SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hicks and Taylor* [2010] QSC 376
PARTIES:	**R** v **JOSHUA ALEXANDER HICKS** (first defendant) and **WILLIAM MICHAEL TAYLOR** (second defendant)
FILE NO/S:	SC No 152 of 2009
DIVISION:	Trial Division
PROCEEDING:	Pre-trial hearing, s590AA
ORIGINATING COURT:	Supreme Court of Brisbane
DELIVERED ON:	1 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2010
JUDGE:	Boddice J
ORDER:	**Subject to a claim that the answer to a particular question may tend to incriminate Barry in involvement in drug trafficking over interstate borders (the validity of which is a matter for ruling by the trial judge on a question by question basis), Barry is not entitled to claim privilege from answering questions when giving evidence at the trial of Hicks and Taylor for the offences of murder and attempted armed robbery in company.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEGE – INCRIMINATING QUESTIONS – where the first and second defendants are charged conjointly with murder and attempted armed robbery – where the applicant was also charged with those offences and has been acquitted following directed verdicts of not guilty – where the prosecution intends to call the applicant at the trial of the first and second defendants – where the Attorney-General has provided an undertaking to the applicant that any answer, statement or disclosure given in these proceedings will not be used in evidence against him – where the applicant submits that there still exists an apprehended danger of prosecution such that he

continues to be entitled to claim the privilege – whether the applicant is entitled to claim privilege against self-incrimination notwithstanding the undertaking

Attorney-General Act 1999, (Qld) ss 4, 7(1)(d), 7(2)
Criminal Code Act 1899, ss 678B, 678F(2)
Director of Public Prosecutions Act 1984 (Qld), s 10
Evidence Act 1977 (Qld), s 10

Accident Insurance Mutual Holdings Ltd v McFadden (1993) 31 NSWLR 412, cited
Re Intercontinental Development Corporation Pty Limited (1975) 1 ACLR 253, cited
Jago v District Court (NSW) (1989) 168 CLR 23, cited
R v Sorby (1983) 152 CLR 281, cited
Rank Film Distributors Ltd v Video Information Centre [1982] AC 380, distinguished
Reid v Howard (1995) 184 CLR 1, cited
Saffron v Federal Commissioner of Taxation (1992) 109 ALR 695, cited
Williams v Spautz (1992) 174 CLR 509, cited
Williamson v Trainor [1992] 2 Qd R 572, cited

COUNSEL: MR Byrne S.C. for the crown
SJ Hamlyn-Harris for the first defendant
D Carlton for the second defendant
DR Kent for the applicant

SOLICITORS: Office of Director of Public Prosecutions for the crown
Legal Aid Queensland for the first defendant
Bell Miller for the second defendant
AW Bale & Son for the applicant

[1] Joshua Alexander Hicks ("Hicks"), William Michael Taylor ("Taylor") and Wayne Rocky Coombes ("Coombes") are charged conjointly with the attempted armed robbery and murder of Leo Coutts ("Coutts") in his home at Caboolture on or about 12 October 2007. Coutts, a 71 year old, died from a single .22 calibre gunshot wound to the head. Coombes entered pleas of guilty and his sentence has been adjourned to a date to be fixed. Russell James Barry ("Barry") was also charged with these offences on a separate indictment. He was acquitted, following directed verdicts of not guilty.

[2] The prosecution intends to call Barry at the trial of Hicks and Taylor. The Crown case is that Coutts' residence was previously owned by a cousin of Barry, and that Barry's cousin was the intended target of the robbery, having been the subject of a previous "home invasion" style robbery on 21 December 2006. The Crown proposes to call Barry to prove, amongst other things, that he drove Hicks and two others to the vicinity of his cousin's house for the purpose of the robbery on 21 December 2006 and that he drove Hicks, Taylor and Coombes to the vicinity of the same house on the occasion Mr Coutts was shot, although Barry believed they were going to a different address to obtain drugs.

