SUPREME COURT OF QUEENSLAND

CRIMINAL JURISDICTION

ATKINSON J

Indictment No 849 of 2010
Indictment No 835 of 2011

THE QUEEN

v.

SHANE ANTHONY UITTENBUSCH

BRISBANE

..DATE 29/03/2012

RULING

HER HONOUR: A matter has arisen for a pre-trial ruling with regard to the evidence to be given by the two complainants in this matter, Gavin Vincent Hyde and Mark Gregory Leeder. The unusual circumstance has arisen that both complainants have died subsequently to the events in question and before the trial for reasons unrelated to the alleged offences. Mr Hyde is the complainant in counts 2, 3 and 4 on the indictment: robbery with circumstances of aggravation, attempted murder and, alternatively, malicious act with intent. He died on 24 January 2010. Mr Leeder is the complainant in counts 1 and 5 on the indictment, burglary with circumstances of aggravation and wounding. He died on 26 or 27 September 2010, I am informed, from a heroin overdose.

The prosecution submits that the requirements for admissibility of those statements under s 93B of the *Evidence Act 1977* (Qld) have been satisfied. Section 93B relevantly provides:

"(1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact—

(a) made a representation about the asserted fact; and

(b) is unavailable to give evidence about the asserted fact because the person is dead...

(2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was

(a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or

(b) made in circumstances making it highly probable the representation is reliable; or

(c) at the time it was made, against the interests of the person who made it."

The relevant section for the admissibility in this case is subsection (2)(a): that the representations which were given as to the events that occurred on 6 October 2009, were made shortly after the asserted facts happened and in circumstances making it unlikely that the representations were a fabrication.

The prosecution, if necessary, also relies upon paragraph (b): that the statements were made in circumstances making it highly probable the representations are reliable, but the subsections are in the alternative and, in my view, it is not necessary to go on to consider subsection (b) because the matters fall within subsection (a).

As to whether or not the representations were made shortly after the asserted fact happened, the offences to which the evidence relates occurred at approximately 1 a.m. on 6 October 2009. Mr Hyde was transported to the Princess Alexandra Hospital from the scene shortly afterwards. Police obtained a signed statement from him on 7 October 2009 while he was still in the Princess Alexandra Hospital. Mr Leeder was transported

to the same hospital where he was treated and he was then released when he returned to his unit, where he was located by the police on 6 October 2009. He was transported to the Acacia Ridge Police Station and provided a signed written statement to the police on that day.

Mr Leeder was still alive at the time of the committal and his deposition was part of the depositions for the committal. He was at Court and available to give evidence on that day but was not required for cross-examination. The statements of both Mr Hyde and Mr Leeder were admitted pursuant to section 110A of the *Justices Act 1886* (Qld).

There is no dispute that the matters in section 93B(1) are satisfied. This is a prescribed criminal proceeding, the statements fall within the definition of a representation, the complainants had personal knowledge of the facts they assert, and they are unavailable to give evidence at the trial by reason of their death.

The circumstances in which Mr Hyde's statement was made, being taken by the police who attended at the hospital, make it unlikely that the representations contained in the statement are a fabrication. He has signed that statement pursuant to the Justices Act, acknowledging the contents of the statement as true and correct to the best of his knowledge and belief and that he was liable to prosecution for anything stated therein known to him to be false. He has a minor criminal history, but that does not impinge upon my view that the

representations were made in circumstances making it unlikely that the representations were a fabrication. He was the victim of an offence giving the police a first-hand account of the events that occurred when those offences took place.

The statement made by Mr Leeder was also made shortly after the asserted fact happened and in circumstances making it unlikely that the representation was a fabrication. He was taken to the police station and, as the police officer who gave evidence before me who recalled him at the police station said, he was volunteering information and obviously not reluctant to tell the police what had happened to him on that morning when the offence occurred. He, too, had a minor criminal history, but that does not take away from the fact that the circumstances make it unlikely that the representation is a fabrication.

The written submissions on behalf of the defendant in this matter are relied upon by counsel who appeared for him today who is not the same as the counsel who wrote those submissions. However, counsel said today that he did not wish to make any further submissions with regard to Hyde's evidence; if the requirements of section 93B were met, he did not submit that it should be otherwise excluded.

It is, of course, true that evidence should not lightly be admitted under this section. As the President observed in *R v McGrane* [2002] QCA 173 at [44], the exception to the hearsay rule under s 93B should be strictly construed,

subject to adopting an interpretation that would best achieve the purpose of the legislation.

When one considers the double test set out in subsection (2)(a), the first question is whether or not the representation was made when or shortly after the asserted fact happened. If, of course, it was part of the asserted fact, then it would be part of the res gestae, so that test is clearly meant to extend the timeframe beyond that.

