SUPREME COURT OF QUEENSLAND

CITATION:	*R v Heuer* [2013] QSC 357
PARTIES:	**R** **(respondent)** **v** **HEUER, Eric Roger** **(applicant)**
FILE NO:	89/12
DIVISION:	Trial Division
PROCEEDING:	Application pursuant to s 590AA of *Criminal Code*
DELIVERED ON:	31 January 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 January 2013
JUDGE:	Justice Margaret Wilson
ORDER:	**If the defendant adduces evidence from Dr Peter Fama as to the defendant's mental condition at the time of the alleged offences, the Crown may adduce evidence from Dr Josephine Sundin in rebuttal.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – COURSE OF EVIDENCE – where the defendant was charged with two counts of attempted murder, and in the alternative with two counts of doing grievous bodily harm with intent – where the principal issues were insanity and intent – where the defence sought to lead expert evidence to support insanity – where expert evidence of insanity would be closely entwined with evidence of intent – whether the prosecution should be permitted to adduce expert evidence in rebuttal *Criminal Code* 1899 (Qld) s 27, s 590B *Killick v The Queen* (1981) 147 CLR 565, cited *Lawrence v The Queen* (1981 – 1982) 38 ALR 1, cited *R v Goode* [2004] QCA 211, considered *R v Pateman* [1984] 1 Qd R 312, cited *R v Soma* [2001] QCA 263, cited *Shaw v The Queen* (1952) 85 CLR 365, cited
COUNSEL:	BG Campbell for the Crown J Pappas for the defendant
SOLICITORS:	Office of the Director of Public Prosecutions for the Crown Legal Aid Queensland for the defendant

[1] **MARGARET WILSON J:** The defendant has been charged with two counts of attempted murder, and in the alternative with two counts of doing grievous bodily harm with intent.

[2] The principal issues are insanity, on which the defendant bears the onus of proof on the balance of probabilities, and intent, on which the Crown bears the onus of proof beyond reasonable doubt.

[3] Each side proposes to call expert psychiatric evidence. The defendant proposes to call Dr Peter Fama, and the Crown proposes to call Dr Josephine Sundin.

[4] The Crown wishes to call Dr Sundin in rebuttal. The defendant seeks an order requiring the Crown to lead her evidence in its case in chief.

Principles

[5] Relevant principles have been enunciated in *Shaw v The Queen*[1] and subsequent decisions. The general rule is that the Crown may not split its case: that it must present all of its evidence before the defendant is asked whether he intends to adduce evidence.[2] This is regarded as an important rule of fairness,[3] in that evidence tendered by the Crown after the close of the defence case "may assume an inflated importance in the eyes of the jury".[4] Ultimately, however, whether the Crown may call evidence in rebuttal is a matter within the discretion of the Court. That discretion is to be exercised in the context of any applicable statutory provisions and relevant principles enunciated in earlier binding authorities. Evidence in rebuttal may be allowed in exceptional cases where the Crown could not have anticipated the evidence adduced by the defendant and in relation to issues on which the defendant bears the onus of proof.[5] Where issues of insanity and intent are entwined, as they are in this case, Courts have been inclined to allow the Crown to call its psychiatric evidence in rebuttal.[6]

Submissions

[6] I accept the submission of counsel for the defendant that whether the Crown should be allowed to call Dr Sundin in rebuttal is a matter of practice and procedure, and a matter of fairness.

[7] Counsel for the defendant relied on the following factors in support of his submission that it would be unfair to allow the Crown to do so –

(a) that on the facts of this case, it would be open to the jury to be satisfied that the defendant was of unsound mind in the absence of psychiatric evidence;

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1 *Shaw v The Queen* (1952) 85 CLR 365.
2 Ibid.
3 *Lawrence v The Queen* (1981 – 1982) 38 ALR 1 at 3.
4 *Killick v The Queen* (1981) 147 CLR 565 at 569; *R v Soma* [2001] QCA 263 at [22].
5 *R v Pateman* [1984] 1 Qd R 312.
6 *R v Goode* [2004] QCA 211 at [45].

(b) that procedural requirements have changed since the decision in *Shaw* in that parties are now required to exchange expert reports before trial,[7] so removing the element of surprise;
(c) that there will be no further factual evidence led in the defence case, and if something were to arise in Dr Fama's evidence which the Crown could not have been expected to foresee, then there would be good reason for the Court to exercise its discretion to allow evidence in rebuttal;
(d) that since the Crown bears the onus of proving intent, it should be required at least to call its evidence on that issue in its case in chief;
(e) that to avoid any unfairness from the Crown's splitting its psychiatric evidence, the Crown should be required to call all of its psychiatric evidence in its case in chief.

