SUPREME COURT OF QUEENSLAND

CITATION:	*Crime and Misconduct Commission v WSX & EDC* [2013] QCA 152
PARTIES:	**CRIME AND MISCONDUCT COMMISSION** (appellant) **v** **WSX** (respondent) **CRIME AND MISCONDUCT COMMISSION** (appellant) **v** **EDC** (respondent)
FILE NO/S:	Appeal No 299 of 2013 Appeal No 301 of 2013 SC No 7874 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2013
JUDGES:	Chief Justice and Gotterson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In relation to each appeal:** **1. That the respondent have leave to file and rely upon his notice of contention;** **2. That the decision given in this court on 13 December 2012 be set aside;** **3. That the decision of the Presiding Officer given on 21 August 2012, the subject of the appeal to this court, be affirmed; and** **4. That the respondent pay the appellant's costs of and incidental to the proceeding before the primary Judge, and on appeal, assessed as necessary on the standard basis.**
CATCHWORDS:	CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – QUEENSLAND – CRIME AND MISCONDUCT COMMISSION – the

respondent was the victim of a violent assault – the respondent witness refused to answer a question posed by the presiding officer at a closed hearing due to his fear of possible retribution from the assailants – the presiding officer held that the respondent did not have a reasonable excuse and directed the respondent to answer the question – the respondent appealed against the decision of the presiding officer – the appellant subsequently appealed the decision of the primary Judge – whether the witness had a reasonable excuse not to comply with the direction to answer the question

Crime and Misconduct Act 2001 (Qld), s 176, s 177, s 194, s 195

Bank of Valletta plc v National Crime Authority (1999) 164 ALR 45; [1999] FCA 791, considered
Ganin Burden & Creswell v New South Wales Crime Commission (1993) 32 NSWLR 423; (1993) 70 A Crim R 417, cited
Lacey v Attorney General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
R v Garland (1997) 95 A Crim R 264; [1997] QSC 145, cited
Registrar of the Court of Appeal v Gilby [1991] NSWCA 235, considered
Schultz v CMC (unreported, QSC, 31 October 2003), considered
Taikato v The Queen (1996) 186 CLR 454; [1996] HCA 28, cited
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, distinguished
Z v New South Wales Crime Commission (No 2) [2005] NSWSC 1388, cited

COUNSEL: W Sofronoff QC, and E J Longbottom, for the appellant
P Callaghan SC for the respondent

SOLICITORS: Crime and Misconduct Commission for the appellant
Robertson O'Gorman Lawyers for the respondent

[1] **CHIEF JUSTICE: Introduction** The respondent WSX (not his initials) was the victim of a serious assault committed upon him by armed men in disguise who entered his premises.

[2] He was rendered unconscious and hospitalized. The respondent did not make a statement to the police or lodge a complaint.

[3] In pursuit of one of its statutory functions (*Crime and Misconduct Act* 2001, s 25), the appellant embarked upon an investigation into offences of violence which may have been committed since 1 January 2012 (the alleged offence occurred after that), or which may in the future be committed, by members or associates of certain motorcycle gangs.

[4] In the course of that investigation, the appellant required the respondent to attend for questioning at a closed hearing (ss 176, 177). The appellant was concerned to determine the identity of the respondent's assailants, and their motives.

The Commission hearing

[5] The respondent attended at the hearing with his solicitor.

[6] The Presiding Officer affirmed that the hearing was closed to the public, and that disclosure of what transpired, without consent, would constitute an offence. He noted that typically the appellant would disseminate information gained to other relevant agencies, such as the Queensland Police Service and the Director of Public Prosecutions.

[7] At the commencement of the hearing, Counsel assisting the Commission itemized a series of violent incidents said to be part of a "tit for tat" sequence attributed to rivalry among members of motorcycle gangs. The Presiding Officer noted that the respondent had been the victim of a vicious assault. He made mention that he was aware of evidence given previously by another witness or witnesses.

[8] The respondent answered questions about his background and work history, and was then asked this question by Counsel assisting:

> "On that particular day … did you see something on the camera that brought your attention to some people coming into the premises?"

[9] The respondent responded as follows:

> "I refuse to answer any questions before this Commission on the basis that I have a reasonable excuse specifically I was a victim to a severe bashing. I'm genuinely fearful of my safety and life if I answer any questions about these matters."

