SUPREME COURT OF QUEENSLAND

CITATION:	*The Queen v Mark Dempsey Knight & Ors (No 3)* [2009] QSC 450
PARTIES:	**THE QUEEN**
	V
	MARK DEMPSEY KNIGHT, WESLEY ROBERT WILLIAMS AND WAYNE THOMAS ROBERTSON
FILE NO/S:	49/08
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	20 July 2009
DELIVERED AT:	Rockhampton
HEARING DATE:	16,17, 20 July 2009
JUDGE:	McMeekin J
ORDER:	**Applications dismissed**
COUNSEL:	Mr D Lynch (for Williams) Mr G McGuire (for Knight) Mr J Fraser (for Robertson)
	(Applicants)
	Mr R Pointing, Mr D Funch
	(Respondent)
SOLICITORS:	Legal Aid Office
	Director of Public Prosecutions

[1] Mark Dempsey Knight, Wesley Robert Williams and Wayne Thomas Robertson, are charged with the murder of Robert James Buckley. They have pleaded not guilty. The Crown case has closed.

[2] The defence make two submissions – first that there is no case to answer; second that I should revisit a pre-trial ruling that I gave concerning the receipt into evidence of hearsay statements concerning the deceased's relationship with, principally, Williams, admitted pursuant to s 93B(2) of the *Evidence Act* 1977 (Qld).

No Case to Answer

[3] The prosecution case is that the accused caused the death of the deceased by compression of his neck in some manner so as to cause asphyxiation. The prosecution allege that he was either first strangled and then suspended, or simply suspended, by a towel from a louvre bar by the accused men. Thus the prosecution say that those actions of the accused men were a substantial or significant cause of Mr Buckley's death (see s 293 of the Code and *Royall v The Queen* (1991) 172 CLR 378 at 411). It can be accepted that if the jury could be satisfied to the requisite standard that the accused did either of those things the prosecution would have discharged its onus of establishing causation of death.

[4] There is no direct evidence that the accused did either of these things. The prosecution case depends on the proposition that the surrounding circumstances are such that an inference should be drawn to that effect. Guilt must therefore not only be a rational inference but also it should be the only rational inference that could reasonably be drawn from the circumstances (*Martin v Osborne* (1936) 55 CLR 367 at p 375; *Plomp v The Queen* (1963) 110 CLR 234 at p 252).

[5] The defence submission assumes that there are only two alternatives open on the Crown case. The first is that the accused killed the deceased. The second is that the deceased committed suicide. The defence contend that suicide remains a reasonable hypothesis and is not excluded on the evidence and hence there is an incurable defect in the Crown case.

[6] The test to apply on such an application was explained in *Doney v R*, (1990) 171 CLR 207 at 214–215 where the High Court said:

> … if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty

[7] The question for me then is this: taking the case at its highest for the prosecution, could the jury, acting reasonably, have rejected as a rational inference the possibility of suicide? Or to put the issue another way – could a reasonable jury be satisfied beyond a reasonable doubt that the inference of an unlawful killing was the only reasonable inference open on the evidence taken at its highest for the prosecution?

[8] Taking the prosecution case at its highest the following facts and inferences are available and need to be weighed and considered by the jury:

(a) Several witnesses observed the three accused assaulting the deceased or heard sounds and observed things consistent with an assault on the deceased by the accused men in the shower block after lunch time muster which was usually at 11.25 am – the evidence is consistent with a time of around 11.30 am to 12.00 noon;

(b) The accused is not seen alive again after these observations;

(c) Given the eye-witness accounts it may not be necessary to record confirmatory evidence but those accounts are consistent with:

(i) the accused's blood being found at differing locations within the shower block remote from the place where the body was found hanging;

(ii) The numerous injuries found on the deceased's body at autopsy. There is a consistent body of evidence that the accused was uninjured up to the day of his death. Prof Ansford said that he had not seen a similar pattern of injuries as the deceased bore in a known suicidal hanging in his 37 years of experience. The inference is that the injuries were inflicted by third parties;

(iii) The pathologists agreed that a number of injuries appeared fresh ie consistent with being inflicted at about the time of death;

(iv) There is no evidence of any third party having any animosity towards the deceased but rather the evidence is that apart from Williams he got on well with the other inmates;

