SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bowen* [2004] QSC 364
PARTIES:	**R** **v** **BOWEN, Cedric Colin**
FILE NO/S:	SC No 26 of 2004
DIVISION:	Trial Division
PROCEEDING:	Rulings
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	28 September 2004
DELIVERED AT:	Cairns
HEARING DATE:	27 September 2004; 28 September 2004
JUDGE:	Mackenzie J
ORDERS:	**1. Discretion to call witness not exercised** **2. Exclude portion of record of interview** **3. Exclude relationship evidence** **4. Discharge jury** **5. Adjourn trial**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – MISCELLANEOUS MATTERS – OTHER CASES – power of trial judge to order Crown to call witness – power of trial judge to call witnesses – where Crown decision not to call key witness – whether trial Judge to exercise discretion to call CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – where accused Indigenous Australian – where right to remain silent conveyed – where accused persistently wanted support person – where questioning continued – whether prejudice outweighed cogency – whether evidence should be excluded CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – PARTICULAR CASES – relationship evidence – where evidence of bad relationship between accused and deceased – whether continuum of conduct – whether logically infer previous conduct led to final result – whether evidence

should be excluded

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – ADJOURNMENT – GENERALLY – where key Crown witnesses not called at last minute – where application to adjourn – whether prejudice to defence – whether discharge jury

Police Powers and Responsibilities Act (Qld) 2000, s 8, s 251

Richardson v The Queen (1974) 131 CLR 116, cited
Whitehorn v The Queen (1983) 152 CLR 657, cited
Apostilides v The Queen (1984) 154 CLR 563, applied

COUNSEL: D MacKenzie for the Crown
K McCreanor for the accused

SOLICITORS: Director of Public Prosecutions (Queensland) for the Crown
O'Reilly and Stevens for the accused

SUPREME COURT OF QUEENSLAND

CRIMINAL JURISDICTION

MACKENZIE J

Indictment No 26 of 2004

THE QUEEN

v.

CEDRIC COLIN BOWEN

CAIRNS

..DATE 27/09/2004

..DAY 1

MR D MacKENZIE (instructed by the Director of Public Prosecutions (Queensland)) for the Crown

MR K McCREANOR (instructed by O'Reilly & Stevens) for the accused

...

HIS HONOUR: The first issue that I want to deal with in these rulings is the situation that has arisen where the Crown Prosecutor has decided in the exercise of his functions as a Crown Prosecutor, not to call evidence from the witness, Brian Bowen. The situation essentially is that Mr Bowen gave evidence in the Magistrates Court which was considerably enhanced over some of the versions which had been given earlier. After having a further conference with him or attempting to have a further conference with him today, at least, the decision has been taken that the Crown Prosecutor will not call him.

The principles are set out in a variety of cases including Richardson and the Queen, Whitehorn and the Queen and the Queen against Apostilides. The essence of the Australian situation is now set out conveniently in a set of propositions at 575 of (1984) 154 CLR 563 in Apostilides. They are that the Crown Prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.

The second is that the trial Judge may, but is not obliged to question the Prosecutor in order to discover the reasons which lead to the Prosecutor to decline to call a particular person, and that the Judge is not called on to adjudicate the sufficiency of those reasons. Mr Mackenzie has put on the record in some detail the considerations that led to his decision.

The situation has not got to the point of what the trial Judge may have to do at the end of the Crown case or when directing the jury which are referred to in propositions 3 and 4 in Apostilides. Proposition 5 is that, save in the most exceptional circumstances, the trial Judge should not himself call a person to give evidence. The reference to "save in the most exceptional circumstances" is prompted no doubt by earlier discussion of this subject in, amongst other cases, Whitehorn against the Queen. And the circumstances of this case are illustrative of why it should be considered a very residual sort of thing that a trial Judge may do.

I'm not sure that any Court which has pronounced on this subject has carefully enunciated how to deal with the process of calling a witness and in particular what role counsel may play once the Judge has taken the decision to call the witness. The present case is a good illustration of some of the problems because undoubtedly one would think that the accused person's counsel could cross-examine any witness so called. The position of the Crown Prosecutor, however, is somewhat less clear, it seems to me.

There are some cases where, if the Crown Prosecutor was allowed to cross-examine, he would gain an advantage which he would not otherwise have, since ordinarily to cross-examine a witness who may have been a Crown witness would elevate the Crown Prosecutor's position above that which he would otherwise have. In other words, if a witness having been called by the Crown, exhibited an unwillingness to tell the truth in the interests of justice, the Crown Prosecutor could apply to have that person declared adverse and cross-examined.

