SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAY* [2010] QCA 369
PARTIES:	**R** **v** **DAY** (applicant/appellant)
FILE NO/S:	CA No 40 of 2010 SC No 1148 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2010
JUDGES:	Fraser and White JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted after trial of murdering her youngest son and daughter, and of attempting to kill her oldest son – where the appellant did not dispute that she killed her two younger children and attempted to kill her older child – where the defence case was that the appellant was not guilty of the two murder counts due to unsoundness of mind or only guilty of manslaughter by reason of diminished responsibility – where the appellant contended that the prosecution adduced inadmissible evidence concerning earlier proceedings in the Mental Health Court resulting in a miscarriage of justice – whether evidence adduced by the prosecution from an expert witness in examination in chief was inadmissible – whether the admission of that evidence resulted in a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL

DISMISSED – where the appellant contended that the convictions for murder cannot be supported by the evidence and are unsafe and unsatisfactory – where the appellant argued that there was no cogent evidence that contradicted evidence that the appellant's abnormality of mind was such as to impair her capacity to control her actions – whether on the whole of the evidence it was reasonably open to the jury not to be satisfied on the balance of probabilities that the appellant was of diminished capacity at the time of the killings

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to life imprisonment for the murders and 15 years imprisonment for the attempted murder – where the appellant contended that the sentence for attempted murder was manifestly excessive – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 27, s 304A(1), s 304A(2)

Dupas v The Queen (2010) 241 CLR 237; [2010] HCA 20, cited
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, applied
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, cited
R v Connolly [1991] 2 Qd R 171, cited
R v Turner (1974) 60 Cr App R 80; [1975] QB 834, cited

COUNSEL: M J Byrne QC for the applicant/appellant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Department of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant was convicted after a trial of murdering her 8 year old son and her 10 year old daughter, and of attempting to kill her 16 year old son. She was sentenced to mandatory terms of life imprisonment for the murder offences and 15 years imprisonment for the attempted murder offence.

[2] The appellant has appealed against her convictions on two grounds.

Ground 1: there was a miscarriage of justice because the prosecution adduced inadmissible evidence

[3] The first ground of appeal is that there was a miscarriage of justice because the prosecution adduced inadmissible evidence concerning earlier proceedings in the Mental Health Court.

[4] At the trial the appellant did not dispute that she killed her two younger children and attempted to kill her older child. On or about the night of 20 November 2002 the appellant gave her children sleeping tablets and took them with her into her car, into which she ran a hose from the exhaust pipe. The bodies of the dead children were found on the morning of 22 November 2002. The semi-conscious appellant was found on a bed in her house beside her 16 year son, who was physically and intellectually disabled. The real issues at the trial concerned the appellant's state of mind at that time. Expert evidence on that topic was given by three psychiatrists, Dr Curtis (who was called by defence counsel) and Dr Sundin and Dr Reddan (who were called by the prosecutor to give evidence in rebuttal). The defence case was that the appellant was not guilty of the offences on account of unsoundness of mind,[1] or not guilty of murdering her two younger children but guilty of manslaughter by reason of diminished responsibility.[2]

[5] Dr Curtis' opinion was that the defendant suffered from a major depressive disorder and was probably in a psychotic frame of mind. The trial judge directed the jury that this would constitute a mental disease within s 27 of the *Criminal Code* 1899 (Qld). Dr Sundin and Dr Reddan considered that the appellant had an adjustment disorder (Dr Reddan considered that the appellant also suffered from a personality disorder) and that there was no indication of a psychotic episode. The trial judge directed the jury that on their evidence the appellant would not have had a disease of the mind. The trial judge directed the jury that unless the jury was satisfied on the balance of probabilities that there was a major depressive disorder or major depressive episode the jury could not be satisfied that there was a defence of unsoundness of mind.

[6] In relation to the defence to the murder charges of diminished responsibility, the trial judge directed the jury that, either on the diagnosis of a major depressive disorder or episode or on the diagnosis of an adjustment disorder, the defendant had an abnormality of mind that was relevantly caused so as to satisfy those elements of the defence. The issue in relation to diminished responsibility was whether, when the appellant killed the children, her abnormality of mind substantially impaired her ability to control her actions or to know that she ought not to kill her children. Dr Curtis' opinion was that the appellant's capacity to control her actions was at least substantially impaired. That possibility was acknowledged by Dr Sundin and Dr Reddan but they did not conclude that there was a substantial impairment.

[7] The prosecutor adduced evidence from Dr Sundin of her relevant experience that she had been doing medico-legal assessments on a regular basis since about 1992 or 1993 primarily on behalf of the Mental Health Court. The prosecutor then adduced the following evidence:

> "And just to be clear about your role in relation to this matter, you were - effectively, you were commissioned by the Court to provide a report independent of either the Crown or the defence?-- Yes. The process in Queensland - and this may have already been explained to you - is that we have a Mental Health Court and where there is a question of-----
>
> All right. Well, sorry, if I just-----?-- Sorry, yes, if you don't - no, I can just simply say, yes, I was, I was commissioned by the Mental Health Court of Queensland."

