SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chardon* [2019] QSCPR 10
PARTIES:	**R** v **JOHN WILLIAM CHARDON** (defendant/applicant)
FILE NO/S:	SC No 801 of 2018
DIVISION:	Trial Division
PROCEEDING:	Pre-trial Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	13 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2019
JUDGE:	Lyons SJA
ORDER:	**That the application be refused**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – RELEVANCE – GENERALLY – where the defendant is charged with murder – where no body of alleged victim recovered – where the defendant allegedly attempted to obtain a gun and procure hitmen through the witness – where the defendant regularly paid the witness – where the witness admitted to engaging in deception to obtain monetary benefit from the defendant – where the defendant argues that the evidence of the attempt to obtain a gun does not overcome the innocent explanation threshold and that there was a legitimate purpose for purchasing a gun – where the defendant argues the evidence of procuring hitmen is unreliable and of limited probative value – where the evidence is sought to be led to show evidence of the defendant's relationship with the victim and as part of the circumstantial case against the defendant – whether the evidence is relevant – whether the evidence should be excluded *HML v R; SB v R; OAE v R* (2008) 235 CLR 334 *Pfennig v R* (1995) 182 CLR 461 *Phillips v The Queen* (2006) 225 CLR 303 *R v Bond* [1906] 2 KB 389 *R v Swaffield* [1998] HCA 1 *Shepherd v The Queen* (1990) 170 CLR 573

The Queen v Bauer [2018] HCA 40
Wilson v R (1970) 123 CLR 334; [1970] HCA 17

COUNSEL: A J Kimmins and M Longhurst for the applicant
M A Green for the respondent

SOLICITORS: Paddington Law for the applicant
Director of Public Prosecutions (Qld) for the respondent

Introduction

[1] John Chardon is charged with the murder of his wife Novy Chardon on or about 6 February 2013. Novy Chardon was last seen by her friends at a restaurant at Runaway Bay between 10.00pm and 10.20pm on 6 February 2013. Her last SMS communication was at 10.21pm on that night. The defendant states that she left the family home sometime that night. She has not used her passport or accessed her bank accounts since that date. Her body has never been found.

[2] The trial is to commence before a jury on 14 August 2019. Pursuant to a s 590AA application filed by leave on 7 August 2019 the defendant seeks a ruling that the evidence of Marshall Bari Aguilor be excluded in the trial insofar as it relates to any allegation that the defendant attempted to obtain a gun in 2012 and to any allegation that the defendant attempted to procure hitmen in 2012. Whilst the application saw the exclusion of further evidence in relation to an attempt to obtain Rohypnol in 2012, that evidence will not be relied on by the Crown at trial. Accordingly no ruling is required in relation to it.

[3] Whilst attempts were made for that witness and a defence witness Ronaldo Tan to give evidence on a *Basha* hearing yesterday, 12 August 2019 or today via a video-link from the Philippines that was not able to be facilitated. Accordingly, for the purposes of this ruling I will rely on the statement of Aguilor taken by Queensland Police on 14 March 2017 and the affidavit of Ronaldo Tan sworn 12 August 2019.

[4] In summary the evidence of Aguilor is in the following terms:

a) Mr Chardon met Aguilor after he had posted a photo of his friend Mitchillie online. They met at the Marriot Hotel in Cebu but the meeting only lasted for an hour as Aguilor said Mitchillie didn't like Chardon. Chardon thought the two were scamming him as he had paid yet Mitchillie didn't have sex with him.

b) Aguilor continued to communicate with Mr Chardon via text when Mr Chardon had returned to Australia and apologised for the meeting at the hotel in Cebu.

c) On the 25th November 2011 Mr Chardon told Aguilor via Yahoo messenger that he would forgive him if they met in Cebu as Mr Chardon had some work for him.

d) They met in Cebu on 6 February 2012. Mr Chardon had arranged rooms for them at the Marriot Hotel. At some point Mr Chardon asked Aguilor "Can you kill?". Mr Chardon then said to Aguilor "I can kill".

e) Mr Chardon then told Aguilor he wanted to get rid of Novy as he was afraid she would take half of his money when they divorced. Mr Chardon asked him if he could find someone to do the job. Aguilor lied and told Mr Chardon he know of someone who could get rid of Novy but that they did not live in Cebu, they lived in Davao, when in fact he did not know of anyone. Mr Chardon told him he would pay the hitman $10,000 USD plus bonus.