(v) The deceased had arrived in 10 block only two days before his death and so had only limited opportunities to make enemies of the inmates. He was known to Williams and Knight before he arrived at 10 block;

(d) Hodder's evidence indicates that at 5.30 pm when the body was cut down the limbs had commenced to stiffen – consistent with rigor mortis having set in at some earlier time;

(e) The evidence of the pathologists was that rigor mortis would become evident about 6 hours after death, give or take, in June (Dr Sinton: T10-1/20; Prof Ansford: 11-67/20-50). One could exclude death within 4 hours of rigor mortis being evident unless it was very hot. There is no evidence that it was very hot in June 1999 and it would not normally be;

(f) That suggests a time of death of around 11.30am but as late as 1.30pm. The deceased therefore died at or about the time that witnesses observed the three accused assaulting the deceased;

(g) The deceased is found at 5.30 pm hanging in a shower cubicle only a few metres from the location where witnesses claim to have seen him being assaulted by the three accused;

(h) The "rope" by which the deceased was found suspended was a towel torn or cut into 6 pieces and plaited and knotted together. It was knotted over a bar at a height of 2.2 m from the floor (Ex 61 paras 14(d) and 15);

(i) Observations consistent with the deceased hanging in the shower cubicle are made shortly after the observed assault or around lunch time (the evidence of Werribone, Nelson (he thought he saw the deceased hanging in the cubicle at around 12.30 pm – T 12-3/30) and Tilberoo (who saw a towel over the louvre bar a matter of minutes, or perhaps seconds, after the three accused left the left hand shower block));

(j) The pathologists' evidence, whilst not conclusive, is consistent with a strangulation followed by a hanging;

(k) The deceased's blood was found on the angle iron on the lower part of the door jamb leading into the shower cubicle where he was later found hanging. Its formation was of a swipe pattern, that is it was consistent with being wiped onto the surface from another object such as a cloth or a hand (evidence of Hall);

(l) The deceased's blood was found on a pullover that he was wearing when found in the cubicle, and on his hand and face;

(m) The feathering and concentration of the deposits of blood on the door jamb are consistent with the object on which the blood was located going into and not out of the shower cubicle (evidence of Hall);

(n) The blood smear on the door jamb was at a height of 24.5 cms from floor level;

(o) A substance was found on the deceased's hands consistent with grease;

(p) Grease was not used or needed on the louvre mechanism near where the towel from which he was suspended was tied;

(q) The only place grease was likely to be used in the shower block was on the door hinge of the shower cubicle;

(r) The available inferences include that the accused was dragged into the cubicle;

(s) An alternative inference is that the deceased was crawling when he entered the cubicle. Combined with the evident fact that he was then bleeding or had been a very short time before that would be consistent with the accused being significantly disabled as he entered the cubicle;

(t) Williams and Knight were both shown to be well aware of the existence of outstanding proceeds of a robbery committed by the deceased and Ryan – the inference is available that they had a motive to harm the deceased associated with their attempts to get hold of the proceeds of his robbery or anger at him for not handing it over;

(u) There were various stories about the amount of the proceeds involved but they ranged up to $300,000 with only $1/5^{th}$ recovered (McLuckie). Another witness spoke of $30,000 being talked about as un-recovered (Findlay from the detention unit). On either account the amount is more than sufficient to provide a possible motivation for murder;

(v) Williams had been seen "standing over" the deceased in an attempt to persuade him to part with the proceeds of his robbery (eg McIlwain Ex 11 para 1-3; Ryan: Williams was angry with the deceased and had punched him in the head a couple of times);

(w) The deceased had expressed concern for his life should he be placed in 10 block to the correctional officer Weeks only 9 days before his death. The cause of that fear can logically be found in the relationship evidence concerning Williams. As well the only inmate of 10 block that he is shown to have known to that time was Williams;

(x) Prior to the assault on the deceased Williams, Knight and Robertson made statements to witnesses that they intended to "knock" the deceased, which is slang for "kill" (Tilberoo, Booth). The evidence is that the statements were made on the day the deceased died and on the day he entered the block two days before he died;

(y) Following the observations of the assault on the deceased Williams is said to have told other inmates that he had "fucked" the deceased up (Barlow);

(z) Whilst there is no direct evidence of motive against Robertson there was evidence that Robertson was a friend of Williams and Knight and seen in their company immediately before and after the sounds of the assault as well as during the assault. The inference is available that he knew what they knew.

