SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stoten* [2010] QSC 137
PARTIES:	**R** **v** **DANIEL ARAN STOTEN** (applicant)
FILE NO/S:	Indictment No 13 of 2010
DIVISION:	Trial
PROCEEDING:	Criminal Application
COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 January 2010
DELIVERED AT:	Brisbane
HEARING DATE:	28 January 2010
JUDGE:	Fryberg J
ORDER:	**1. The recording of telephone conversation between Glenn Luke Hargraves and Daniel Aran Stoten on 14 June 2005 is inadmissible.** **2. The recording of telephone conversation between Katherine Stoten and Daniel Aran Stoten on 15 June 2005 is inadmissible.** **3. The recording of telephone conversation between Katherine Stoten and Daniel Aran Stoten on 20 June 2005 is admissible.**
CATCHWORDS:	Criminal law – Evidence – Hearsay – Particular matters – Telephone calls – Level of connection with calls already tendered *Criminal Code Act* 1899 (Qld), s 590AA *R v Rudd* [2009] VSCA 213, considered
COUNSEL:	J Hunter SC for the applicant A MacSporran SC with C Toweel for the respondent
SOLICITORS:	Peter Shields Lawyers for the applicant Director of Public Prosecutions (Commonwealth) for the respondent

HIS HONOUR: I am asked to make rulings on the admissibility into evidence of three taped telephone intercepts. The first is of a conversation between two of the accused. The second and third are of conversations between the accused Stoten and his wife.

The intercepts are among a total of some 16,000 intercepts made by police in the course of this investigation. Of those intercepts, a smaller number, perhaps 20 or so, have been tendered by the Crown. When they were tendered, they were admitted without objection. Nobody has attempted on the present application to undertake an analysis of their strict admissibility or the basis of their admissibility. However, it seems to me that, looking at the matter broadly, they are generally admissible for the purpose for which the Crown contends; that is, to show that the accused were aware that their conduct was dishonest. There are four which are in a different category, but they need not be addressed for the purposes of the present argument.

That said, it is again not the subject of detailed submission before me whether they are admitted as direct evidence of the awareness or as admissions against interest and, therefore, an exception to the hearsay rule. Without undertaking individual analysis of them, my overall impression is that they are in the former category. My impression is that they are not tendered to prove the truth of what was said, but rather, because the fact that various things were said they enable inferences to be drawn about the state of mind and level of awareness of the speaker. It may be said that these are

statements against interest but that does not mean that they constitute hearsay.

So much for the ones that the Crown has tendered. The three in question now are sort to be tendered on behalf of the accused Stoten and there is no opposition from the other accused.

The first is of a conversation between Mr Stoten and his alleged co-conspirator, Glenn Hargraves. It is said that a passage on p 10 is relevant in the present case. The conversation occurred on the 14th of June 2005, five days after police had raided the homes of the two participants in the conversation, as well as the office of their company, and after they were aware that they faced potential charges of fraud.

The raids had attracted a degree of media attention and it is the submission on behalf of Mr Stoten that the passages in question in the conversation show first that Mr Stoten was concerned about the future of their business consequent upon that media attention. He was also concerned about the impact that the raids had had upon the staff of the business and wanted to protect the staff.

The submission is that demonstration of that state of mind provides an alternative explanation for the inculpatory material in the tapes tendered by the Crown. The first passage relied upon is at p 10 of the transcript of the

tape where Mr Stoten says to Mr Glenn Hargraves that he had had a conversation with a solicitor, Christian Faes, and reports what he said to that solicitor. Other material indicates that Faes was concerned with the impact which events had had on media reporting and with the way the matter was dealt with in the media.

Stoten said, "Yeah, I sort of said to him, we're just blown away by this whole - you know. We always thought that it was a tax deduction issue and we were told that, we're just blown away that this - it has got to this sort of point. It's mind blowing." Mr Hargraves responded, "Yeah.", and Mr Stoten continued, "And, ah, he said, 'That sort of stuff works in your favour. Don't worry.', you know. 'That's the whole point of it. You - you never thought that this is the way it was because you always thought that it was an ATO deduction issue.'" Then Mr Hargraves said, "Yeah." Mr Stoten continued, "Um, they're things that are - you know, but we'll probably get a bit more insight tomorrow when - ah, yeah, one more step and certainly - um, from, what we - when I was just speaking to staff and getting a feel for it today, the admin staff upstairs have sort of gone back to work, not even - no dramas, you know, that - and they're busy." And then there is further conversation about what is happening at the business.

The defence submits that the first part of that passage is admissible on two bases, first as direct evidence of Mr Stoten's state of mind. It seems to me that that is not a basis upon which a statement by Mr Stoten that he had said

something to a solicitor concerned with the media impact of events can be used for. The fact that Mr Stoten says that he said something to the solicitor is not a basis upon which, in my judgment, any inference can be drawn as to his state of mind at the time before the raids when the allegedly dishonest scheme was being carried out and when his awareness of the dishonesty is relevant.

The second basis is that it is an exception to the hearsay rule. The objection, of course, to the material on the part of the Crown is based on the fact that it is hearsay, it is an out of Court statement tendered to prove the truth of what was said, the alleged truth being that it was always thought that it was a tax deduction. That might be thought to be inconsistent with a dishonest state of mind or an awareness of dishonesty.

One difficulty with this argument is that it is really hearsay upon hearsay. It is a report not of a statement by the accused from which his state of mind correctly can be inferred, but, rather, a statement by the accused of what he said to someone else which itself asserts something about his thought processes. It seems to me that in terms of relevance that is a very remote connection.