f) Mr Chardon then told Aguilor that if they could not kill her he would shoot her himself and just needed assistance moving the body. Mr Chardon also enquired about possible caves to hide the body and about cliffs. He said he would tell Novy they were going to the Philippines on a holiday but he would kill her there. Mr Chardon gave Aguilor money to organise the hitman but Aguilor never did so.

g) The men discussed girls that Mr Chardon had met online. He told him that he paid for their schooling but when he went to the Philippines it was payback time. Mr Chardon would transfer money to Aguilor via Western Union for him to pay to the girls.

h) When Mr Chardon returned to Australia he asked for an update on the hitman and Aguilor said it was fine and that they were just waiting for Novy and John to go to the Philippines.

i) At some time in 2012 Mr Chardon asked Aguilor to buy him a gun in Aguilor's name for protection when visiting the Philippines. He paid Aguilor 80,000 peso. Aguilor did not purchase the gun.

j) Later in 2012 Mr Chardon told Aguilor that he and Novy were going to Thailand for Novy to have a cosmetic procedure. He asked Aguilor to find someone to travel to Thailand to kill Novy. Aguilor said he would organise it but did not, and did not hear back from Mr Chardon.

k) Mr Chardon advised Aguilor that Novy's lawyers put a restraining order on him transferring out of their accounts.

Should the evidence be excluded?

[5] The Crown argues that Aguilor's evidence should be understood within the context of a circumstantial case. The case against the defendant consists of a number of strands of evidence which cumulatively can prove the guilt of the defendant for the murder of Novy Chardon.

[6] In this regard the Crown relies on the following statement of principle by McHugh J in *Shepherd v The Queen*:[1]

> "Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances – often numerous – which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance."

[7] The Crown argues that the evidence that the defendant sought to procure a 'hitman' is therefore another strand to the circumstantial case as it shows:[2]

1. The nature of his relationship with Novy Chardon and his feelings toward her (amply demonstrated in his own words to police);

2. The fact that at a time well before her disappearance he had contemplated having her killed which is both a relevant circumstance to her disappearance and relevant to intent;

3. It is also relevant to identify that the action of having her killed was within his nature, and therefore relevant propensity evidence.

[8] The Crown argues therefore that the evidence that the defendant sought to obtain a gun from the witness Aguilor is relevant to understanding the nature of the relationship with the witness, that is the defendant was paying money to the witness with respect to what could loosely be described as 'procuring' women and he was also someone to whom the defendant would turn to possibly purchase a gun.

[9] The Crown argues it allows for a true understanding of the nature of the relationship and why the defendant would consider this witness was someone to whom he could make a request of the type alleged. That relationship is also demonstrated by the fact that there were 38 separate transfers of money by the defendant to the witness by way of Western Union between 13 October 2011 and 27 March 2013.

[10] The Crown argues the collective evidence therefore goes to excluding the 'defendant's account' (that she simply voluntarily left her life behind that evening) consistent with innocence and proving his guilt as the person responsible for her death.

[11] Counsel for the defendant argues however that the evidence that the defendant attempted to obtain a gun in 2012 is irrelevant and the evidence does not overcome the innocent explanation threshold as set out in *Pfennig v R*.[3] In particular it is argued that he had a legitimate purpose for buying a gun for protection in the Philippines and that such a precaution was not unusual in that country.

[12] In relation to the hitman allegation, counsel for the defendant argues that the evidence is unreliable and of limited probative value and the defendant would face unfair prejudice by the admission of that evidence at his trial.

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1 (1990) 170 CLR 573 at 592-3.
2 Crown's Outline of Submissions at [5].
3 (1995) 182 CLR 461 (Pfennig).

[13] Counsel for the defendant argues that in a circumstantial case this evidence in relation to the hitman or hitmen is a crucial link in the chain in relation to the element of intent to kill or cause grievous bodily harm. It is argued that the allegation is so fundamental to the Crown case concerning the element of intent that in its absence or non-acceptance it could make a finding of guilt on murder as opposed to manslaughter unsafe and unsatisfactory. Defence counsel argues that because of this significance, the allegation should be established beyond reasonable doubt. It is also argued that the evidence is such that it is essentially an allegation of an uncharged act or relationship evidence.

[14] It would seem clear that the evidence is sought to be led to show evidence not only of the defendant's relationship with his wife but also as part of the circumstantial case that Novy Chardon is dead and that it was Mr Chardon who killed her with an intention to kill her. Clearly then, the evidence goes to every element that makes up the offence of murder. The evidence of Aguilor would also go to Mr Chardon's motive as he gave evidence that the defendant told him should his wife divorce him he would lose half of his assets which he had worked hard to acquire as that was the current law in Australia.