[10] The Presiding Officer then addressed the consideration of whether that was an appropriate response. Section 194 of the *Crime and Misconduct Act* 2001 provided (and provides):

> "**194 Presiding officer to decide whether refusal to answer questions or produce documents or things is justified**
>
> (1) This section applies if a person claims to have a reasonable excuse, including a reasonable excuse based on a claim of legal professional privilege, for not complying with a requirement made of the person at a commission hearing—
>
> (a) to answer a question put to the person; or
> (b) to produce a document or thing that the person was required to produce.
>
> (1A) The presiding officer must decide whether or not there is a reasonable excuse.
>
> (1B) The presiding officer must decide, after hearing the person's submissions—
>
> (a) that the requirement will not be insisted on;
> (b) that the officer is not satisfied the person has a reasonable excuse.
>
> …

> (3) If the presiding officer decides the person did not have a reasonable excuse for not complying with the requirement, the presiding officer must—
>
> (a) give the person reasons for the decision; and
>
> (b) require the person to answer the question, or to produce the document or thing as required by the attendance notice, subject to the person's right of appeal under section 195; and
>
> (c) advise the person that the person may appeal the presiding officer's decision to the Supreme Court within the time allowed under section 195.
>
> *Note—*
>
> A refusal to comply with the requirement to answer the question or produce the document or thing is an offence against section 185 or 192."

[11] The Presiding Officer invited the respondent to lead evidence in support of his claim of reasonable excuse. The respondent led no evidence. His solicitor presented his position in this way:

> "The submission that my client … has a lawful excuse is based on the events that occurred that day and (WSX's) concern based partly on what you Sir said at the beginning of these proceedings as to dissemination of answers both to other law enforcement agencies and in certain circumstances to an open court. WSX's concern is that having been bashed once if he gives answers as to the circumstances, the background assuming he's in a position to do so, his concern is that that evidence can and possibly will be disseminated and that his safety will be severely compromised as a result. Partly in support of that submission I rely on various media reports from time to time that are published particularly in relation to so-called Outlaw Motorcycle Clubs where there are detailed so-called investigative reporting articles where it is a reasonable inference to conclude that some and sometimes a reasonable inference can be drawn that most or at least a significant part of the content of those investigative articles come from police. So for those very submissions – for those various reasons I submit because of the very real possibility of the dissemination of my client's answers that those answers could come to the notice of those who were responsible for bashing him and that therefore he has a reasonable excuse for not answering because of his concern about a further serious bashing which could cause him serious injury. That is my submission."

[12] The Presiding Officer then put the following question to the respondent:

> "What is your knowledge of the reasons for the alleged assault of yourself and (the other respondent)…at (your workplace)…on the (specified date)?"

[13] The respondent responded in the same terms as before.

[14] Following the submissions, the Presiding Officer ruled that the respondent did not have reasonable excuse for not answering.

[15] The preceding submissions had included reference to the witness protection regime. The respondent was informed that he was not at that time eligible for assessment for that program. His lawyer asserted that if involved in the program, the respondent would have to move and close down his business. The Presiding Officer described his situation as "catch 22".

The Presiding Officer's decision

[16] In his reasons for ruling that the respondent had no reasonable excuse for not answering, the Presiding Officer referred to what Muir J (now Muir JA) said in *Schultz v CMC* (unreported, 31 October 2003):

> "Curiously, the Act is silent as to what may constitute a reasonable excuse. It is not, so far as I am aware, a concept capable of precise definition. Presumably it was intended to give the presiding officer a degree of practical latitude so as to prevent the consequences of answering a question from causing harm disproportionate to the benefit resulting from the answer."

[17] The Presiding Officer said that he placed "great weight upon the balancing test that Muir J [adverted] to in that passage".

[18] The Presiding Officer said:

> "I accept that (the respondent) was indeed violently assaulted … and that it could not be said in those circumstances that a fear of a further assault would be fanciful…. I certainly don't characterise this claim, given what's happened...as being imaginary or insubstantial, or arising from an insubstantial fear or one which is so remote in the practical world as to be safely ignored."

[19] He also observed that it was "simply speculation' to suggest that given cooperation, the respondent would "necessarily" be subjected to further violence. He acknowledged that the witness protection program was a relevant consideration.