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1 *Criminal Code* 1899 (Qld), s 27.

2 *Criminal Code* 1899 (Qld), s 304A.

[8] In the course of answering a subsequent question Dr Sundin referred to the primary issue that she had been asked to first consider when the appellant "was first referred to me by the Mental Health Court for assessment". After the evidence had been given defence counsel made submissions to the trial judge that it should not have been adduced but ultimately did not submit that the trial judge should give the jury any particular direction about it.

[9] If, as the submissions suggested, the only purpose of that evidence was to enhance Dr Sundin's credibility, that did not render the evidence admissible. It is generally not permissible to adduce evidence in chief from a witness which merely bolsters the credibility of the witness.[3] In *HML v The Queen* Heydon J referred to the practice of bringing out a non-expert witness's lack of contact with either side,[4] but we were not referred to any decision which sanctioned a similar exception to the general rule for expert witnesses called by the Crown in criminal cases. In this case it was not necessary to adduce the evidence as part of any relevant narrative and no other ground of admissibility was identified. In my opinion the evidence was inadmissible.

[10] The argument for the appellant was that the admission of this evidence resulted in a miscarriage of justice. The appellant's senior counsel argued that one vice in the evidence was that it informed the jury that the issue for the jury's determination had already been before a court for assessment. However the evidence did not suggest that the appellant's mental state had been assessed by the Mental Health Court or that anything had occurred that supported the prosecution or was opposed to the defence case. There is also no basis for assuming that any juror attempted to ascertain what, if anything, the Mental Health Court had decided. The trial judge directed the jury on a number of occasions that the jury was to determine the facts based only upon the evidence and there is no ground in this case for departing from the usual assumption that the jurors follow the trial judge's directions.[5] I note also that any attempt by a juror to discover what happened in the Mental Health Court would have failed because, as the trial judge mentioned when defence counsel raised this at the trial, the Mental Health Court's decision had been removed from the website.

[11] The appellant's senior counsel argued that another vice in the evidence was that it clothed the Crown's expert witness in an aura of independence in contradistinction to the expert witness called for the defence. He argued that this was particularly significant because the only issue concerned the appellant's mental state and the trial judge directed the jury that it was up to them to give such weight to the opinions of the expert witnesses as they thought should be given, having regard to the qualifications of the witness, "whether you thought them impartial or partial to either side", and the extent to which the expert's opinion accorded with whatever facts the jurors found to be proved.

[12] I do not accept that the jury would have reasoned from the evidence that Dr Sundin was commissioned by the Mental Health Court that she should be regarded as being

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3 *R v Turner* [1975] QB 834 per Lawton LJ at 842 (giving the judgment of himself, Nield and Cantley JJ); *R v Connolly* [1991] 2 Qd R 171 per Thomas J (Dowsett J concurring at 180) at 173 to 174; *Palmer v The Queen* (1998) 193 CLR 1 at 21to 22 per McHugh J; *HML v The Queen* (2008) 235 CLR 334 per Heydon J at 434 to 435 at paragraph [297].

4 *HML v The Queen* (2008) 235 CLR 334 at [298].

5 *Dupas v The Queen* (2010) 241 CLR 237 at 247 to 248, at paragraph [26]; *Gilbert v The Queen* (2000) 201 CLR 414 at 420, at paragraph [13].

more independent or impartial than Dr Curtis. There was no challenge to Dr Curtis' evidence on the ground that he lacked independence or impartiality and there was no such suggestion in the prosecutor's address to the jury or in the trial judge's summing up. There was no basis in the evidence for any such suggestion and it should not be assumed that the jury would have speculated in that way. The trial judge gave the directions identified by senior counsel after giving other conventional directions: the jurors were to determine the facts upon the evidence, including the evidence of the witnesses; there would be matters which concerned the jurors about the credibility of witnesses or the reliability of the evidence; it was for the jurors to decide whether to accept what a witness said, either in whole or in part or not at all; it was for the jurors to judge whether a witness was telling the truth and reliably recalling the facts; there were many things which might be considered in assessing the evidence; and in relation to the expert evidence the jurors were the sole judges of the facts. It should be assumed that the jury heeded those directions and resolved the conflicts in the expert evidence accordingly.

[13] The absence of any request for a direction about this evidence by experienced defence counsel after it had been adduced also suggests that this evidence did not have the significance at the trial which it is now said to bear.

[14] In my opinion the admission of this evidence did not contribute to any miscarriage of justice.

Ground 2: diminished responsibility

[15] The second ground of appeal is that the appellant's convictions for murder cannot be supported by the evidence and are unsafe and unsatisfactory.

[16] Section 304A(1) of the *Criminal Code* 1899 (Qld) provides:

> "**304A Diminished responsibility**
>
> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only."

[17] Section 304A(2) provides that it shall be for the defence to prove that the person charged is by virtue of s 304A liable to be convicted of manslaughter only.