[15] Any consideration of an appropriate ruling in this application must commence with the two High Court cases of *HML v R*[4] and *Pfennig*. Those decisions reinforced the fact that the basic principle for admissibility of all evidence is that evidence that is *prima facie* relevant is admissible. Evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of existence of a fact in issue in the proceedings.[5]

[16] As Gleeson CJ stated in *HML,* that directs attention, in a criminal case, to the elements of the offence charged, the particulars of those elements and any circumstances which bear upon the assessment of probability. He noted that motive may rationally affect the assessment of the probability of the existence of one or more elements of the offence and therefore evidence that tends to establish motive may rationally affect such assessment and if so it is relevant. When the prosecution seeks to establish motive, that is often a step in the prosecution case that is not indispensable. If it is established it may support the prosecution case. Juries are told that failure to establish motive does not mean the case must fail. So, information may be relevant and potentially admissible where it bares upon the assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence. It may explain a statement or an event that would otherwise appear curious or unlikely.

[17] In *HML,* Crennan J noted that in *Wilson v R*,[6] the Court held that evidence of a pre-existing hostile relationship between a person accused of murder and the victim was relevant and admitted so as to ensure the jurors were not required to decide the issues in a trial in a vacuum.[7] In *R v Bond*,[8] in a passage approved by Barwick CJ in *Wilson*,[9] Kennedy J said:

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4 *HML v R; SB v R; OAE v R* (2008) 235 CLR 334 (HML).
5 *HML* at [5].
6 (1970) 123 CLR 334; [1970] HCA 17 (Wilson).
7 At [428].
8 [1906] 2 KB 389.
9 *Wilson* at 338 per Barwick CJ.

> "the relations of the murdered or injured man to his assailant so far as they may reasonably be treated explanatory of the conduct of the accused as charged … are properly admitted to proof as integral parts of the history of the alleged crime for which the accused in on trial."

[18] Both *Wilson* and *Bond*, sometimes called "relationship" cases, were concerned with acts relevant to the offences charged but were not, strictly speaking, "similar fact" cases from which a jury might reason that an accused has a propensity to commit a murder. I also note that in *HML*, Crennan J stated:[10]

> "The background to any consideration of whether the evidence of uncharged acts in these matters should be admitted is the 'thesis of English law' referred to by Dixon CJ in *Dawson v The Queen* that a crime is not to be proved by 'the character and tendencies of the accused. In *R v Makin*, in the Supreme Court of New South Wales, Windeyer J considered the bar on proving guilt by reference to the character and tendencies of the accused was subject to 'certain exceptions and limitations' compelled by 'common sense and our experience of life". That case involved leading similar fact evidence to prove the actus reus."

[19] As Gleeson CJ said in *HML,* evidence of uncharged acts can come from a source other than a complainant and in fact uncharged acts of the same kind as the charged acts are themselves a particular example of evidence that reveals criminal or discreditable conduct of an accused other than the conduct with which he or she is charged.[11]

[20] In my view, the proper characterisation of Aguilor's evidence is that it is essentially evidence of uncharged acts by the defendant. In *HML,* Hayne J stated that *Pfennig* establishes the rule that governs the admission of evidence that would reveal an accused person's commission of discreditable acts other than those that are subject of the charges being tried. His Honour stated that:[12]

> "The rule takes as its premise that evidence of other discreditable acts of the accused is ordinarily inadmissible. The foundation for the rule excluding evidence of other discreditable acts of an accused is that despite judicial instruction to the contrary, there is a risk that the evidence will be used by the jury in way that give undue weight to the other acts that are proved. That is why the exception to the general rule of exclusion is drawn as narrowly as it in *Pfennig*. It is why *Pfennig* requires that evidence of other acts may be omitted only if it supports the inference that the accused is guilty of the offence charged and the evidence of those other acts is open to no other innocent explanation."

[21] His Honour stated that:[13]

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10 (2008) 235 CLR 334 at [441].
11 (2008) 235 CLR 334 at [1].
12 At [113].
13 At [113]-[114].

> "It also follows from the considerations that have just been mentioned that the exclusionary rule is not to be circumvented by admitting the evidence but directing the jury to confine its uses. There are several points he said to make about attempts to divide the uses to which evidence of other discreditable acts on an accused can be put."