[20] The proceeding in relation to EDC (again, not his initials), the other respondent to this appeal, proceeded similarly. The Presiding Officer noted that EDC had not satisfied him that the consequence of that respondent's failure to answer "far outweighed" or were disproportionate to the very clear benefits which would ensue were answers given.

[21] In the course of his comprehensively expressed reasons in relation to EDC, the Presiding Officer said:

> "Having considered all of those submissions I do seek to apply the balancing exercise prescribed by Muir J in *Schultz's* case considering on the one hand the consequences of answering questions I posed to the witness in terms of harms that might thereby be caused, as against the benefits that might result from the answer were the witness minded to give an answer to that question. As I already said I fully accept that the witness was violently assaulted … and I accept indeed that there is a risk of a further assault upon the witness. I cannot discount that possibility, however in the absence of further evidence as to the cause or reasons for the assault upon the witness in the first place … or any information as to the identity of the perpetrators of that assault, I simply am not able to graduate that risk.

> If information was provided as to the identity of the perpetrators, that would enable assessments to be made as to their criminal antecedents. If information was provided as to the reason for the assault – whether in fact it was a one off incident or whether it was part of some particular ongoing dispute that directly involved this witness – I might be in a better position to assess the seriousness of the risk to the witness of a further assault or put it somewhere on a scale from "unlikely" to "almost certain" at the other end of the spectrum. So that's the situation in terms of the consequences to the witness, that whilst I accept that there is a risk of further violence to him were he to cooperate with law enforcement, I am not in a position on the information before me today to, as I say, graduate that risk. So that's on the one side of the ledger."

Application for leave to appeal to Supreme Court

[22] Each respondent sought leave to appeal from the Presiding Officer's direction, a course open under s 195 of the Act, and on 13 December 2012 the learned primary Judge gave that leave and allowed the appeals, ruling that each respondent had reasonable excuse "for refusing to answer questions at the Commission hearing".

[23] His Honour referred to *Bank of Valletta plc v National Crime Authority* (1999) 164 ALR 45, *Taikato v The Queen* (1996) 186 CLR 454 and the decision of Muir J, and then expressed his conclusion as follows:

> "[21] Like Muir J, I consider that the potential benefit resulting from the answer to questions at a Commission hearing may be a relevant consideration. That is broadly consistent with the statement in a passage from the majority judgment in *Taikato*, cited previously, where reference was made to the "purpose of the provision to which the defence of 'reasonable excuse' is an exception". There are likely to be cases where that purpose will outweigh particular concerns which are said to constitute a reasonable excuse for not answering questions (or doing other things, such a producing documents).
>
> [22] In my view, there is a real prospect that the applicant, if compelled to answer questions, will be exposed to further violence. He has already been subjected to violence on one occasion. The presiding officer explained the use which might be made of any information which the applicant provided. On the assumption that that information would assist in identifying those who assaulted the applicant, its use in those circumstances is likely to suggest that he is the source of it. The conclusion that the applicant faces a real prospect of further violence is reinforced by the nature of the organisation under investigation, which has a well-known reputation for violent conduct.
>
> [23] It seems to me that, prima facie, that prospect provides a reasonable excuse for the refusal by the applicant to answer questions at the Commission hearing. It seems to me that it would be unreasonable to expect that a person who is

> unwilling to do so, should answer questions, in the face of that prospect. To the extent that it might be of assistance to consider the intent to be attributed to the legislature, it seems to me unlikely that the legislature would intend that a person should be compelled to answer questions in such circumstances.
>
> [24] The remaining question is whether that conclusion is affected by the prospect that the applicant might be admitted into the witness protection assessment program. It is apparent from the statements of the presiding officer that there is a substantial uncertainty about whether that would occur. It seems to me, therefore, that this consideration does not alter the prima facie conclusion which I have reached."