[3] The Attorney-General of Queensland has provided an undertaking to Barry in the following terms:

> "To: Russell James Barry
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> I **CAMERON DICK** Attorney-General for the State of Queensland HEREBY UNDERTAKE that –
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> (a) any answer you give, or any statement or disclosure you make, in the course of giving evidence in the proceedings specified in the schedule hereto;
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> (b) any information, document or other thing that is obtained as a direct or indirect consequence of any answer you give, a statement or disclosure you make, or a document or other thing you disclose or produce in the said proceedings;
>
> will not be used in evidence against you in any civil or criminal proceedings under the laws of the State of Queensland other than in proceedings in respect of the falsity of any evidence you may give.
>
> SCHEDULE
>
> Proceedings against Joshua Alexander HICKS and William Michael TAYLOR for alleged offences of murder and attempted armed robbery in company committed on or about 12 October 2007."

[4] It is not in dispute that Barry's evidence, but for the terms of the undertaking, would tend to incriminate him. In short, his evidence would disclose involvement in possible offences of trafficking in dangerous drugs, armed robbery in company on 21 December 2006 and attempted armed robbery in company and murder on 12 October 2007 (although he has been acquitted of the latter two offences).

[5] Barry makes application that he is entitled to refuse to answer questions at the trial of Hicks and Taylor as his answers may tend to incriminate him. Barry contends that, notwithstanding the terms of the undertaking, there remains an apprehended danger of prosecution such that he continues to be entitled to claim that privilege.

[6] Barry accepts the Attorney-General has the power to "undertake to a person not to use, or make derivative use of, information or a thing against the person in a proceeding, other than in relation to the falsity of evidence given by the person in that proceeding",[1] but contends his apprehended danger of prosecution is real and appreciable as:

(a) no undertaking has been given by the Director of Public Prosecutions ("the DPP"), an independent prosecuting authority not subject to the direction or control of the Attorney-General ("the first ground");

(b) the undertaking by the Attorney-General relates to State offences and does not provide any undertaking or immunity from Commonwealth authorities in respect of any potential prosecution concerning evidence he might give ("the second ground");

(c) notwithstanding his acquittal of murder, on a directed verdict, he is at risk of being retried for that offence if a subsequent court is satisfied there is fresh and compelling evidence against him in relation to the offence and it

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1 *Attorney-General Act* 1999, s 7(1)(d).

is in the interests of justice for the order to be made.[2] As such, the undertaking is ineffective to protect him from the risk of criminal prosecution ("the third ground");

(d) the Queensland Police Service has a prosecutorial function in the Magistrates Court, and there is a risk that the undertaking does not protect him from further prosecution by that authority ("the fourth ground");

Law

[7] The privilege against self-incrimination is deeply entrenched in our common law. It is also protected by statute.[3] The privilege is a basic and substantive common law right not simply a rule of evidence.[4] It extends not only to the risk of incrimination by direct evidence but also to incrimination by indirect or derivative evidence, that is, evidence obtained by using disclosed material as the basis of an investigation.[5]

[8] To be able to avail oneself of that privilege, it is necessary that there "is reasonable ground to apprehend that the witness will be in danger of conviction and punishment if he answers questions".[6] In considering whether the privilege against self-incrimination is available "the question, which is for the Court to determine, is whether the apprehended danger of prosecution is 'real and appreciable, and not of an imaginary or insubstantial character'".[7]

[9] A "mere possibility of danger of conviction" is not sufficient[8] and a mere assertion that an answer may tend to incriminate is also not sufficient. A Court must assess the risk from the available evidence and all of the circumstances, and conclude that there are reasonable grounds to make a claim.[9]

Conclusion

First ground

[10] Barry has been given an undertaking from the Attorney-General, the first law officer of the State.[10] That undertaking is in clear and unequivocal terms. It covers both the direct or indirect use of Barry's answers or of documentary or other material obtained as a direct or indirect consequence of Barry's answers or disclosures in evidence in any civil or criminal court proceedings.

[11] Whilst it is correct that the DPP has an independent authority to prosecute,[11] and that those prosecutorial powers are to be exercised independently of the prosecutorial powers of the Attorney-General,[12] it is inconceivable that the DPP,

