

SUPREME COURT OF QUEENSLAND

CITATION: *R v Pike* [2012] QSC 353

PARTIES: **R**
(respondent)

v

STEPHEN JONATHON PIKE
(applicant)

FILE NO: Indictment 131/12

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Brisbane

DELIVERED ON: 16 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 2 October 2012

JUDGE: Peter Lyons J

ORDER:

1. **I overrule the objection to the evidence of Mr Howard;**
2. **I overrule the objection to the evidence of Ms Green;**
3. **I overrule the objection to the evidence of the purchase of a shovel, referred to in evidence to which my attention is drawn;**
4. **I adjourn the application so far as it relates to Ms Wiseman's evidence, to a date to be fixed.**

CATCHWORDS: EVIDENCE – ADMISSIBILITY AND RELEVANCY – IN GENERAL – OBJECTIONS – where statement of a witness records a conversation between the witness and the applicant – where the applicant submits the witness can not remember the conversation word for word – where the applicant submits evidence suggests the witness was intoxicated at the time of the conversation – whether evidence of the conversation should be excluded on the basis it is not reliable – whether reliability of evidence is a matter for the jury

EVIDENCE – ADMISSIBILITY AND RELEVANCY – IN GENERAL – OBJECTIONS – where statement of a witness records a conversation between the witness and the applicant and alleges, in relation to the killing of his mother, the applicant said “if I did it, there would be pieces of her in the bush everywhere...[t]hey would never find the body” –

where the respondent's case is a circumstantial case where the applicant submits the evidence is not probative – where the applicant did not identify any unfairly prejudicial effect that might flow from the admission of the evidence – whether, if accepted, the jury could rationally take the evidence of the conversation into account as supporting an inference of guilt, in light of the evidence overall

where witness states that she was the person initially involved in the sale of a particular cleaning product on 24 August 2010 – where the product is described as a “powerful corrosive and caustic shock treatment” for very dirty floors – where it was not suggested that the purchaser was a person other than the applicant – where the applicant submits the evidence is of no probative value – where the respondent submits that, in the context of other evidence, it is probative – whether, if the evidence were accepted, it might rationally affect the assessment by a jury of the probability of the applicant's guilt

EVIDENCE – ADMISSIBILITY AND RELEVANCY – FACTS RELEVANT TO FACTS IN ISSUE – PARTICULAR MATTERS – MURDER OR MANSLAUGHTER where respondent proposes to lead evidence that a shovel and two plastic sheets were purchased with cash from the Bunnings Warehouse at Burleigh heads on 13 August 2010 – where applicant submits that evidence is not probative and accordingly not relevant – where respondent submits that evidence is probative in context of other evidence – whether, in the context of other evidence, the evidence of the purchase could give rise to an inference that the applicant was the purchaser – whether that could constitute an intermediate fact in a rational chain of reasoning leading to a conclusion that the applicant was involved in his mother's death

Criminal Code Act 1899, s 590AA

Doney v The Queen (1990) 171 CLR 207, cited
Driscoll v The Queen (1977) 137 CLR 517, distinguished
Papakosmas v The Queen (1999) 196 CLR 297, considered
Roach v The Queen (2011) 242 CLR 610, followed
Rozenes v Beljajev [1995] 1 VR 533, cited
Shepherd v The Queen (1990) 170 CLR 573, considered
Smith v The Queen (2001) 206 CLR 650, cited

COUNSEL: DR Lynch for the applicant
 TA Fuller SC for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
 ODPP for the respondent

[1] The applicant is charged with the murder of his mother, Suellen Pike. He has applied under s 590AA of the *Criminal Code Act 1899 (Criminal Code)* for the

exclusion of some of the evidence proposed to be called at his trial. Generally, his principal objection is to relevance, it being submitted that the evidence has no probative value.