[24] In *Bank of Valletta*, Hely J had relied on what Kirby P said in *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423, 436, 439, with reference to comparable legislative provisions:

> "There is no apparent reason to read down exemptions for 'reasonable excuse' in s 18(2) of the Act. On the contrary, there is every reason to give the words used their ordinary construction. They simply ask whether the refusal to answer the question was 'without reasonable excuse' … in accordance with orthodox canons of construction these words would not be given a narrow meaning. They appear in a provision which imposes a criminal sanction for its breach. They appear in an enactment which, as has been said, amounts to a drastic derogation from the ordinary liberties of citizens.
>
> …
>
> It is undesirable that different *formulae* should be substituted for that which parliament has enacted.
>
> Nevertheless, in judging whether a 'reasonable excuse' exists, it was clearly appropriate for the decision-maker to put out of mind imaginary and insubstantial fears or those which, in the practical world, are so remote as to be safely ignored or over-ruled as unreasonable."

Appeal to Court of Appeal

[25] The appellant appeals on these grounds: first, that the primary Judge misdirected himself as to the substance of the Presiding Officer's decision; second, that His Honour wrongly concluded that a "reasonable excuse" under s 194 authorized a refusal to answer questions generally; third, that the Judge erred in failing to identify the error which enlivened a decision to grant leave to appeal under s 195; fourth, that the Judge erred in identifying any evidence establishing a reasonable excuse; fifth, that he erred in finding there was reasonable excuse; and sixth, that he erred in failing to give reasons for his conclusion that there was reasonable excuse.

[26] The appellant seeks orders that the decisions given on 13 December 2012 be set aside, that the decision of the Presiding Officer on 21 August 2012 be affirmed, and that the respondent pay the appellant's costs in the Court of Appeal and before the primary Judge.

[27] Each respondent has filed a notice of contention in which he contends that the Presiding Officer erred in his consideration of the issue of reasonable excuse under s 194(3), and in his consideration of the relevance of the witness protection program, and that the decision of the primary Judge should in any event be affirmed by reference to those considerations.

[28] The appellant did not oppose the respondents' being given leave to file the notice of contention, and there should be an order that leave be given.

Analysis

[29] The first three grounds of appeal are plainly not sustainable.

[30] The first derives from the Judge's reference to a "reasonable excuse for refusing to answer questions" (that is, questions in the plural). The Presiding Officer's ruling concerned the particular question asked. The Judge clearly had in mind what would amount to reasonable excuse for refusing to answer any such questions as that leading to the Presiding Officer's direction. In allowing the appeal, he set aside the particular ruling made by the Presiding Officer, and that is all that is relevant to the appeal before the primary Judge and the further appeal now.

[31] The second ground, developed from the first, involves a contention that the Judge proceeded on the basis of a finding of "reasonable excuse" in relation to one question which would apply generally to all questions asked. There is no basis to think His Honour was in any determinative way proceeding on that basis. It would have been unnecessary and irrelevant for him to do so. The Judge was assessing the ruling made by the Presiding Officer on the response to the particular question which was asked by him. He was not saying that whatever further questions may have been asked, with a refusal to answer, the ruling would continue to apply.

[32] The third ground, that the Judge failed to identify the error which enlivened his discretion (cf. *Lacey v Attorney General (Qld)* (2011) 242 CLR 573, 596-7), ignores the position the Judge had found, which was that the Presiding Officer erred in finding, as a matter of fact, that "reasonable excuse" did not exist. If the Judge was right, then obviously the discretion was there. In any case, the present appellant, when before His Honour, did not oppose a grant of leave to appeal.

[33] The remaining three grounds of appeal concern the more substantial issue, which is whether there was any evidence justifying the learned Judge's conclusion that there was reasonable excuse to refuse to answer the question asked.

[34] The only material before the Judge was that the respondents had been the victims of a serious assault and that they subjectively feared reprisal if it emerged they had responded to the Commission's questioning. Was the reasonableness of that fear so apparent that it should have been assumed, in the absence of further evidence establishing it?

[35] The respondents declined an invitation to present such further evidence. Its scope could, for argument's sake, have covered any past association (if it existed) between the respondents and members of motorcycle gangs such as might have given ground for a particular fear in this instance, or knowledge of the way such organizations proceed, if relevant and known to the respondent. They are but examples of the sort of evidence which might have been led. Significantly, the respondents did not meet

the Presiding Officer's invitation by saying there was no further relevant evidence in support of their contention which could be presented.

[36] Counsel for the appellant emphasized there was no evidence that the fear of reprisal was reasonable; there was no evidence as to the level of any risk; and that the material stopped at the assertion of the respondents' subjective beliefs. As to the possibility of dissemination outside the Commission of material confidentially received, whether that may occur in this case, it was submitted, did not surpass speculation.