[18] Senior counsel for the appellant argued that she should have been convicted of manslaughter instead of murder because there was no cogent evidence which contradicted the evidence that the appellant's abnormality of mind was such as substantially to impair her capacity to control her actions. He argued that the jury, acting reasonably, was therefore bound to have concluded that diminished responsibility was established. The respondent's senior counsel argued that on the whole of the evidence it was reasonably open to the jury not to be satisfied on the balance of probabilities that the appellant was of diminished responsibility at the time of the killings.

[19] The appellant gave evidence of her depressed state and that she felt incapable of resisting the impulse to act upon the thought of killing herself and her children. The appellant's senior counsel referred to evidence given by neighbours of the appellant (Mr and Mrs Curtis) and by her friends (Ms Brody and Mr Haidle) to the effect that the appellant was a good mother who, shortly before the events, was very upset and depressed. As was also submitted for the appellant, three psychiatrists who assessed the appellant close in time to the events concluded that she was suffering from major depression. The Crown admitted that on 29 November 2002 Dr Evans, a psychiatrist, saw the appellant at hospital and considered that she had major depression and that on 13 January 2003 Dr Kumar, a psychiatric registrar, observed that the appellant had a resolving major depressive episode. Dr Evans and Dr Kumar did not give evidence at the trial. Dr Curtis saw the appellant at hospital on 29 November 2002. I have already referred to his evidence that she was suffering from major depression. Dr Curtis gave evidence of his opinion the appellant was substantially deprived of the capacity to control her actions.

[20] However there was a substantial body of evidence which the jury was entitled to find pointed in the opposite direction. There was, for example, evidence which was indicative of some pre-planning of the killings, which the jury might reasonably have accepted and treated as evidence that the diminution in the appellant's capacity to control her actions was not substantial. That included evidence of the appellant's reaction to a court order made on 14 October 2002, which permitted the children's father (from whom the appellant had separated) to take the children to Sydney during December, including Christmas Day. The appellant gave evidence that she was pretty upset about that. Ms Bridges, who went with the appellant to the court on 14 October 2002, gave evidence that the appellant was angry and spoke about hiring a hit man. The appellant agreed in evidence that she might have spoken of a hit man. Ms Brody gave evidence that two or three weeks before the appellant killed her children the appellant asked her how to "gas yourself in a car". The appellant agreed that she might have said something of that kind. The jury might perhaps also have accepted and taken into account the evidence of a prisoner, Ms Hayward, that the appellant told her in the prison in 2004 that she had planned the killings in advance. There was also evidence, given by a friend of the appellant, Ms Knight, that on 20 November 2002 the appellant appeared to be her normal self.

[21] Furthermore, whilst Dr Sundin and Dr Reddan acknowledged the possibility that the appellant's capacity to control her actions was substantially impaired they did not conclude that there was a substantial impairment. Although Dr Reddan's evidence was that the appellant told her that the thought of killing herself and the children came to her and she acted upon it, Dr Curtis reported that the appellant told him that she had formed a plan to kill herself and her children some days before she carried the plan into effect. The appellant denied having said that to Dr Curtis, but Dr Reddan considered that, if the appellant had made such a statement, it meant that she could control her actions enough to delay carrying the plan into effect. Similarly, Dr Sundin gave evidence that, although it was possible that a defence of diminished responsibility might be available, she had some doubts about that because there were a lot of inconsistencies in the answers the appellant gave to Dr Sundin and others. Dr Sundin's opinion was that, if there was calculated planning, the defence of diminished responsibility would not have been available because planning does not suggest an impaired capacity to control but a following through on a pre-determined set of actions.

[22] It is not necessary to refer to the evidence in more detail. The appellant bore the onus of proving that the diminution in her capacity to control her actions was substantial. Whilst there was some evidence that supported such a finding, the evidence was not all one way. The question whether there was a substantial impairment in the appellant's capacity was for the jury to resolve in light of all of the evidence and there is no ground for thinking that the jury did not conscientiously attend to that duty. The jury's decision not to acquit the appellant of murder on account of diminished responsibility was reasonably open on the evidence.

Sentence

[23] The appellant's notice of appeal included a ground that the sentence imposed for the conviction of attempted murder was manifestly excessive but no submissions were made in support of that ground. The written submissions about sentence for the appellant contended that where her actions, including necessarily those constituting attempted murder, were accompanied by diminished capacity, the sentence should reflect that fact. Similarly, the appellant's senior counsel confined his oral submissions, and a subsequent written submission on sentence, to the sentences which would be appropriate if the convictions for murder were set aside and convictions of manslaughter were instead entered. In these circumstances, and in the context of the mandatory sentences of life imprisonment for the two counts of murder, it is sufficient to observe that there is no ground for concluding that the sentence of 15 years imprisonment for the offence of attempted murder, with the accompanying declaration that it was a serious violent offence, was manifestly excessive.

Order

[24] I would dismiss the appeal and refuse the application for leave to appeal against sentence.

[25] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with his Honour for those reasons that the appeal should be dismissed and the application for leave to appeal against sentence refused.

[26] **McMEEKIN J:** I have read the draft reasons of Fraser JA and agree that the appeal and application should be disposed of as he suggests and for the reasons that he gives.