Background

- [2] Mrs Pike lived at Burleigh Waters on the Gold Coast. She was aged in her 60s, and suffered from a variety of health issues, including schizophrenia. She took medication for her health conditions. She was a large woman, said to have difficulties with mobility.
- [3] In the early part of 2010, the applicant lived at the unit of Ms Fordham. At some time towards the middle of that year, he went to live with his mother.
- [4] On 15 July 2010, Mrs Pike altered her will, the alteration being made at her request. Prior to that date, her estate had been left to the applicant and his brother Adam Pike. Under the will as it was made on 15 July 2010, the applicant became the sole beneficiary of Mrs Pike's estate.
- [5] The last known contact between Mrs Pike and anyone other than the applicant occurred on 12 August 2010, when Mrs Pike spoke to a friend.
- [6] Mrs Pike had a medical appointment on 13 August 2010, which she had recently confirmed. She did not attend this appointment.
- [7] The applicant later told police that on 13 August 2010 (a Friday) he did not go to work. He said that, when he awoke, he found his mother was not at home. He then went to look for her, but could not find her. He said that around lunchtime, his mother arrived home, and told him she had been with Adam, and that she intended to leave the next day to stay with him for a couple of weeks. He also said that the next morning was the last time he saw his mother. She was dressed, ready to leave, and had a bag packed. She said that Adam was to pick her up. The applicant said that he did not want to be present when Adam arrived, so he went for a run, there being hostility between him and Adam.
- [8] On 13 August 2010, the applicant withdrew money from his account by means of an automatic telling machine at Burleigh Heads at 12:06pm. Twelve minutes later, a cash transaction occurred at Bunnings Warehouse, approximately one and a half kilometres away, where a shovel and two plastic sheets were purchased.
- [9] Early on the morning of 14 August, the applicant used his computer to view Google Maps, including the area around Nerang. In the very early hours of 15 August 2010, the applicant caught a taxi from a service station at Nerang to his home. The applicant later told police that on the afternoon of 14 August he drove to Nerang and went to a hotel. He said that he spent the evening drinking there, before catching a cab home. CCTV footage shows that the applicant was not in the hotel that evening.
- [10] On 15 August 2010, the applicant arranged by telephone for a tow truck to collect his vehicle from bushland in the vicinity of Nerang. He used a pay phone to make the telephone call, although a landline was available at Mrs Pike's home. The tow truck driver stated that, when they arrived at the location of the car, the applicant walked into bushland nearby and returned a short time later. The tow truck driver

- observed what appeared to be the handle of a shovel in the rear of the applicant's car.
- [11] On 17 August 2010, the applicant conducted an internet search for a cleaning product, his search including the term "butchers supplies". That search resulted in the identification of a company, Total Supply Solutions, located at Mermaid Beach, which supplied professional and commercial cleaning chemicals.
- [12] On the same day, Ms Brenda Ring telephoned Mrs Pike's home concerning a birthday dinner which had been arranged for Mrs Pike for the following day. The applicant said that Mrs Pike had gone to stay with Adam.
- [13] On 18 August 2010, Adam telephoned Mrs Pike's home for her birthday, and left a message on the answering machine.
- [14] On 23 August 2010, police conducted a welfare check at Mrs Pike's home, because she had failed to collect her medication from the pharmacy. The applicant informed them that Mrs Pike was staying with Adam in Brisbane, and undertook to contact her.
- [15] On 24 August 2010 the applicant bought an industrial strength cleaning product from Total Supply Solutions.
- [16] On 28 August 2010 the applicant attended a friend's birthday party. He there had a conversation with Dean Howard. Mr Howard's evidence is the subject of one of the objections, and will be referred to in more detail later in these reasons.
- [17] On 29 August 2010, the applicant reported that Mrs Pike was missing. He stated that she had failed to make contact with him the previous day, for his birthday.
- [18] Adam Pike said that he had last seen Mrs Pike on Mother's Day, before the applicant had moved into her home; and that he had had no contact with her since. There had been no suggestion that she would stay with him in August 2010.
- [19] When the police commenced their investigations, they found at Mrs Pike's home a shovel of the same kind as that which had been purchased at Bunnings Warehouse at Burleigh Waters a little after midday on 13 August 2010. The applicant told police he may have purchased the shovel some months earlier, although he also said he may have purchased it in August 2010.
- [20] Examination of the applicant's car revealed Mrs Pike's blood in the rear of the vehicle. The applicant attributed this to some ulcers for an open wound on her leg.
- [21] Police went to the location where the tow truck had collected the applicant's vehicle. In bush nearby, they found the remains of a fire, including a burnt pair of glasses, a pair of earrings, some metal clips and studs from a handbag, and a porcelain tooth crown. The glasses are similar to glasses purchased by Mrs Pike; the earrings are similar to earrings owned by her; and the handbag remains are similar to fittings on a style of a handbag owned by Mrs Pike. The tooth crown was consistent with dental work done to Mrs Pike.