[9] The available evidence, including the inferences from that evidence, is that the three accused expressed an intention to kill the deceased very shortly before he died; they had a reason for doing so; they were seen inflicting harm on the deceased consistent with their putting into effect their intention; the deceased died at about the time they were seen doing so; the deceased is seen hanging in the shower cubicle a few metres from where he was seen being assaulted by the accused; a towel is seen tied to the louvre bar in that cubicle within a few minutes of the assault, consistent with the towel from which he is later found suspended; the accused plainly had the physical capacity between them to strangle the deceased and suspend his body from the bar over the louvres where he was found; and the pathological evidence is consistent with the deceased having been unlawfully killed.

[10] In my view these facts alone, especially in the context of the statements of the accused of their intent to kill the deceased, would enable the jury, acting reasonably, to exclude the competing hypothesis of suicide. However there is a great deal more.

[11] The principal defence point is that the pathologists' evidence cannot exclude suicide and is inconsistent with strangulation by co-axial cable (Booth's version) or the application of a choke hold (Roberts' version). I think that on a fair reading of the evidence that latter point overstates the effect of the pathologists' views. However it is not a necessary part of the prosecution case that either man witnessed the action that killed the deceased. It is equally open that they observed actions preliminary to his death and in the course of the accused disabling the deceased.

[12] The hypothesis advanced to support the suicide theory suffers from some significant improbabilities and weaknesses.

[13] First the theory that the deceased was suicidal is based to a very significant degree on speculation. The direct evidence of every prisoner asked was that the deceased appeared to be a happy person, in a normal mood, who got on well with other inmates, save Williams. He made no statements suggestive of suicidal intent. To the contrary there is strong evidence of a desire to live – he had talked of his future life with his partner, spoke of his partner and daughter to his friends, and said nothing to his friends at least as recently as the day before, and on some versions on the day of, his death, suggestive of suicidal intent.

[14] The defence contentions are that the deceased felt abandoned and alone, had recently received a letter from the child support agency pointing out his responsibilities to his baby child and from his solicitor advising him of the date of

his sentencing, had possibly received a letter from his de facto ending their relationship, and had been placed in a cell with a person known to have perpetrated sexual assaults on other prisoners, the deceased having indicated that a circumstance in which he would possibly harm himself was if he was sexually assaulted.

[15] Whilst the day of his sentencing might now have become more certain the deceased had known that was inevitable from the time he was apprehended – yet numerous witnesses spoke of his happy nature and demeanour whilst in prison.

[16] The evidence that he received a letter from his de facto ending the relationship is very weak and certainly not taking the prosecution case at its highest. The de facto denies sending any such letter. As well her known actions are contrary to sending such a letter. She had visited him in the prison on four occasions between 27 April and 4 June, had telephone conversations with him two or three times a week, and had booked to visit him in the week before he died but was unable to do so because the visit was cancelled by the authorities due to the deceased's placement in the detention unit. She was emphatic that they were on good terms at this time and that she had said nothing to suggest that their relationship was ending and he had said nothing to suggest that he thought it was. They had spoken together of his looking forward to his future life with his de facto and child. Her evidence was consistent with a letter the deceased wrote, ostensibly to his daughter, speaking of a future with her (T3-106/10).

[17] Thus the evidence is that the deceased was embracing the future responsibilities of parenthood. It is hardly likely that a letter from a child support agency advising him of those responsibilities would in these circumstances be even a concern, let alone a sufficient concern to trigger suicide.

[18] The claimed basis for the receipt of a letter from the de facto ending the relationship is a note in a police officer's notebook that he was told by the manager of the prison that the deceased had received such a letter. The manager of the prison had no recollection of ever saying that to the police officer, was confident that she had no personal knowledge to that effect, and that at its highest she was passing on something that she had heard from another, presumably a correctional officer, whom she cannot identify. No correctional officer was called who had any such knowledge. Whilst personal letters from the de facto were located in the deceased's cell and returned to the de facto apparently unexamined and have since been lost, that does not establish that there was any such letter. So the police officer's record is of a double hearsay statement from an unknown source based on unknown facts.