[37] Whether reasonable excuse exists is a matter for objective determination, and the consequences of a refusal to answer, to both the examinee and the appellant Commission, are relevant considerations.

[38] Counsel for the appellant referred, as of some assistance, to cases dealing with excuse for committing what would otherwise amount to contempt of court. In *Registrar of the Court of Appeal v Gilby* [1991] NSWCA 235, this was said (p 12):

> "It is not uncommon for witnesses to have a general apprehension that those on trial might in some way cause harm to them. In some cases, the reason for apprehension of this kind goes further. Threats may be made, general or specific, that harm will be done to a person if he gives evidence. In some cases, threats may be made to other persons and that fact may provide a basis for apprehension by the particular witness. But such circumstances do not, in [general], constitute duress in the sense of relieving the witness of the obligation to give evidence when properly called upon to do so.
>
> In order to constitute duress in the sense relevant to an offence of the present kind, it is necessary that there be, in the sense to which we shall refer, elements of immediacy, directness and fear in respect of what has been done."

See also *Z v New South Wales Crime Commission (No 2)* [2005] NSWSC 1388 and *R v Garland* (1997) 95 A Crim R 264, 270.

[39] In this case, the existence of "reasonable excuse" depended on the assumption that the respondents' assailants would reach the conclusion that the respondents had given evidence before the appellant which may identify them, and would therefore determine to, and in fact, commit further assaults upon them. It is speculative to contemplate that the circumstances of the respondents' presence, and presentation, before the appellant would, in breach of law, be disclosed and come to the knowledge of the respondents' previous assailants or their associates. (That puts to one side what the respondents may be perceived to have disclosed in any answers given.) The context is of proceedings legislatively private, with disclosure an offence.

[40] *York v The Queen* (2005) 225 CLR 466, to which reference was made before us, was quite different from the present case: in *York* there was substantial evidence of actual, grave threats.

[41] There is a high public interest in identifying those responsible for serious criminal offending. While the respondents' own concern is understandable, that it is borne of the previous assault – as substantially the only matter founding the Presiding Officer's decision and the Judge's contrary finding, was not enough to warrant a conclusion that they had reasonable excuse not to answer a question which if

answered may have led to the identification of their assailants. In determining whether or not there was "reasonable excuse", the decision maker had to balance the respective considerations of the public interest in tracking those responsible for violent crime, and the private concerns of those who may be able to disclose those responsible.

[42] The respondents were given the opportunity, which they declined, to provide more information as to the basis of their concern.

[43] I have reached the conclusion that in these circumstances, the public interest prevailed, and the respondents should have answered the question asked.

[44] If the hearing before the appellant is resumed, and the respondents are again asked questions drawing answers which may identify, or lead to the identification of, their assailants, they would no doubt again be given the opportunity to provide an informative basis for their concern. If they were to accept that opportunity, it would then fall to the Presiding Officer to make a ruling on a proper basis – that is, a basis surpassing mere assertion, however genuinely the fear may subjectively be entertained.

[45] As to the notice of contention, I do not consider that the Presiding Officer should be regarded as having said that he was bound, in a constraining sense, by a "test" laid down by Muir J in *Schultz*. Muir J did no more than raise a relevant consideration, namely the public interest, and the Presiding Officer did no more than take that interest into account.

[46] As to the witness protection program, the Presiding Officer did no more than refer to that as a relevant consideration, which it plainly was.

[47] The Presiding Officer's ruling was in my respectful view correct, and the determination of the learned Judge should be set aside.

Orders

[48] I would order, in relation to each appeal:

1. that the respondent have leave to file and rely upon his notice of contention;
2. that the decision given in this court on 13 December 2012 be set aside;
3. that the decision of the Presiding Officer given on 21 August 2012, the subject of the appeal to this court, be affirmed; and
4. that the respondent pay the appellant's costs of and incidental to the proceeding before the primary Judge, and on appeal, assessed as necessary on the standard basis.

[49] **GOTTERSON JA:** I agree with the orders proposed by the Chief Justice and with the reasons given by his Honour.

[50] **MULLINS J:** I agree with the Chief Justice.