SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sica* [2012] QSC 428
PARTIES:	**R** (respondent) **v** **SICA, Massimo** (applicant)
FILE NO:	SC No 68 of 2011
DIVISION:	Trial Division
PROCEEDING:	Ruling on objection to tender of evidence
DELIVERED ON:	5 January 2012
DELIVERED AT:	Brisbane
HEARING DATE:	4 January 2012
JUDGE:	Peter Lyons J
RULING:	**The objection is upheld**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – NATURE OF DISCRETION – GENERALLY – where applicant seeks to tender psychiatric reports regarding a witness to be called in the trial – where respondent objected to the tender on bases that the evidence was irrelevant, and that the reports did not constitute admissible expert evidence – whether objection could be upheld on either basis *Criminal Code 1899* (Qld), s 590AA *Doney v R* (1990) 171 CLR 207, cited *Geoffrey Peter Lobban* (2000) 112 A Crim R 357, cited *Purcell v Venardos (No 2)* [1997] 1 Qd R 317, distinguished *R v Swaffield* (1998) 192 CLR 159, cited *Rozenes & Anor v Beljajev & Ors* [1995] 1 VR 533, applied
COUNSEL:	S Di Carlo for the applicant M R Byrne SC, with BG Campbell, for the respondent
SOLICITORS:	Howden Saggers Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **PETER LYONS J:** The applicant has been charged with the murder of three members of the Singh family. The prosecution intends to call evidence from Ms Andrea Bowman of statements by the applicant which might be regarded by the jury as demonstrating his guilt. The applicant has applied for an order under s 590AA of the *Criminal Code 1899* (Qld) excluding the admission of the

evidence of Ms Bowman on a discretionary basis. In support of that application, reports of a psychiatrist, Dr Warwick Middleton, dated 28 November 2011 (*first report*) and 5 December 2011 (*second report*) have been tendered. The prosecution has objected to the reception of the reports.

[2] Ultimately, the objection is based on two grounds. The first is that the evidence of Dr Middleton is not relevant to any ground on which the evidence might be excluded. The second is that the reports do not contain admissible expert evidence.

[3] The first report set out what is described as Ms Bowman's "complicated medical history". It referred to a diagnosis made by another medical practitioner in 1999 of "probable major depression". It referred to many inconsistencies in reported statements made by Ms Bowman, including comments apparently directed to a consideration of the veracity or reliability of statements made by Ms Bowman. Dr Middleton concluded by stating that he could detect nothing that would indicate Ms Bowman suffers formally from a psychosis. He expressed suspicion that Ms Bowman "has significant personality vulnerabilities". He also speculated on a reason why Ms Bowman might have reported a "confession" by the applicant.

[4] In the second report Dr Middleton commented upon a condition described as pseudologia fantastica, a form of factitious disorder (the first report had made reference to factitious disorders, but had not specifically attributed such a condition to Ms Bowman). Dr Middleton expressed the view that it was likely that Ms Bowman "is a psychologically vulnerable individual". He made comment about whether her evidence might be considered to be factual; and referred to adverse comments about her, apparently made by police officers. Much of the document is directed to identifying the reasons why Ms Bowman's evidence might not be regarded as credible. He also expressed the view that her behaviour in respect of the applicant and the police "represents an example of pseudologia fantastica".

[5] The applicant's submissions in support of the application for the exclusion of Ms Bowman's evidence set out in some considerable detail matters relied upon to demonstrate why Ms Bowman should not be believed. They rely upon some passages from Dr Middleton's reports, including his reference to the psychological vulnerability of Ms Bowman, and to the condition, pseudologia fantastica.

[6] It is clear from those submissions that the basis relied upon for the exercise of the discretion to exclude Ms Bowman's evidence is that it is unreliable, so that its reception would be unfair.

[7] It is convenient to deal first with the objection that Dr Middleton's evidence could not be relevant to a ground on which Ms Bowman's evidence might be excluded. In essence, the submission is that evidence of a witness might not be excluded merely on the ground that it is unreliable. As an alternative, it is submitted that if unreliable evidence might be excluded in exceptional cases, this is not an exceptional case; and the applicant's submissions sufficiently identify the nature of the challenge to show that this is so. For the applicant, it is submitted that there is a discretion to exclude unreliable evidence; and that

accordingly Dr Middleton's reports are relevant; and that a decision can only be made on the application for the exclusion of Ms Bowman's evidence after those reports and all of the other evidence which it is proposed to adduce, has been put before the court.

[8] A convenient starting point may be found in *Cross on Evidence*[1] in relation to the admissibility of the evidence of a person who is mentally disabled. It is there said:[2]

> "At common law where it is contended that the witness is too mentally disabled to give evidence, it is for the judge to decide whether the witness understands the nature of an oath. If the judge answers this question in the affirmative, it is for the jury to say what degree of credit is to be given to the testimony. The inmate of an asylum whose only delusion was that spirits talked to him was, accordingly, allowed to give evidence at a prosecution for manslaughter." (citations omitted).

[9] The prosecution's submissions made reference to the following statement from *Doney v R*:[3]

> "… 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."

[10] Those submissions also relied on the following passage from the same case:[4]

> "The acceptance or rejection of evidence involves an inference as to its truth, which inference is, at least in part, based on 'a principle of faith in human veracity sanctioned by experience' … [b]ut it is appropriate here to draw attention to the fact that the drawing of inferences extends beyond circumstantial evidence because the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in a determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful."

[11] On the basis of these statements it was submitted that the question of the reliability of Ms Bowman's evidence was a matter for the jury.