It is a question of degree what "shortly after the asserted fact" means, and depends on the circumstances of the case. For example, in *R v Crump* [2004] QCA 176, a conversation on the morning immediately after the alleged assault had occurred was taken to fall within the period of "shortly after the asserted fact happened". It was held in *Williams v The Queen* [2000] FCA 1868 that a delay of several days would ordinarily mean that the statement had not been made shortly after the event, such delay lacking the proximity in time required by the section. However, in *R v. Raye* [2003] QCA 98, a statement made one week after an incident was regarded as admissible under 93B(2)(a). It is a question of fact in the circumstances of the case, and in this case both statements were made shortly after the events in question, as soon as could reasonably occur given the offences that took place. It therefore amply satisfies that part of the section.

As to the circumstances making it unlikely that the representation is a fabrication, the statements were given to

the investigating police. There is no suggestion that there is some motivation for the complainants to have lied in those statements to the police.

The only question which remains is whether there is any reason other than the possibility of fabrication for the statements to be considered unreliable, and any reason why the discretion to exclude them should be exercised.

So far as the matters that might make them unreliable are concerned, a number were canvassed by Mr Lynch this morning with regard to Mr Leeder's statement. He made no further submissions on Mr Hyde's statement. They include material found in Leeder's own statement such as that he was a chronic alcoholic who suffered from anxiety and depression; that he had been living on the streets; and that he had been drinking on the day prior to these offences, which occurred in the early hours of the morning. All of those matters are found in his statement and can safely be the subject of directions given by the Judge to conform with s 93C, informing the jury of matters that may cause the hearsay evidence to be unreliable.

There is one other matter, and that is that Mr Leeder makes no reference, it is submitted, to his addiction to drugs. However, Hyde gives evidence in his statement of giving amphetamine to Leeder on that day, and so that evidence will be before the jury and can be the subject of a direction by the trial Judge that they should accept that Leeder also used

amphetamine on the day before the incident occurred in the early hours of the next day.

I did express some concern about the statement appearing more coherent than perhaps it had been when given, and Senior Constable Brown was called to give evidence as to the taking of the statement. He cannot recall Mr Leeder specifically and there appears to be no reason why he would. He gave evidence as to his usual manner of taking statements, which appears to be careful, and there appears to be no reason to think he deviated from that usual practice in this case. On that basis it appears that the statement was given voluntarily by someone who appeared to have a reasonable recollection of what had occurred, who understood the questions that were asked and was responsive to them, and therefore the statement does truly represent the version of events given by Mr Leeder, and in the order in which Mr Leeder said the events happened.

Mr Lynch submitted that notwithstanding all those matters I should exclude Mr Leeder's statement pursuant to s 130 of the Evidence Act, which gives statutory expression to the court's discretion to exclude evidence which would be unfair. He submitted that applying a ruling made by de Jersey J as the Chief Justice then was in *R v. Falzon* [1990] 2 Qd R 436, that there is reason to exclude this evidence on the basis of its unreliability. The evidence in that case was not excluded for that reason, but rather because the evidence was improperly obtained. There is no suggestion in this case that the kind of impropriety which led to the evidence being excluded in

Falzon has any application to the circumstances of this case.

The ruling in *Falzon* was considered by White J in *Warmenhoven v The Queen* [2006] QSC 064, where the question was whether the evidence of another prisoner to whom an accused allegedly confessed should be excluded on the grounds that it was unreliable. Her Honour distinguished *R v Falzon* on the basis that there was no indication that the evidence had been obtained by improper means, or that the witness had an incentive to misrepresent the circumstances. Her Honour said at [28]-[29], "The applicant has referred to *R v Falzon* [1990] 2 Qd R 436. That was a case where the conduct of the police was an affront to proper methods of investigation on any view. There was so great a risk that the statements sought to be excluded were untruthful that no warning to a jury could exclude it.

There is nothing here of the kind which concerned the Court in Falzon either in relation to Hudson or this applicant. Nesbitt is not an accomplice to the crime. He did not approach either the prison authorities or the police with his evidence. He was approached by them. Nesbitt testified at the committal hearing on 27 January 2005 well after his parole application was unsuccessful."

Her Honour referred with approval to the decision of the Victorian Court of Appeal in *Rozenes v Beljajev* [1995] 1 VR 533 where the Court said:

"It is difficult to see how it can be said that the trial is unfair by reason of the unreliability of evidence which is probative where the circumstances which make the evidence unreliable are properly exposed for the consideration of the jury ... there [i]s 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. "

The circumstances which might suggest that the evidence was unreliable should be dealt with by way of warning to the jury under s 93C(2), and I have no reason to expect that the jury would fail to follow those warnings.

In the circumstances, there is nothing that convinces me that the evidence is so unreliable that it would be unfair to the accused to allow the evidence to be admitted, and in those circumstances I do not propose to exclude the evidence under s 130 of the Evidence Act. I am not satisfied that it would be unfair to the defendant to admit that evidence subject to the appropriate warnings to be given under s 93C. The outcome is that the statements of Mr Hyde and Mr Leeder sought to be led may be led under s 93B, and that is my ruling.