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2 See *Criminal Code Act* 1899, s 678B.
3 *Evidence Act* 1977 (Qld), s 10.
4 *Reid v Howard* (1995) 184 CLR 1 at 11.
5 *R v Sorby* (1983) 152 CLR 281 at 312; see also *Reid* (supra) at 6.
6 *Sorby* (supra) at 290.
7 *Saffron v Federal Commissioner of Taxation* (1992) 109 ALR 695 at 697 [11] citing Bowen CJ in Eq in *Re Intercontinental Development Corporation Pty Limited* (1975) 1 ACLR 253 at 259.
8 *Sorby* (supra) at 293.
9 *Sorby* (supra) at 289; see also *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 422.
10 *Attorney-General Act* 1999, s 4.
11 *Director of Public Prosecutions Act* 1984, s 10.
12 *Attorney-General Act* 1999, s 7(2); see also the Explanatory Notes to the *Attorney-General Bill 1998*, cl 7(2).

knowing the Attorney-General has given such an undertaking, would exercise those powers to prosecute Barry in relation to offences disclosed whilst giving evidence in reliance upon the undertaking. As such, the perceived risk of prosecution by the DPP is not real and appreciable.

[12] Further, the Attorney-General specifically has a power to enter a *nolle prosequi* in respect of indictments before the Court. That power is not limited, and extends to all indictments.[13] Accordingly, if the DPP presented such an indictment the Attorney-General has the power to enter a *nolle prosequi* in relation thereto, and would be "honour bound" to do so.[14]

[13] Barry submits that a proper reading of s 7 of the *Attorney-General Act* 1999 and s 10 of the *Director of Public Prosecutions Act* 1984 leads to a conclusion that the Attorney-General's power to enter a *nolle prosequi* does not extend to enter a *nolle prosequi* in respect of an indictment presented by the DPP in the exercise of his independent prosecutorial function. It is submitted that a conclusion to the contrary would have the practical effect of rendering the DPP subject to the direction or control of the Attorney-General. I do not accept that contention.

[14] There is no inconsistency between the two independent prosecutorial functions, on a proper reading of those provisions. Those provisions enshrine the principle that, should the Attorney-General wish to present an indictment or enter a *nolle prosequi*, the Attorney-General cannot do so by directing the DPP to undertake that task. Rather, the Attorney-General is required to do it in the exercise of the prosecutorial functions enshrined in s 7 of the *Attorney-General Act* 1999.

[15] There is, therefore, no real and appreciable apprehension of a danger of prosecution by an indictment being presented by the DPP, notwithstanding the undertaking having been provided by the Attorney-General. In that event, the Attorney-General has the power to enter a *nolle prosequi* in respect of such an indictment. It is inconceivable that the Attorney-General would not take steps to enforce his undertaking in this matter. Any such proceeding would be an abuse of process.[15]

[16] It was contended that an undertaking should be provided by the DPP. It was accepted there is no specific power given to the DPP to provide such an undertaking but it was contended that such a power is to be implied from the terms of s 10 of the *Director of Public Prosecutions Act*. That does not necessarily follow, in my view, having regard to the statutory nature of the position of the DPP, and the powers given under the *Director of Public Prosecutions Act*. Indemnities from prosecution and/or undertakings have traditionally been the purview of the Attorney-General as the first law officer of the State. That power is now enshrined in s 7 of the *Attorney-General Act* 1999. However, it is unnecessary to determine this point having regard to my earlier conclusions on this ground.

Second ground

[17] The undertaking provided by the Attorney-General is specifically restricted to proceedings under the laws of the State of Queensland. It does not provide any

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13 *Attorney-General Act* 1999, s 7(1)(b).

14 *Saffron v Federal Commissioner of Taxation* (1992) 109 ALR 695 at 698.

15 See, generally, *Jago v District Court (NSW)* (1989) 168 CLR 23; *Williams v Spautz* (1992) 174 CLR 509; *Williamson v Trainor* [1992] 2 Qd R 572.

undertaking or immunity in respect of any potential prosecution for Commonwealth offences. However, for there to be substance in this ground, there must be a real and appreciable danger that Barry could be prosecuted by the Commonwealth authorities for an offence.

[18] Counsel was unable to identify any Commonwealth offence in relation to which Barry's evidence might tend to incriminate him. At best, a concern was raised as to the possibility his evidence will deal with drug trafficking activities where there was a possibility of interstate activity.

[19] The bare possibility of such a scenario is insufficient, in my view, to constitute a real and appreciable danger of prosecution such as to justify a finding that Barry is entitled to claim privilege from giving any evidence in these proceedings. Any prosecution sought to be undertaken by the Commonwealth authorities could only be undertaken with the consent of the DPP having regard to the terms of the memorandum of understanding between Commonwealth and State authorities in respect of prosecutions. Plainly, the fact that the evidence was given in reliance upon the undertaking from the Attorney-General would be a relevant factor.

