1.30 and 2 a.m. on Sunday 20 August 1995 three members of the Bandidos motorcycle club arrived at the nightclub and Tyler was seen speaking to them. Ms Shinnick-Spoor was able to identify one of those persons as the appellant. One of them was heard by another person to say to Tyler, "I'll see you at the clubhouse" and he replied, "Yeah, okay."

After finishing work Tyler returned to the unit he shared with Ms Shinnick-Spoor and some others but left between 4.30 and 5 a.m. in Ms Shinnick-Spoor's motor vehicle saying that he was going to the Bandidos' clubhouse. He was not seen again. The car was found that afternoon on the Captain Cook Highway between Ellis Beach and Wangetti Beach near Cairns. Tyler's body was found in a shallow grave in bushland on the Rex Range near Cairns on 11 November 1998.

In the meantime, on 17 October 1995, under surveillance by police, the appellant, Klarfeld, the president of the Bandidos Club at Cairns, and Houghton, another member of the club travelled together to the Rex Range. It was admitted in the trial that they went there to bury Tyler's body which the appellant and Houghton did in a shallow grave. This was the grave discovered some years later by police. They were also observed, upon their return to the Bandidos' clubhouse, burning clothes and other items including digging tools.

So much was undisputed or at least indisputable. The substance of the case against the appellant relied on the evidence of Klarfeld and Robert Sainsbury another member of the Bandidos club. It also relied on the evidence of Robyn Kay the appellant's former de facto wife. By the time they gave evidence at his first trial, both Klarfeld and Sainsbury had received indemnities against prosecution. Klarfeld was no longer a member of the Bandidos club.

There appears to be little doubt that Tyler was murdered at the Bandidos club on the morning of 20 August 1995. The central figure in this murder appears to have been Grant William Clear the sergeant-at-arms of the Prospect Chapter of the Bandidos Sydney branch. He was also charged with the murder of Tyler but committed suicide whilst on remand. Although there was some evidence on this question, it was not clearly shown why Clear had an animus against Tyler. However, the Crown case, and this seems to be likely, was that Tyler was lured to the Bandidos club at Clear's behest.

Clear arrived in Cairns on Friday 18 August 1995. Robyn Kay swore that Clear and the appellant went to the clubhouse on Saturday saying that they would be back for dinner. When they failed to return she made unsuccessful attempts to contact the appellant at the club. He did not return that night. On the following day she went to the movies and when she returned home the appellant and others were there. When she said to the appellant, "Thanks for giving me a ring" he started crying. He refused to say what was wrong. Later she noticed that the tray of the utility truck, belonging to her which he had taken, had been cleaned and was still wet. When they saw the news on the television on Monday 21 August 1995 concerning Tyler's disappearance the appellant said, "He must have pissed someone off."

No reason was suggested for doubting Ms Kay's evidence. It is therefore at least likely that the appellant was at the club when Tyler was murdered.

Klarfeld gave evidence that he became ill on Thursday 17 August and, in consequence, did not go to the club until Sunday 20 August after the death of Tyler. However, he admitted that Clear had visited him at home on Saturday 19 August "to brief the president of this Chapter of his activities up here".

Klarfeld said that his involvement in the matter commenced on Sunday when he received a telephone call from the appellant who had run out of fuel some 15 kilometres north of Mareeba.

Klarfeld said he got some petrol in a can and delivered it to the appellant who was in company with Clear. After Clear left, Klarfeld went to the clubhouse where he saw the appellant and others engaged in extensive cleaning. Outside the clubhouse there were two 44 gallon drums smouldering.

According to him he asked the appellant what was going on and was told, "The cunt deserved it, I whacked him." Klarfeld then asked, "Why did you have to go this far?" The appellant then said that Clear had got them to bring Tyler to the clubhouse so he could flog him and "things got out of hand and me and Dave and Clear fucked him up". Dave was Houghton, another club member who had been charged also with the murder. He also said that Tyler could "go a bit" and they couldn't get on top of him and so "Clear shot him in the leg to slow him down and then me, Dave and Clear got into him and fucked him up". He also told Klarfeld that he had burnt Tyler's clothes and their own clothes in the drums and then taken Tyler out and dumped him in the bush.

Klarfeld said he had about three conversations with the appellant in which those details were discussed. He also said that about two months later the appellant asked him if he would give the appellant and Houghton a lift to the Rex Range to do some cleaning up. He said he dropped them off there and collected them about 30 minutes later.

Sainsbury's evidence was that he had driven the appellant and Mitchell to the Nest Nightclub on the night of Saturday 19

August 1995 at Clear's request. Upon his return to the Bandidos club he was told by Clear to go home and that he would be called if he was needed. On the following morning he got a call to return to the club where he participated in a clean up. In a subsequent conversation the appellant said to him, "What, are you freaking out about that cunt we knocked the other week?"

As this Court pointed out in the previous appeal there were a number of matters relating to Klarfeld which could have caused the jury to fail to be satisfied with the truth of his evidence, at least in its entirety. In particular, his conversation with Clear on Saturday 19 August and his position of authority in the club were reasons to suspect that he knew more about the murder than he admitted.

It was also submitted in this appeal that Klarfeld was subjected to considerable pressure by police in order to gain his co-operation and that this made his evidence so unreliable that it should not have been accepted by a reasonable jury. There is no doubt that the police did, in the strongest terms, point out to Klarfeld the advantages of his co-operating and the possible disadvantages to Klarfeld of his not doing so, namely that others might give evidence implicating him. However, I think it unlikely that Klarfeld would have needed any inducement to minimise his own involvement, if any, in Tyler's murder.

I have already referred to the evidence of Ms Hancock, on the basis of which this Court ordered a new trial. It is unclear what the jury would have made of that evidence in light of Ms Hancock's failure to come to court. She had, from time to time, lived in a de facto relationship with Sainsbury. However, by the time she gave a statement in this matter that relationship had come to an end and she had apparently formed a friendship with Houghton who had already been convicted at the same time as and after a joint trial with the appellant and for whose benefit it seems she had proffered her statement.

Her evidence contradicted that of Sainsbury and indirectly that of Klarfeld in two relevant respects. The first was that, contrary to his evidence, Sainsbury told her that he was at the club on the night of the murder but had been asleep. He got up, started washing glasses and saw people cleaning up. Klarfeld told him to leave which he did. The other was that he told her that Klarfeld was present at the club on the night of 19 August and the morning of 20 August.

If the jury believed Ms Hancock's evidence they might have disbelieved Klarfeld's evidence that he heard of the murder only from the appellant. But they had uncontradicted evidence that the appellant was present at the club when the murder occurred.

For the reasons I have already given, the jury may have entirely rejected Ms Hancock's evidence, but, even if they

were satisfied that Klarfeld was present at the club when the murder occurred, or could not be satisfied that he was not, they may nevertheless have been satisfied that the murder occurred generally as he described it. On either of these bases, in my opinion, they did not act unreasonably in being satisfied beyond a reasonable doubt that the appellant had murdered Tyler.

I would therefore dismiss the appeal.

McPHERSON JA: I agree.

DAVIES JA: It has been submitted by the appellant that, if this appeal were dismissed, the appellant's conviction as an accessory after the fact should be quashed. In my opinion that is correct. The charge was, on the indictment, alternative to that of murder and the appellant's plea to that charge had not been accepted by the Crown in discharge of the indictment before he was convicted of murder. See R v. Collins; ex parte Attorney-General [1996] 1 QdR 631 at 639-640. I would therefore set aside that conviction.

McPHERSON JA: I agree with that order too.

MULLINS J: I agree.

DAVIES JA: The orders are as I have indicated.