[19] Far from being abandoned and alone the deceased had restored relations with his grandparents, with whom he had lived before his incarceration and, as I have explained, with his de facto partner. His grandfather gave evidence that the visit a month before the deceased died was a cordial and happy one.

[20] As to the possibility of sexual assaults the cell mate is shown to have committed sexual assaults, of a fairly minor nature, in the year following the deceased's death

but not before. There is no evidence of him perpetrating any assault on the deceased.

[21] The defence hypothesis of suicidal intent seems to me to be based more on conjecture than fact. The following observation in *Peacock v The King* (1911) 13 CLR at p 661 (cited in *Knight v R* (1992) 175 CLR 495 at 503 per Brennan and Gaudron JJ) seems apt: "[A]n inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence."

[22] Second, there are features of the physical evidence that make the suicide theory an improbable one. The nature of the "rope" by which the deceased was found suspended and its location above the floor each present some difficulties for the suicide theory. That theory requires one of two possibilities – that the deceased had already prepared the rope before entering the shower block or that he did so after the assault. If he had already prepared the rope then the theory requires the coincidence that on the very day and at the very time that the three accused attacked the deceased, after expressing their intention to kill him, he had determined to commit suicide. That would be a truly remarkable coincidence.

[23] Alternatively if he prepared the rope after the assault then there are two significant difficulties for the theory. First, Tilberoo claims to have seen the towel over the bar, at the most, only minutes after the three accused left the shower block having assaulted the deceased. The available time seems far too short to create and fix the rope. Second, the height of blood smears on the cubicle door above the floor indicates that if the deceased entered the cubicle under his own volition he was crawling. The suicide theory requires that a man in that condition had to obtain a towel, tear or cut it into six pieces, plait it, and then find the strength to get to the bar to tie the towel and at the correct height such that he could bring about his own suspension. Again that must be achieved in a few minutes. The sequence is improbable.

[24] Either possibility requires that the deceased handle the towel rope after the assault and at a time when his hands are bloodied, but none of his blood is found on the towel (Ex 61: para 6(b)).

[25] The evidence of Professor Ansford was that there were signs suggestive of suspicious circumstances – particularly the horizontal nature of the ligature mark almost continuously around the neck and the apparent lack of an abraded suspension mark. Neither is typical of a straightforward suicidal hanging and both features that, whilst not conclusive, are more consistent with a strangulation than suspension.

[26] In my judgement these various circumstances taken together are sufficient to overcome the competing hypothesis to the requisite standard. In my view "according to the ordinary course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed" (per Dixon

CJ in *Martin v Osborne* (1936) 55 CLR 367 at p 375; cited in *Knight v R* (1992) 175 CLR 495 at 503 per Mason CJ, Dawson, Toohey JJ).

Admission of Relationship Evidence.

[27] The basis for the reopening of the objection is that the evidence as led at trial differed significantly from the statements relied on pre trial with the result that the statements themselves, and the circumstances surrounding the making of the statements, did not satisfy the necessary preconditions for the admission of hearsay evidence namely:

(a) the conditions of s 93B(2) of the *Evidence Act* 1977 (Qld); and
(b) that the evidence be such that a "relevant inference may logically and reasonably be drawn" from it that advances the Crown case.

[28] I will not repeat the views already expressed by me in my pre-trial decision as to the requirements of s 92B(2). In my view there has been no significant change to the circumstances in which the statements were made. The significant points I relied on for my earlier finding that the preconditions of s 93B(2) (a) and (b) were satisfied were:

(a) The witnesses were, save for one Weeks, a guard, fellow prisoners of the deceased and the accused and each was on good terms with the deceased;
(b) In each case the disputed statements of the deceased were made at a time when the deceased had no reason to mislead the witness and reason to make his state of mind and its cause accurately known;
(c) The reason for that state of mind is related by the Crown to the evidence concerning Williams' physical violence towards the deceased and his intimidation of the deceased as reported by the deceased and as witnessed by some of the other witnesses.