[22] It is suggested that it is propensity, disposition or tendency on the one hand and context and explanation or intelligibility on the other. Hayne J argues that such a division is not to be attempted. Hayne J argues that the uses of the evidence cannot be segregated in the manner suggested.

[23] Accordingly Hayne J held that *Pfennig* is authority for the proposition of the circumstances in which evidence of other discreditable acts of an accused will be received in evidence. If it does not meet the *Pfennig* test it will be not admitted. This test was recently reiterated in the 2018 decision of the High Court in *The Queen v Bauer* where the Full Bench stated:[14]

> "Of course, *HML* was concerned with the admissibility of evidence of uncharged sexual acts as tendency evidence under common law rules of admissibility; in particular under the common law rules of admissibility propounded in *Hoch v The Queen* and confirmed in *Pfennig v The Queen* **that evidence of an accused's commission of discreditable acts other than those the subject of a charge may be admitted as tendency evidence only where it supports the inference that the accused is guilty of the offence charged and permits of no other, innocent explanation**." (my emphasis)

[24] Hayne J considered that in deciding the questions of admissibility as presented by *Pfennig*, the trial judge is not called on to decide whether the evidence which the prosecution intends to adduce does or does not establish the accused's guilt. In most cases he considered that such an that enquiry could not be undertaken because to ask whether evidence proves guilt would not be possible because the trial judge is usually required to decide those questions before any or all of the evidence has been led by the prosecution. That is why the court stated in *Phillips v The Queen*[15] that the test in *Pfennig* is to be applied by the judge on certain assumptions. It must be assumed that the similar fact evidence would be accepted as true and that the prosecution case may be accepted by the jury.

[25] Accordingly, he considered that *Pfennig* does not require the judge to conclude that the similar fact evidence standing alone would demonstrate the guilt of the accused of the offence with which he is charged. Rather, he considered that *Pfennig* requires a judge to exclude the evidence if viewed in the context in the way described. Hayne J held that the determinative question is whether there is a reasonable view of similar fact evidence which is consistent with innocence.

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14 [2018] HCA 40 at [52].
15 (2006) 225 CLR 303.

[26] Having considered the evidence, it is clear I am not required to conclude whether the evidence of these uncharged acts would demonstrate the guilt of Mr Chardon but rather I should exclude the evidence if there is a reasonable view of the evidence consistent with innocence. On the evidence currently before me I do not consider that there is a reasonable view on the evidence of Aguilor about the discussions to engage a hitman in either the Philippines or Thailand which is consistent with innocence. I also consider that the evidence about being asked to buy a gun for him to use whilst in the Philippines is part of the same context of discussions and cannot be separated out and are properly admitted as integral parts of the history of the relationship between Aguilor and the defendant particularly when viewed with the evidence in relation to the payments made to him by the defendant via Western Union.

[27] I also note the summary of facts tendered by counsel for the defendant which sets out a summary of matters which would point to Aguilor being unreliable and which point to him seeking financial reward for his evidence. [16] In particular counsel for the defendant argues that the following matters should be taken into account:[17]

(a) The alleged conversations are unrecorded

(b) The alleged conversations are uncorroborated

(c) The alleged conversations took part without an interpreter

(d) The allegation about a hitman in Thailand is contradicted by the fact that Mr Chardon did go to Thailand with Novy without incident

(e) Aguilor only provided information after learning a significant reward had been put in place and he wishes to relocate to Australia.

(f) Aguilor has consistently by his own admission engaged in deception to obtain monetary benefit with respect to his dealing with Mr Chardon.

[28] I accept that there is clear evidence that Aguilor has been dishonest and that he has obtained money from Mr Chardon in the past on a false basis. He was clearly interested at some point in obtaining the reward money which was offered. Those factors can clearly be put before the jury at the time they are asked to consider what weight they should attribute to his evidence. I do not consider those matters afford a basis for the exclusion of the evidence.

[29] I also note the arguments by counsel for the defendant that the statements are unreliable because there have been variations in the evidence which he has given on a number of occasions. In particular, counsel for the defendant argues that as the High Court remarked in *R v Swaffield*,[18] unreliability is an important aspect of the unfairness discretion and unreliability may be a touchstone of unfairness.

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16 Exhibit 1 tendered at the hearing on 13 August 2019.
17 Applicant's Outline of Submissions at [34].
18 [1998] HCA 1.

[30] I have been taken to those variations and I do not consider those variations to be substantial. I consider that there is a clear consistency in the basic facts he has asserted from his first statement.

[31] I consider therefore that the defendant has not established a basis upon which the evidence should be excluded.

[32] The application is refused.