Mr Hunter for Mr Stoten relied on the recent decision of the Victorian Court of Appeal in *R v Rudd* [2009] VSCA 213, particularly at paras 60 to 61. There was discussion about the basis upon which conversations might be admitted in

circumstances where some conversations had been admitted but others, separate conversations, excluded. The court concluded on the basis that the conversations contained implied admissions, that there was a continuity of purpose throughout, a continuing intent by the participants to conceal the applicant's guilt, to falsely assert his innocence. That is not really the position with this conversation.

In Rudd, the conversations were close in time and were between the same participants, and the Crown allegation was that those two participants had planned to deliberately deceive known interceptors of the conversation. Here the subject matter of the conversation is quite different and so is the context. The context is the handling of the media, not the same as the context of the conversations tendered by the Crown. The conversation is with a co-conspirator, but Mr Hunter has not been able directly to link it to any particular passage in the material led by the Crown.

The ultimate test that one derives from the decision in Rudd is that one must look at the material to see whether the level of connection between the Crown material and the proposed defence material is such that it would be unfair to the accused not to allow it to be tendered. I have come to the conclusion that it would not be unfair to reach that conclusion.

The same reasoning applies in respect of the purpose of protecting the staff. I am unable to see that the material tendered by the Crown is even rebutted by material tending to

show that Mr Stoten was concerned about the position of the staff. Therefore, I rule that the transcript marked V12A for identification is not admissible.

In V12B, the conversation is between Mr Stoten and his wife. It occurs six days after the police raids, and the relevant part relied upon on behalf of Mr Stoten is at pp 4 to 5. It is apparent from the transcript that Mr Stoten has just finished a meeting somewhere down south, presumably Melbourne, with a Queen's Counsel. He tells his wife that, "We", presumably he and at least some of his co-accused, "are going back to have a chat about some things", before their flight home. One has the impression that he has moved slightly out of earshot of the other participants in the meeting but is not far away from them.

Mr Stoten reported to his wife that he had spoken to the solicitor, Christian Faes, who was "coming from media and that sort of angle", an approach which apparently he found not very helpful, but he also reported - and this is the part that leads into what was relied on by the defence - that, "We had a good chat, Adam and I, and we had a chat to - we actually had a chat to Matt Franklin." Franklin was the lead investigator for the police.

It emerges from the conversation that presumably at the meeting Franklin was telephoned, not with regard to the charge, it is said, but "with regards to our business and things like that and, ah, certainly." Mrs Stoten asks, "What

did he say?" Mr Stoten says, "Yeah, well, he sort of pushed the point again about the whole idea that, um, it's not, you know - we're not in - he actually said his words were that - I was trying to listen on the phone. He said that the - the – um, that the more we've - we - since we've, um - um, gained - gained, you know, access and, ah, now looking through it, it's even probably more clearer that there won't be any shutting down of - you know, the business," et cetera.

Mrs Stoten responded that she hadn't even thought about that. Mr Stoten said, "Yeah, yeah, well, we sort of - well, this is the thing that we're doing a little bit now, is that, um, you're sort of looking at every possible horrible option," and he continued, "And sort of going through that motion of, ah, what's - what's there and it was really good today. There was a lot of things that made us realise where we were at with - you know, compared to others and things like that. We were able to get a feel for different things like that, which, you know, being an appendage to it rather than - anyway, it was - um, yeah, it was just - ah, interesting day and good day from that point of view and I feel a lot better."

Now, that is material which in the defence submission demonstrates Mr Stoten's concern about the closure of the business. It is submitted that that is direct evidence that he was concerned about that and that this indicates an alternative explanation for why he might have said some of the things which he did say in the recordings tendered by the prosecution.

I would accept that the conversation does tend to show that at least at the time of the meeting there was concern at the possibility that the business might have to close. It does not seem to me, however, that that can translate into a basis for explaining material in the prosecution case which strongly suggests that Mr Stoten ordered the destruction of evidence and was aware of the use of a credit card as a key element in the scheme, possibly one which would give away its dishonest purpose. There does not seem to me to be a sufficient connection.

The state of mind that is indicated is a concern about the business, but that he was concerned about the business some days later in the light of what had happened in the raids does not seem to me to bear upon the question of his honesty. I would, therefore, not admit the conversation recorded in the transcript marked V12B for identification.

The third recording is of a conversation between Mr Stoten and his wife on the 20th of June 2005. Mr Stoten was in Brisbane in between meetings with barristers and QCs. It is evident that his wife was distressed. It appears from the material that she was concerned about an impending interview with police and I was told from the Bar table that, in fact, she was interviewed by the Australian Crime Commission compulsorily two days later. Mr Stoten is evidently attempting to reassure her.

It is unnecessary to record the whole of the conversation. It

is sufficient to say that he, on a number of occasions, says to her, "We thought - I mean, what was the point of doing all that if we - all that we did if we thought it was illegal?" That is restated in a number of ways.

If the jury were to accept the truth of the implied proposition in the statement that Mr Stoten and the others thought that the whole thing was legal, then that would, I think, be some evidence bearing directly on the issue of the awareness of dishonesty raised in the tapes tendered by the prosecution.

It seems to me that this conversation does fall within the principle enunciated in *R v Rudd*. There is a direct connection notwithstanding that Mrs Stoten was not a party to any of the conversations tendered by the Crown and the connection is close enough for it to be unfair for this conversation not to be tendered.

Of course, the explanation sought to be advanced by the defence is not the only explanation for this conversation. It may well be that what Mr Stoten was attempting to do, despite the fact that he repeatedly said to his wife that she had to be honest, was to convince her that there was no dishonesty against her own commonsense feeling about the way the scheme operated and to influence thereby her evidence on the question.

Less importantly, but also another construction which may run cumulatively, is he was attempting to reassure her in her

state of distress. The defence is aware of those constructions and persists in the desire to tender the tape and I think it is admissible. I will therefore permit that to be tendered through the appropriate witness.