[29] In general the statements were made close in time to the claimed events being reported. The circumstances in which the statements were made, in my view, made it highly likely that the representations were reliable. I was not taken to any passage in the evidence which rendered those findings false.

[30] The thrust of the defence contentions was that the second of the preconditions that I have set out above is not met given the evidence actually led – that even if the statements can properly be received pursuant to s.93B of the *Evidence Act 1977* no relevant inference can reasonably and logically be drawn from the impugned statements that assists the Crown in its proof. Mr Lynch, who presented the argument on behalf of the defendants, submitted that "there is a vastly different connotation on the relationship evidence" such that there was no "proper basis for the jury to draw the inferences about the state of mind or relationship or motive".

[31] The Crown maintains its submission that the statements on which the Crown wishes to rely is admissible because the statements do one or more of the following:

(a) place other evidence in an intelligible context;
(b) provide evidence of the state of mind of the accused;

(c) provide evidence of the state of mind of the deceased as brought about by the actions and attitudes of Williams;
(d) provide evidence of motive;
(e) rebut defences and hypotheses consistent with innocence;
(f) provide evidence of intent.

[32] I observed in my earlier decision the effect of the statements on which the Crown rely is that "the deceased was concerned about the accused Williams, that Williams was placing pressure on him and had caused physical violence to him, that this was done in the context of Williams wishing to gain access to certain gold that Williams believed the deceased had, and that the deceased did not want to go into "ten Block" (a reference to a block in the prison where Williams and the other accused were located). Some statements were made shortly after physical force had apparently been used by Williams on the deceased." In my view, after hearing the evidence, those observations remain valid and support the logical inference that the existing relationship between the deceased and Williams was one of animosity by Williams towards the deceased. The only modification I would make is that in relation to the possible motivation for the animosity from Williams I would add anger at a suggested reneging by the deceased on an arrangement to give Williams some of the proceeds of the robbery retained by the deceased.

[33] That violence was used by Williams towards the deceased on the deceased's report or in fact observed was confirmed by Ryan, Hill, McIlwain (Ex 11), Robinson, and Mason. Whilst Hill attributed the violence to a different complaint (noise in the night) it nonetheless demonstrates the state of the relationship and that, to that point, it was not resolved in some amicable way. Mason's impression that the assault he spoke of was a minor matter quickly resolved is at odds with other evidence and essentially for the jury to weigh in the mix. Similarly the submissions about whether McIlwain could have witnessed what he claims to have witnessed depends on a resolution of conflicting facts and is not a matter for me.

[34] Donovan's evidence was strongly supportive of the deceased being in fear of Williams, that he related it to an argument about the gold from the robbery, and that the deceased was relieved when Williams was moved out of the block. Donovan asserted that the deceased had told him that he was scared to go to 10 block because Williams was there.

[35] The evidence gives context to the evidence from a number of witnesses of the deceased's distress at going to 10 block where Williams resided and context and explanation for his statement made to the guard Weeks. Weeks' account was unchanged from her statement – that the deceased refused a direct order to go to 10 block from 8 block, that he said that he feared for himself there, and that prisoners he refused to identify were going to kill him. That this was said in a serious manner was not questioned and is confirmed by Weeks' response to him (why didn't you tell me earlier and we could have moved you to a different block), her recording of the conversation in her official notebook and reporting it to her superiors, Robertson's evidence that the deceased was very distressed about going to 10 block, and the need for several officers to be involved in removing him from 8 block. So far as the evidence shows Williams was the only 10 block prisoner who had ever

previously displayed animosity towards the deceased or indeed whom the deceased knew to that time.

[36] The defence approach was to have some witnesses agree at trial that their construction of what the deceased said was consistent with the deceased merely wanting to stay in 8 block and was not concerned about being placed in 10 block. This evidence helps meet those defence arguments and so logically advance the prosecution case. The manner of the refusal of Weeks' order was hardly likely to endear the deceased to the authorities and so get him into 8 block.

[37] I appreciate that there are arguments that the defence can mount as to the credit worthiness of the witnesses but that in my view is not the relevant point. Inconsistencies in accounts do not render the evidence inadmissible and in my view comes nowhere near the level that would justify a trial judge in refusing to receive evidence otherwise admissible which the authorities show is done in only rare cases.

Conclusion

[38] I reject the defence applications.