Evidence of Dean Howard

- [22] Mr Howard gave evidence that on the evening of 28 August 2012, he had been drinking beer from about 6pm until 9pm. He then went to a party at which the applicant was present. While he was there, he drank six drinks of bourbon and coke, up to midnight. In the course of the evening he was told by another person that Mrs Pike had been missing for a few days. A little later, Mr Howard went outside and spoke to the applicant. His statement records that Mr Howard said to the applicant words to the effect “so the house is in your entire name now Stevo?”; to which the applicant replied “oh yeah, yeah, something like that”. His evidence at committal was to the effect that “[o]h, your mum’s – the will’s gone into your name”, to which the applicant replied “[o]h, yeah’ or something like that”.
- [23] The conversation continued with a statement by Mr Howard to the effect the applicant could “knock your mum off”, and “if they don’t find the body, you can’t get caught”. He said in his evidence-in-chief that the applicant responded by saying that if he did it, it would not be possible to find her. In cross-examination, somewhat consistently with his statement, Mr Howard said that the applicant said that if he was to “do it”, he would “do it properly”, and he would spread the pieces “around the bush”. In re-examination he gave a slightly clearer version of this evidence. Mr Howard’s statement was that, with reference to the possibility that the applicant might “knock her off”, the applicant said “if I did it, there would be pieces of her in the bush everywhere ... [t]hey would never find the body.”
- [24] It might be observed that Mr Howard gave his statement on 14 September 2010; and his evidence at the committal on 11 April 2011.
- [25] Mr Howard acknowledged that by the end of the party (about midnight) he was “a bit tipsy”; and by then, on a scale of 1 to 10 (10 being “paralytic”) he would have been a six (in cross-examination this was said to be a nine). He also described his conversation with the applicant as tongue-in-cheek, or joking.
- [26] For the applicant, it was submitted that the evidence was not probative, and therefore not relevant. That submission in part relied upon the hypothetical nature of the conversation, as well as the fact that it was jocular. It was also submitted that it was unreliable, having regard to the quantity of alcohol consumed by Mr Howard, and the fact that he acknowledged that he was not able to reproduce the conversation word for word. It was also submitted that the evidence should be excluded on the basis that its probative value was slight, and was outweighed by its prejudicial effect, relying on *Driscoll v The Queen*¹ (*Driscoll’s case*) with reference also to *Papakosmas v The Queen*,² where the nature of prejudice relevant for this discretion was discussed.
- [27] For the respondent it was submitted that questions of reliability were matters for the jury.³ It was said that the evidence was probative, and accordingly relevant. It was submitted that the only prejudice which had been identified was in truth the tendency of the evidence to incriminate the applicant, and accordingly there was no proper basis for its exclusion under the discretion discussed in *Driscoll’s case*.
- [28] In my view, in light of the authorities cited, it is not appropriate to exclude the evidence by reason of the fact Mr Howard could not recall the conversation word

¹ (1977) 137 CLR 517, especially at 541.

² (1999) 196 CLR 297, 325.

³ *Rozenes v Beljajev* [1995] 1 VR 533; *Doney v R* (1990) 171 CLR 207.

for word. As a matter of common experience, it is rare for people to have such an accurate recollection of a conversation, yet evidence is regularly admitted, either in the form of direct speech, or by way of a statement as to the effect of what was said. The accuracy of the account of the conversation is a matter for the jury to determine, after hearing Mr Howard's evidence, including the cross-examination of him.

- [29] Likewise, whether Mr Howard is a reliable witness is a matter for the jury to determine, taking into account the evidence about his consumption of alcohol. In my view, in light of the authorities mentioned, this is not a basis for the exclusion of the evidence.
- [30] The real issue is whether the evidence is probative. In *Roach v R*⁴ it was said in the joint judgment of four members of the Court:

“The question as to relevance is whether the evidence, if accepted, could rationally affect the assessment by the jury of the probability of the existence of a fact in issue.⁵ It may do so indirectly.”

- [31] The prosecution case is a circumstantial case. Mr Howard's evidence of his conversation with the applicant is relevant only if, assuming it is accepted by the jury, it could, when taken with the balance of the prosecution case, rationally support an inference of guilt. It seems to me that a jury could rationally take into account as supporting that inference, the fact that the applicant was prepared to enter into a discussion about killing his mother, and disposing of her body in the bush, approximately two weeks after her disappearance, and the night before he reported to the police that she was missing, in the light of the evidence overall. That evidence includes the fact that he was the last person to have seen her alive; and the finding of items that may have been hers in the bush, near where the applicant's car broke down.
- [32] The applicant did not identify any unfairly prejudicial effect that might flow from the admission of Mr Howard's evidence. It seems to me that the only effect the evidence might have, adverse to the applicant, is that, in the context of the Crown case, it could rationally support an inference of guilt. That consideration does not warrant its exclusion.
- [33] I overrule the objection to the evidence of Mr Howard.

Purchase of cleaning product

- [34] Ms Green gave evidence that she was the person initially involved in the sale of the cleaning product on 24 August 2010, though the transaction might have been finalised by another employee of the business. She described the product as “a powerful corrosive and caustic shock treatment” for hard floors. She said that she rarely recommends this product, and never to a female. She recalled recommending it to a male person on about 24 August 2010. That person had “hard floors” which were “really dirty”.