[20] In any event, there is substance in Mr Byrne SC's submissions on behalf of the Crown that any evidence in relation to this possibility is readily compartmentalised, and that any answer that may be the subject of a claim for privilege on the grounds that it may tend to incriminate Barry in relation to the commission of Commonwealth offences can be considered on a question by question basis by the trial judge.

Third ground

[21] The power to re-try a person acquitted of murder arises as a consequence of relatively recent amendments to the *Criminal Code*. These legislative provisions have not been the subject of judicial determination. The power to order a retrial is extremely limited and can only occur if a subsequent court is satisfied there is fresh and compelling evidence and that it is in the interests of justice for the order to be made. "Fresh" evidence is a well-known expression in the criminal law. To be "fresh" evidence, the evidence must be evidence which was not known to a party at the time of the initial proceeding, and could not have been able to be ascertained by exercising reasonable diligence. It is difficult to envisage there would be any evidence given by Barry that could satisfy such a requirement, in the present circumstances. A bare suggestion to the contrary does not give rise to a real and appreciable apprehension of a danger of prosecution.

[22] In any event, a second requirement for any such retrial is that it be in the interests of justice for the order to be made. It is not in the interests of justice unless the Court is satisfied that a fair retrial is likely in the circumstances.[16] If such an order were sought on the basis of evidence given by Barry pursuant to the undertaking provided to him by the Attorney-General, or as a result of evidence obtained from the derivative use of Barry's evidence, it is inconceivable that a subsequent Court would find a retrial was fair in the circumstances. Public respect would not be maintained if current processes are perceived to be used in an unconscionable

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16 *Criminal Code*, s 678F(2).

manner.[17] In this respect, the observations of Dowsett J in *Williamson v Trainor*[18] are apposite:

> "Nothing is more likely to bring the judicial process into disrepute than to permit either the Crown or the police force to resile from such an agreement."

The perceived possibility of a retrial of Barry on a charge of murder does not give rise to a real and appreciable risk of danger of prosecution such as to justify maintenance of a claim of privilege.

Fourth ground

[23] Although the Queensland Police Service has a prosecutorial function in the Magistrates Court, any attempt to exercise that function in circumstances where the first law officer of the State has given an undertaking to that person, which was the basis that person has given evidence, would be a clear abuse of process. As such, there is no real and appreciable danger of Barry being the subject of a prosecution instituted by the Queensland Police Service in respect of evidence given by him pursuant to the undertaking provided by the Attorney-General.

Conclusion

[24] The undertaking provided by the Attorney-General is clear and unequivocal. It ensures that any answers given by Barry, or any statement or disclosure made by Barry in the course of giving evidence in the proceedings against Hicks and Taylor for alleged offences of murder and attempted armed robbery in company committed on or about 12 October 2007, and any information, document or other thing that is obtained as a direct or indirect consequence of any such answer or statement or disclosure made by him, or disclosed or produced in the said proceedings, will not be used in evidence against Barry in any civil or criminal proceedings under the laws of the State of Queensland other than in proceedings in respect of the falsity of any evidence he may give. This undertaking is readily distinguishable from the undertaking considered in *Rank Film Distributors Ltd v Video Information Centre*.[19] That being so, there is no real or appreciable danger that evidence given by Barry in those proceedings may tend to incriminate him in any civil or criminal proceedings in the State of Queensland.

[25] To the extent that it may be asserted by Barry that an answer to a question may tend to incriminate him in the commission of Commonwealth offences in that the answers may incriminate him in involvement in drug trafficking over interstate borders, the trial judge may determine, on a question by question basis, whether there is any substance in that claim for privilege.

Ruling

[26] Subject to a claim that the answer to a particular question may tend to incriminate Barry in involvement in drug trafficking over interstate borders (the validity of which is a matter for ruling by the trial judge on a question by question basis), Barry is not entitled to claim privilege from answering questions when giving evidence at

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17 *Williamson* (supra) per Ambrose J at 582.

18 *Williamson* (supra) at 583.

19 [1982] AC 380.

the trial of Hicks and Taylor for the offences of murder and attempted armed robbery in company.