[8] The prosecutor submitted –

(a) that the traditional approach to the calling of rebuttal evidence in cases involving psychiatric evidence continues to apply, despite the comparatively recent procedural changes requiring the exchange of expert reports before trial;
(b) that there are sound practical reasons for the traditional approach and why it should not be disturbed:
    (i) that it demonstrates and makes clear to the jury that the defendant bears the onus of proving insanity;
    (ii) that by calling its evidence in rebuttal the Crown responds to the actual evidence rather than to the prosecutor's perception of what it might potentially be;
    (iii) that by calling its evidence in rebuttal the Crown responds to actual live issues as opposed to attempting to deal with issues in anticipation.
(c) that Dr Sundin's evidence relevant to intent should be adduced at the same time as her evidence relevant to insanity, and that should be in rebuttal;
(d) that, in the circumstances of this case, it is a fair assumption that Dr Fama's oral testimony will go beyond the contents of his report of 16 July 2009 and his addendum report of 9 January 2013. This is not a case where only two experts have expressed opinions about the defendant's mental condition. There is a large body of medical records and expert reports relating to the defendant, and counsel have endeavoured to shorten the trial by agreeing that the experts who give evidence may refer to the earlier material without the other doctors being called. The Crown does not know precisely which parts of that other material may be referred to by Dr Fama (either in evidence in chief or in cross-examination) in support of his opinions. In order to try to anticipate what might become relevant in Dr Fama's evidence, the Crown would have to canvas all of the other medical material;
(e) that while in some cases it might be open to the jury to be satisfied that the defendant was of unsound mind in the absence

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7 *Criminal Code* s 590B.

> of psychiatric evidence, such cases would be extremely difficult [sic].[8] In any event, in the present case, if the defendant were not calling medical evidence to support a defence of insanity, he as prosecutor would not be calling evidence of a psychiatric nature.[9]

[9] In reply, counsel for the defendant stressed that the earlier medical material has been equally available to both experts. He acknowledged that Dr Fama referred to some of it in his addendum report only in general terms and that in his oral testimony he might go beyond the report, in the sense of identifying precisely the material he relied on, its relevance and the conclusions he drew from it. He acknowledged that the Crown cannot anticipate with particularity how Dr Fama may do this. He submitted that there was nevertheless a safety valve, in that the Court could, in light of the evidence actually given by Dr Fama, exercise its discretion to allow evidence in rebuttal to accommodate "something that arose without proper forewarning, without the ability to forecast, applying a proper understanding and a proper and reasoned approach to what the case was about."[10]

Discussion

[10] The Court has a discretion to allow the Crown to adduce Dr Sundin's evidence in rebuttal. Fairness to both sides is the touchstone of the exercise of that discretion.

[11] The defendant is presumed to have been of sound mind at the time of the alleged offences. He bears the onus of proving that he was of unsound mind within the meaning of s 27 of the *Criminal Code*. Mental disability short of unsoundness of mind may be relevant to the factual question whether he formed the requisite intent, which is, of course, an issue on which the Crown bears the onus of proof.

[12] It is clear from the Court of Appeal's decision in *R v Goode* that the principles generally applicable to an application for leave to call evidence in rebuttal in such cases have not been affected by comparatively recent changes in procedure and practice whereby psychiatric reports are exchanged in advance of the trial.[11] Generally, where a defendant relies on insanity as a defence and calls psychiatric evidence in support of that defence, the Crown may adduce psychiatric evidence in rebuttal. Generally, the Crown may do so even where its psychiatric evidence is relevant to intent as well as to insanity.

[13] The Court has been told that the defence will not be calling factual evidence beyond that on which the expert reports have been based. Nevertheless, it can fairly be anticipated that Dr Fama will give oral testimony about the relevance of earlier medical material beyond the somewhat elliptical reference to it in his addendum report. That material was quite extensive, and in all the circumstances it would be unreasonable to expect the Crown to anticipate every possible way in which Dr Fama might rely on it.

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8 Transcript 24 January 2013 at 1-27.
9 Ibid.
10 Transcript 24 January 2013 at 1-31.
11 [2004] QCA 211 at [39]-[42].

[14] All of Dr Sundin's evidence should be given at the same time. If this is in rebuttal, it will be inevitable that, in so far as that evidence relates to intent (on which the Crown bears the onus of proof), it is led in rebuttal. Any unfairness can be overcome by the trial judge reminding the jury that insanity and intent are distinct issues, and where the onus of proof lies on each and the standard of proof relevant to each.

Disposition

[15] I have concluded that it would be fair to both sides to allow the Crown to adduce Dr Sundin's evidence in rebuttal.

[16] I rule that, if the defendant adduces evidence from Dr Peter Fama as to his mental condition at the time of the alleged offences, the Crown may adduce evidence from Dr Josephine Sundin in rebuttal.