

SUPREME COURT OF QUEENSLAND

CITATION: *R v Sutton (No 2)* [2015] QSC 289

PARTIES: **R**
v
SUTTON, Paul Bruce
(respondent)

FILE NO/S: SC No 678 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 4 May 2015

DELIVERED AT: Brisbane

HEARING DATE: 4 May 2015

JUDGE: Burns J

ORDER: **Application dismissed**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – EXHIBITS – where the accused was on trial for manslaughter – where CCTV footage was tendered as an exhibit during the trial – where the CCTV footage captured the altercation which caused the victim’s death – where a television news broadcaster brought an application on the first day of trial pursuant to r 56A of the *Criminal Practice Rules 1999 (Qld)* to access and copy the exhibit for the purpose of news broadcast – where that application was dismissed and, in effect, stood over until the end of the trial due to risk of prejudicing the fair trial of the proceeding – where the trial was discontinued on the third day when the learned Crown Prosecutor entered a nolle prosequi – where the exhibits had been returned to the Office of the Director of Public Prosecutions – where the television news broadcaster brought the same application after the trial – where the prosecution oppose the application – where the defence did not appear but had opposed the previous application – where the victim’s family oppose the application – whether the access and copying of the exhibit for publication is in the public interest

Criminal Practice Rules 1999 (Qld), r 56A

COUNSEL: The applicant appeared on its own behalf
B J Merrin for the prosecution

SOLICITORS: The applicant appeared on its own behalf
Director of Public Prosecutions (Queensland) for the
prosecution

HIS HONOUR: Channel Nine News has brought an application pursuant to r 56A of the *Criminal Practice Rules 1999* (Qld) for access to an exhibit tendered during the trial. Rule 56A provides:

Copying for publication of exhibits

- 5 (1) A person who is not a party to a trial may, on payment of the fee prescribed under a regulation, apply to the trial judge during or after the trial for an order permitting the copying for publication of an exhibit tendered at the trial.
- (2) If the trial judge is not available to hear the application, the application may be heard by—
- 10 (a) for the Supreme Court—a judge nominated by the Chief Justice; or
- (b) for the District Court—a judge nominated by the Chief Judge of the District Court; or
- (c) for the Magistrates Court—a magistrate sitting at the place the trial was conducted.
- 15 (3) The judge or magistrate hearing the application may make an order permitting, on payment of the fee prescribed under a regulation, the copying for publication of the exhibit.
- (4) Without limiting subrule (3), the judge or magistrate may, in deciding whether to make the order, have regard to the following matters—
- 20 (a) whether the copying for publication is in the public interest or another legitimate interest;
- (b) the nature of the proposed or potential publication by the applicant or another person;
- (c) the nature of the exhibit;
- 25 (d) the content of the exhibit and whether the exhibit contains information that is private, confidential or personally or commercially sensitive;
- (e) whether the copying for publication is likely to prejudice the fair trial of an accused person;
- 30 (f) the likely effect of the copying for publication on the following persons—

- (i) a victim or alleged victim of the offence alleged against the accused person;
- (ii) a family member of a victim or alleged victim of the offence alleged against the accused person;
- 5 (iii) a family member of the accused person;
- (iv) a person referred to directly or indirectly in the exhibit;
- (v) a person whose personal, proprietary or commercial interests may be affected by the copying for publication (including the owner of any copyright in the exhibit);
- 10 (g) whether the persons mentioned in paragraph (f) have been notified of the application and given an opportunity to be heard on the application;
- (h) whether the owner of any copyright in the exhibit consents to the copying for publication;
- 15 (i) whether the copying for publication is authorised under the Copyright Act 1968 (Cwlth), section 43(1);
- (j) whether access to, or dealing with, the thing produced as the exhibit was or is restricted under an Act because the thing is—
- (i) sensitive evidence within the meaning of the Code, section 590AF; or
- 20 (ii) a recording within the meaning of the Evidence Act 1977, section 21AY; or
- (iii) a section 93A criminal statement within the meaning of the Evidence Act 1977, section 93AA;
- (k) whether the exhibit was produced in open court;
- 25 (l) whether the copying may damage the exhibit or risk its security;
- (m) whether the court has facilities to copy the exhibit;
- (n) the likely cost of copying the exhibit.
- (5) For opening or keeping open the registry to make an application or copy an exhibit under this rule, the applicant must pay the fee prescribed under a regulation.
- 30

The trial commenced before me and a jury on 29 April 2015, but the prosecution was discontinued on the morning of the third day when the learned Crown Prosecutor entered a nolle prosequi.