However, if the case fell short of that, the Crown Prosecutor could not cross-examine and it is in that sense that if it became apparent as a result of the Crown Prosecutor making the decision with which he alone is charged, of deciding not to call the witness, it seems anomalous that he could cross-examine if the trial Judge took it upon himself to call that person. I think that that kind of consideration illustrates the narrowness of any exception to the rule that the parties call witnesses in these proceedings, if indeed the possibility that a trial Judge may call a witness is more real than theoretical.

So that is the situation with regard to calling the witness by the Crown. It seems to me that Mr Mackenzie, having taken that decision cannot be compelled to do so and, as I have already indicated, there are reasons which have prompted him to do so which he was not obliged to explain, but did, so that they are there for anybody who wishes to see them, to see them.

Now having got to that point, I indicated that there had been an issue raised earlier in the day about the admissibility of certain aspects of a record of interview taken by the police from the accused person. It is probably not correct to describe it as a record of interview. It is more a tape-recording of the investigation during which certain matters were raised. Where a person is in the company of police officers for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence, chapter 7, part 3 of the Police Powers and Responsibilities Act prescribes a number of safeguards.

The accused person, it seems to me, was clearly a person who was a suspect in respect of this matter, as indeed events have turned out. Looking back in time, it seems that even at that point he was. Section 251 relates to the question of Aboriginal people being questioned. The framework is that certain restrictions apply if a police officer wants to question an Aboriginal person in his company about an indictable offence, and reasonably suspects that the person is an adult Aboriginal person, and does not reasonably suspect that because of the person's level of education and understanding, he is not at a disadvantage in comparison with members of the Australian community generally. He must do and refrain from doing certain things.

In a situation where the suspicion exists that the person is an adult Aboriginal and there is no belief based on level of education and understanding of the kind that I've referred to, the police officer, in a case where he is not aware that the Aboriginal person has arranged for a lawyer to be present during questioning, he must inform the person that a representative of a legal aid organisation will be contacted and as soon as reasonably possible, notify or attempt to notify a representative of the organisation.

And he must not question the Aboriginal person unless the police officer has allowed, if practicable, the Aboriginal person to speak to a support person and the support person is present during questioning.

In this case it seems that the accused person had of his own accord, instigated an attempt to obtain advice from a solicitor and at the time that the questioning was proceeding that person had not yet got back to him, which perhaps was not surprising given the time when the events relevantly happened.

Having said all that, the breach of these requirements of The Police Powers and Responsibilities Act only falls within section 8 of the Act, which, in effect, preserves the principles relating to exercise of the discretion to exclude evidence. That is so because a breach of the requirements of the Act do not carry with it a specific provision with respect to exclusion, unlike certain other requirements of the Act.

The facts disclosed in the transcript of the conversation are that the police officers went to the residence at which the accused was. At the outset the accused had told the investigating police officer that he did not want to say anything until he had talked to Legal Aid. When the police officer said that he was there about the shooting of the deceased, the accused replied "accidentally" - which is one of the parts that the Crown Prosecutor wants to have admitted although the defence, despite its potentially exculpatory nature, does not wish to have admitted. When the accused was given the standard caution he said, "Okay, that's why I'm waiting for a call from David Kempton" although it is referred to as Kemp in the transcript. Mr Kempton is a solicitor.

When the accused was told of his right to contact a friend or relative and to arrange for them to be present he said, "Yeah, well, that thing's been arranged by the justice lady down there, Gladys, so I just leave it to her." "All right, so you don't want to answer any questions?" Answer: No."

Notwithstanding that, the police officer proceeded to ask him questions about his personal details, which he may well have been entitled to do. Then he asked him questions about owning firearms and about his vehicle. He gave replies which the Crown Prosecutor wishes to lead, especially in so far as it applied to a denial that he owned a firearm or had a firearm in the house.

Immediately after this, the accused inquired where the justice lady, Gladys, was and repeated that he wanted to find out if Mr Kempton had rung. The police officer then said, "If he hasn't mate, we'll ring someone for you. All right, we'll ring Tharpuntoo for you. All right, I know a - I know you've told me you don't want to answer any questions, you've told me it was an accident, that's all I'm - that's all you're saying. Mate, what I'm going to do is - just so you - you're not free to leave, I'm going to tell you that you're under arrest. Yeah? All right? And that's in relation to the - to the death of your brother, hey, Fred Bowen, all right? When you're under arrest that means you're not free to leave. You can't just walk around, you've got to stay with us, okay? Yeah. And we're going to take you back to Cooktown where I'll make some further - inquiries about the matter."