[12] The prosecution's submissions also relied on *Rozenes & Anor v Beljajev & Ors* (*Rozenes*).[5] The headnote records the decision as holding that there is no discretion to exclude evidence based wholly or primarily upon the trial judge's conclusion that the evidence is unreliable. The judgment states that *Doney* is against the existence of such a discretion.[6] The court also referred to a

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1 Butterworth's 1996 looseleaf service.
2 At [13065].
3 (1990) 171 CLR 207 at 214-215.
4 Also at 214.
5 [1995] 1 VR 533.
6 Ibid at 550.

statement of Carter J from *R v McLean and Funk; ex parte Attorney-General*[7] as follows:

> "His Honour went on to conclude at 260 that there was no discretion to exclude evidence which was based wholly or primarily upon the trial judge's conclusion that the evidence was unreliable: the exercise of such a discretion interfered with one of the most integral of the jury's functions, a function which there was no reason to believe any properly instructed jury to be incapable of properly performing.
>
> We are, with respect, in general agreement with the view of Carter J on these questions."[8]

[13] Their Honours then discussed the possibility of such a discretion at some length, including by reference to a number of authorities.[9] Their Honours then continued:[10]

> "The vast body of case law that has grown up over many years on what a judge should say to a jury in particular recurring situations where evidence regarded by the law as unreliable forms part of the Crown case shows that the common law's answer to the problem of unreliable evidence has been to leave it to the jury, assisted by warnings and comments from the judge."

[14] Later their Honours said:[11]

> "We accept the view of Carter J that there is no discretion to exclude evidence which is based wholly or primarily upon the trial judge's conclusion that the evidence is unreliable."

[15] An application for special leave to appeal against that decision was refused on the ground that the proposed appeal did not enjoy sufficient prospects of success to warrant the grant.[12]

[16] In *Geoffrey Peter Lobban*[13] Martin J cited with apparent approval the two passages from *Rozenes* which adopted the view of Carter J that there is no discretion to exclude evidence based wholly or primarily upon the trial judge's conclusion that the evidence was unreliable.[14]

[17] The following appears in Cross,[15] dealing with the discretion to reject evidence on the unfairness ground.

> "The unreliability of a witness has been held not to attract the discretion, on the ground that this interferes unduly with the division of function between judge and jury, and would amount

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7 [1991] 1 Qd R 231.
8 *Rozenes* at 553.
9 See pages 554-555.
10 Rozenes at 555.
11 Ibid at 559.
12 *Beljajev & Ors v Rozenes & Anor* [1995] HCA Trans 74.
13 (2000) 112 A Crim R 357.
14 See *Lobban* at [80] and [81].
15 At [11125].

> to an anticipatory ruling which would be erroneous if given at the close of the Crown case." (citations omitted).

[18] I was not referred to a case subsequent to *Rozenes* rejecting the proposition set out in the quoted passages, as to the limitation of the discretion to exclude the evidence on the grounds of unfairness. The applicant relied on *Purcell v Venardos (No 2)* (*Venardos*),[16] a decision of Ambrose J. His Honour was referred to *Doney* and *R v Sutton*,[17] which his Honour distinguished because they did not deal with the obligation on magistrates in committal proceedings. However, his Honour noted:

> "… a very long line of authority to support the proposition that indeed in determining whether the prosecution has adduced sufficient evidence to put a defendant on trial, a committing magistrate should have regard to the reliability of the evidence not for the purpose of determining whether he personally is persuaded of guilt but for the purpose of determining whether any reasonable jury properly instructed could return a verdict of guilty upon it."[18]

[19] The decision in *Vernardos* is, in my view, not on point in the present case.

[20] Other decisions relied upon by the applicant, such as *R v Swaffield*[19], recognise a discretion to exclude evidence on the ground of unfairness, but do not suggest that the limitation on that discretion identified in *Rozenes* is wrong.

[21] It was submitted on behalf of the applicant that if Ms Bowman's evidence is admitted, notwithstanding its unreliability, then the applicant would suffer forensic disadvantages which would result in an unfair trial, and accordingly, the evidence should be excluded on this basis. The forensic disadvantages which result from the admission of evidence which might be regarded as unreliable are not unique to this case. It seems to me that they can not affect the correctness of the proposition adopted in *Rozenes*. It might be thought that the very purpose of the trial is to permit all parties to explore the unreliability of evidence led against them; the trier of fact (in this case, the jury) being the body to determine whether the evidence should be acted on.

[22] In my view, the proposition from *Rozenes* previously referred to represents the current law. It follows that there is no ground on which the evidence of Ms Bowman might be excluded on a discretionary basis, which might be supported by the evidence proposed to be called from Dr Middleton. I therefore would reject its tender.

[23] I was invited by the prosecution to deal with an alternative submission, namely that if one were to apply the alternative proposition referred to in *Rozenes* (that the circumstances calling for a favourable exercise of the discretion to exclude evidence on the ground of unreliability would have to be "most exceptional"[20]), and taking the applicant's case at its highest, then the alternative test was not

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16 [1997] 1 Qd R 317.
17 [1986] 2 Qd R 72 at 75.
18 See *Venardos* at 320.
19 (1998) 192 CLR 159.
20 *Rozenes* at 559.

satisfied. While the prosecution's submission may be of some force, I would not be prepared to determine that Dr Middleton's evidence should be rejected on the basis that it, taken together with other evidence which has not yet been led, could not lead me to the conclusion that this is an exceptional case.

[24] I indicated during the course of argument that I would not be prepared to conclude that none of Dr Middleton's evidence comes within his area of professional expertise, without permitting the applicant to call evidence on that question.