⁴ (2011) 242 CLR 610 at [12].

⁵ *Smith v The Queen* (2001) 206 CLR 650 at [7].

- [35] It is not suggested that the purchaser was someone other than the applicant. A receipt for the purchase was located in the applicant's car, and the container of the cleaning product was located at Mrs Pike's house.
- [36] For the applicant, it was submitted this evidence is of no probative value; and that it invites the jury to speculate about what might have happened.
- [37] For the respondent it was submitted that, in context, the evidence was probative. The relevant context was said to include the fact that, in his interviews with the police, the applicant did not tell them that he had travelled to the bush in the vicinity of Nerang on the night of 14 August 2010; the fact that Mrs Pike's blood was located in the rear of the applicant's vehicle and that damage was noted to the vehicle; and the fact that on 17 August 2010 the applicant conducted a search using the search term "butcher supplies", the results for which included Total Supply Solutions. It was submitted that the search term suggested the applicant wished to clean blood from a surface; and the timing of these events, which was between when Mrs Pike disappeared and when the applicant reported to the police that she was missing, was important.
- [38] In my view, the evidence of Ms Green, if accepted, could rationally affect the assessment of a jury, at least indirectly, of the probability of the applicant's guilt. It seems to me that this is evidence of a circumstance which, taken with other circumstances in the prosecution case, could rationally support that inference of guilt.

Purchase of shovel

- [39] Objection is taken to the leading of evidence that a shovel and two plastic sheets were purchased from the Bunnings Warehouse, Burleigh Heads, on 13 August 2010 at 12:18pm. There was no evidence, either by way of CCTV footage, or from a witness, which identifies the applicant as the purchaser.
- [40] For the applicant it was submitted the evidence was not probative, and accordingly not relevant; and that it again invited speculation by the jury.
- [41] For the respondent it was submitted that the evidence was probative. An available inference was that the applicant was the purchaser. It was submitted by reference to *Shepherd v The Queen*⁶ (*Shepherd*) that not every fact which forms part of a circumstantial case must be proven beyond reasonable doubt. The fact which it is sought to have the jury infer is that the applicant purchased the shovel on 13 August 2010.
- [42] It seems to me that that fact may well be regarded as an intermediate fact (which may itself be a matter of inference).⁷ However, it does not seem to me to be a fact which is indispensable to establishing the guilt of the applicant. Accordingly, it is not a fact which must be proven beyond reasonable doubt.
- [43] Again, the evidence of the purchase of the shovel needs to be looked at in the context of the case as a whole. At 12:06pm, some 12 minutes before the purchase of the shovel, the applicant withdrew cash from an automatic telling machine at

⁶ (1990) 170 CLR 573.

⁷ *Shepherd* at 579.

Burleigh Heads. That was about one and a half kilometres from the Bunnings Store. A shovel of the same kind as that purchased on 13 August was found at Mrs Pike's home. What appeared to be the handle of the shovel was seen by the tow truck operator in the applicant's car in the bush in the vicinity of Nerang on 15 August 2010. This was very shortly after the disappearance of Mrs Pike.

[44] It seems to me first that the evidence of the purchase, in the context of the other evidence, could give rise to an inference that the applicant was the purchaser; and that that in turn could constitute an intermediate fact in the chain of reasoning leading to a conclusion that the applicant was involved in his mother's death. I do not consider that such a chain of reasoning would be irrational.

[45] In my view, therefore, the evidence is relevant and admissible.

Other matters

[46] At the hearing, I upheld an objection to some evidence from Ms Kelly Marie Fordham, of a telephone conversation, apparently between the applicant and his mother.

[47] Objection was taken to evidence from a Ms Julie Wiseman, a police officer, who gave evidence of inquiries with various entities with whom Mrs Pike might have had dealings had she been alive, and the fact that those inquiries did not indicate any dealing with Mrs Pike after her disappearance. The evidence was intended to assist in the conclusion that Mrs Pike was dead. It emerged that the objection was on the hearsay ground. Mr Fuller of Senior Counsel, who appeared for the prosecution, then indicated that evidence would be called from the various entities whom Ms Wiseman had contacted. From this, and discussions at the bar table, it appeared likely that some resolution would be reached about this evidence. In those circumstances, I propose to adjourn the application, so far as it relates to the evidence of Ms Wiseman.

Conclusion

[48] I propose to make orders overruling the objection to the evidence of Mr Howard, Ms Green, and of the purchase of the shovel. I have previously upheld the objection to Ms Fordham's evidence by telephone of a conversation between the applicant and, it would appear, his mother. In relation to Ms Wiseman's evidence, I adjourn the application to a date to be fixed.