

DISTRICT COURT OF QUEENSLAND

CITATION: *R v Applebee* [2016] QDC 95

PARTIES: **The Queen**
(respondent)

v
Glenn Ivan Applebee
(applicant/ defendant)

FILE NO/S: 23/15

DIVISION: Criminal

PROCEEDING: Pre-trial hearing

ORIGINATING COURT: District Court in Kingaroy

DELIVERED ON: 4 March 2016; ex tempore

DELIVERED AT: Kingaroy

HEARING DATE: 4 March 2016

JUDGE: Kingham DCJ

ORDER: **1. Application to exclude pre-text call is refused.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – where application to exclude pretext call from evidence – where applicant alleges pretext call is unfairly prejudicial to the defendant because it is too ambiguous or equivocal – whether pretext call is unfairly prejudicial.

Evidence Act 1977 s130

HML v The Queen [2008] 235 CLR 334; *BCQ* [2013] QCA 388.
BBH v The Queen [2012] HCA 009 at 9
R v IE [2013] QCA 291 (11/0319), *R v Caulfield* [2012] QCA 204 (12/155)

COUNSEL: H. Fong for the applicant.
P. O'Connor for the respondent.

SOLICITORS: Legal aid Queensland for the applicant
Office of the Director of Public Prosecutions for the respondent.

[1] I will give brief oral reasons for my decision to refuse the application to exclude the pretext call.

- [2] It is conceded by defence that the pretext call is relevant and admissible. The basis upon which the Crown is seeking to lead it is twofold; firstly to rely upon the demeanour of the defendant during the telephone call as indicating his consciousness of guilt of the charges laid against him; and secondly as evidence of generalised sexual misconduct by the defendant which can be relied upon by the jury in forming its conclusion on count 1 (the charge of maintaining).
- [3] Those two bases for admissibility, appear to have been conceded by defence. The phone call is not led as an admission to any particularised charge, except in the way I've explained in relation to count 1.
- [4] Given those bases for relevance, a trial judge would be required to give very careful directions to the jury about how they can use the pretext call. I must proceed on the assumption that the jury will observe the trial judge's directions on the law. The direction that is indicated in this case is that the jury could only act on the pretext call if they were satisfied beyond reasonable doubt that this generalised sexual misconduct had in fact occurred.¹
- [5] I note there has been no submission that there is unfairness in the circumstances of the call itself. She is certainly not in a position of dominance or authority over the defendant. I am not aware of any other unfairness in the circumstances of the call. The defendant was free to terminate the call at any time. The only basis for excluding it is the content of the call itself and whether it is so ambiguous or equivocal that it should not be admitted.
- [6] Defence has revised arguments based on the delay by the complainant in making this complaint and the serious nature of the charges. I accept the prosecution's submission that those arguments are not relevant to this. I must look at the evidence about and from the call and determine whether there would be unfairness to the defendant in admitting the call.
- [7] Certainly, the telephone call is prejudicial. That is the reason the Crown seeks to lead it. The question is whether it is unfairly prejudicial. The possibility of an innocent explanation does not deprive the evidence of its relevance.²
- [8] It is an unusual pretext call in one respect. On the one hand it could be argued to be ambiguous or equivocal because the complainant did not particularise any actual sexual misconduct. But on another reading, it is completely unambiguous and unequivocal in the defendant's acknowledgement that he has committed some wrong against the complainant when she was young; that he accepts responsibility for it and that he tries to dissuade her from going to the police, as she told him she was intending to do.
- [9] In that sense I think this pretext call is more probative than the calls that were admitted in the cases of *R v IE* and *R v Caulfield*.³ I particularly note the following features: The conversation starts with the complainant declaring that she is going to make a complaint to the police about what happened when she was younger and that she wanted to give him a "heads up" about that. The defendant's response "*So why are you doing this to me?*" indicates a consciousness of his guilt of whatever

¹ HML (2008) 235 CLR 334; BCQ [2013] QCA 388.

² BBH (2012) HCA at 9

³ *R v IE* [2013] QCA 291 (11/0319), *R v Caulfield* [2012] QCA 204 (12/155)

complaint she was going to take to the police. So he is aware from the outset that this is a complaint she wants to take to the police about his conduct towards her during her youth. She makes it very clear that she is talking about what he has done on a number of occasions. He apologises for it. He talks about the effect her complaint will have on him and he offers her money not to make the complaint.

- [10] So it is not ambiguous and unequivocal in these ways: that she is talking about serious wrongdoing by him to her in her youth; that he admits that he did something to her that was wrong; and that he tries to deter her from complaining to police.
- [11] What is ambiguous is precisely what wrongdoing is being admitted. That is not, in itself, a ground for exclusion; that is a question for the jury to determine. In the context of the complainant's evidence at trial, it would be open to the jury to reasonably conclude that their conversation relates to the complaints that she went on to make to police about the defendant's sexual misconduct.
- [12] I must proceed on the basis that the jury will act on trial judge's directions about what use they can make of the call. The other factors that might enliven discretion to exclude, such as the circumstances in which the call took place, do not appear to arise in this case.
- [13] I am satisfied the call is relevant evidence and that it is not so ambiguous or equivocal that it should be excluded in exercise of the court's discretion.⁴

⁴ Guidance Act 1977 s130