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The application on the part of Channel Nine News was brought late on the first day of the trial. I dismissed the application at that stage principally for the reason that I was concerned that if I was to allow the exhibit to be copied and provided to Channel Nine News, as they seek in their

application, it had the very real prospect of prejudicing the fair trial of the proceeding. I referred, in particular, to the prospect that witnesses yet to be called in the trial might be exposed to that footage on television before giving evidence before the jury.

5 After dismissing the application, Ms Hunter, who appeared in person on behalf of Channel Nine News, asked that the application be, in effect, stood over until the end of the trial so that she could have an opportunity to renew it. That was on the assumption that all witnesses had given evidence and the trial had proceeded to its conclusion. Nevertheless, on Friday, after the Crown entered a nolle prosequi, I ordered the return of all exhibits to the Crown in accordance with
10 the usual practice.

In consequence, the relevant exhibit, being CCTV footage of the incident that, in my view, led to the death of the deceased, is no longer in the custody of the Court. Rather, it is in the custody of the Director of Public Prosecutions or, by now, it may be in the custody of the Queensland
15 Police Service.

Although r 56A provides that an applicant for access to or copying of an exhibit may make that application during or after the trial, I do not regard such an application as being competent where the trial has concluded and exhibits have been returned to the Crown. Rather, my view
20 is that Channel Nine News ought direct their request to the Director, or the Queensland Police Service. If I am wrong in that conclusion, such that I ought entertain this application for access to and copying of the exhibit, I would dismiss the application in any event.

Rule 56A(4) sets out a number of matters that the court may have regard to in deciding whether
25 or not to make an order. At the forefront of my mind, in a consideration of the exercise of my discretion in this regard, is of course the public interest and the principle of open justice to which Ms Walsh, who appears in person on behalf of Channel Nine News today, has referred.

It is an important principle but it is not a principle which is so powerful as to override the other
30 considerations set forth in subrule (4). Each of those, if they are applicable, must be weighed in the balance. In this case, when the application was first brought late on 29 April 2015, it was made plain to Channel Nine News that the family of the deceased strongly opposed the making of the order. The particular footage, being that exhibit, had been played that day. When it was played, it caused those members of the family who were present in court great distress. I am

told, and I accept, that the wife of the deceased, Mrs Miles, had never seen the footage before it was played in court that day.

5 There was concern expressed by Ms Merrin, who appears on behalf of the Crown, that a release of the footage to the media and Channel Nine News, in this case, would be personally very distressing, not only to Mrs Miles, but to the wider members of Mr Miles' family, including his stepson, Jake.

10 I note also that the release of the exhibit to Channel Nine News was opposed by the defence. In this regard, Mr McGirr was to have appeared on the hearing of this application by telephone but, for some logistical reason, that has not been possible. Nevertheless, I have taken into account the opposition that his counsel, Mr Bellanto QC, voiced on 29 April 2015 with respect to this application.

15 The footage depicts, as Ms Merrin submits, the incident that, as I have found, caused Mr Miles' death. It is, for that reason, personally sensitive. I must have regard to the likely effect of the broadcast of such footage on the family of Mr Miles, as well as the family of Mr Sutton, and Mr Sutton himself. I think it is obvious that the broadcast of that footage would cause great distress to all of those persons.

20 Ms Walsh has submitted that the distress that would otherwise be caused by the broadcast of the footage could be ameliorated to some degree by not broadcasting the final moment of the incident where the deceased's head hit the floor, and that any persons depicted in the footage who had not provided consent to broadcast would have their faces blurred. I do not regard such
25 steps as sufficient at all to remove or to reduce the concern I have in relation to a broadcast of the incident.

30 Lastly, one of the considerations I may have regard to under r 56A(4)(g) is whether the family of Mr Miles, the accused and his family have been notified of this application and given an opportunity to be heard on it. No notification has been given by Channel Nine News to any of those persons. It follows that they have not had an opportunity to be heard.

In all of the circumstances, although I acknowledge the strong public interest in the provision to the media of exhibits tendered in open court, in this case, I am not persuaded that that

principle outweighs the other concerns I have mentioned, in particular, the great distress that will be caused to family members by publication of this material, and the feature that they have not been served with the application returnable today and been given an opportunity to be heard. I make no order as to costs.