The police officer then decided to search the vehicle for weapons and then the house. The police officer said, "We've had a - a look in the house to see if there's any firearms in there too" and the accused person said, "The one that I use is in there." "In where?" "I think behind the cupboard there." Well, then there was a further search made and a weapon located. A portion of the transcript then is referred to as indistinct, but from the following exchange it appears to be a further statement that the accused did not want to answer any more questions, because that was repeated by the police officer and reaffirmed by the accused.

As I understood the argument for the prosecution it was that it was intended to lead the evidence about the firearm on the basis that to say that it was not in the house was a lie. It was not to be relied on as a lie illustrating consciousness of guilt, but simply a lie about that particular issue.

The question, as I observed during submissions, is really one with two or three components to it. It related firstly to a question, "Mate, have you owned any firearms?" and then the next question asked was "Have you got any firearms in the house or in the truck at the moment?" and then the answer was, "No, I'm not allowed to own one" or something to that effect because the tape was recorded as indistinct.

It is fairly obvious that one explanation of the lie may be that he wished to distance himself from the notion of having any firearm at all because he was under some sort of prohibition from doing so. In any event, that probably is not of critical importance. The point that I have tried to make in going through that evidence in some detail is that, throughout, the accused appears to have exhibited clearly and persistently that he did not want to answer questions until he had had the opportunity to have legal advice.

Now, what I'm about to say is not a suggestion that the police behaved with any improper motive in this matter. It was an investigation in a remote location in the early hours of the morning with inherent difficulties of being in an isolated place and no doubt a need to conduct investigations as

thoroughly could be conducted at the time and at the place and no doubt, it was also thought necessary to secure the firearm. But having said that, it seems to me that there was a plain degree of overlooking the right to remain silent and of the desire of the accused person to take legal advice before proceeding with any questioning. That of course, is not of itself fatal; it is a still an issue of discretion which is involved.

In my view, the weight of the evidence concerning the firearm in the context is not particularly great; it was as I've said, a two or three-headed question which led to the evidence being given. It was not suggested that it was a consciousness of guilt situation and I am satisfied that that view would have been untenable.

I think that in all of the circumstances I should exclude the evidence not only because of the aspect of the right to silence, but also because of the issue of weighing the cogency and probative value of the evidence against the possible prejudice which may unduly be caused.

With regard to the suggestion that the killing happened accidentally, it seems to me that that is a self-serving statement in any event. If the other evidence goes somewhat there in isolation, and as the defence does not suggest that it should be allowed in, it should be excluded. So far as the personal details are concerned, I'm not sure whether any particular purpose is served by having those in, but standing alone I cannot see what use they serve. And I think that I would intimate that I see no reason why they should be led.

With regard to what I think is the remaining issue, that is at page 7 where there is a reference to a bandaid for a finger that the accused had lost, the tenor of the conversation is that the police officer inquired whether he had lost a finger, and how did he lose it. And the answer is said to be, "Same bloke there." Then the police officer said, "All right, mate. Can you just show me? Just show me your finger so I can just see what it is. Oh, you've actually" - and then he tailed off. The answer is then recorded as indistinct. But the tape, I am told, records the answer as, "Bugger all to do with this."

One might be tempted to consider that to be a reasonable response or explanation of the relevancy issue. But to put it in legal terms, it really seems to me to stand or fall largely with the other evidence which the Crown was pressing to be led, that is to say, as some evidence of ill blood between the accused person and the deceased, and also as I understood it, some bad blood, perhaps, between him and Brian Bowen as well.

I'm not sure that the parties have actually completed their submissions on that, but I could observe for the assistance of the Crown Prosecutor that it seems to me that where relationship evidence or this kind of evidence is intended to be led, the kind of test that is to be applied is that if there is not actually a continuous linkage between the evidence and the final event to which it is said to be

relevant, in the sense of a sort of a continuum of conduct that culminates in the event, there should at least be some kind of conduct from which it can be logically inferred that the previous conduct may well have led to the final result.

I could indicate that I have reservations as to whether the evidence is of that quality in this case with regard to the preceding events.

The final issue is that the defence has said that in view of the late decision not to call this witness it is prejudiced in its conduct of the case because it has not had opportunity to consider the implications of doing that, and more importantly to take a proof of evidence from the person with a view to making tactical decisions as to whether he should be called or not. The Crown frankly concedes that if there was an application, as there indeed is, for an adjournment of the trial that it could not seriously resist that in the circumstances. While I regret having to take that step, it seems to me that realistically that is probably the only course that is open in the circumstances, having regard to the way in which the matter has developed. And I think that I will have to discharge the jury and adjourn the matter for a hearing at a later date.

...