

SUPREME COURT OF QUEENSLAND

CITATION: *R v Chardon* [2019] QSCPR 9

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: 30 July 2019

DELIVERED AT: Brisbane

HEARING DATE: 29 and 30 July 2019

JUDGE: Lyons SJA

ORDER: **Application allowed**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – where the defendant is charged with murder – where no body of alleged victim recovered – where the defendant makes an application to exclude evidence of a conversation containing an alleged confession – where the evidence of the conversation comes from a convicted fraudster who stood to obtain benefit for his undertaking to assist police – where the conversation was unrecorded and uncorroborated – where the witness said he had taken notes of the alleged confession but later conceded he had not – whether the alleged confession should be excluded because it is unfair and against the interests of justice – whether the alleged confession should be excluded because its prejudicial effect outweighs its probative value

Criminal Code 1899 (Qld), s 590AA

R v BCU [2014] QCA 292
R v Swaffield; Pavic v R (1998) 192 CLR 159; [1998] HCA 1
R v Fraser [2004] QCA 92

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

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

Introduction

- [1] The defendant John William Chardon is charged with the murder of his wife Novy Chardon on or about 6 February 2013. The four week trial is listed to commence in about 10 days on Monday 5 August 2019.
- [2] The defendant makes application pursuant to s 590AA of the *Criminal Code* 1899 (Qld), that the content of all conversations between Peter Foster and the defendant from 31 March 2015 be excluded from the trial of the defendant. The defendant contends that the contents of the conversation of that evening is an alleged confession and it should be excluded because of a number of factors.
- [3] Firstly, it is argued that it is unfair and against the interests of justice to admit the alleged confession because:
- (a) It was unrecorded and uncorroborated; and
 - (b) The circumstances are such that it amounts to an impermissible curtailment of the defendant's freedom to choose to speak to police in accordance with the decisions in *R v Swaffield; Pavic v R*.¹
- [4] Secondly, it is argued that it is unfair to admit the evidence as its prejudicial effect substantially outweighs its probative value as:
- (a) The confession was unrecorded and uncorroborated;
 - (b) The evidence comes from a witness who is not only a convicted fraudster, but a witness who stood to obtain benefit for his undertaking to assist police;
 - (c) There are no contemporaneous notes of the alleged confession in circumstances where firstly Foster said he did so but then apparently conceded that he had not done so.
- [5] The background to the alleged confession is that the wife of the defendant was last seen on the night of 6 February 2013.

¹ (1998) 192 CLR 159; [1998] HCA 1 (Swaffield and Pavic).

- [6] On 25 February and 28 February 2013 he took part in an electronic record of interview with police as a suspect and denied the allegations. On 28 February 2013, through his solicitor, he made it clear he would not participate in any further records of interview.
- [7] Some two years later, in February 2015, when the defendant was in custody at the Wolston Correctional Centre for unrelated matters, he came into contact with Foster who was also at the prison. They became known to each other and would take walks around the oval.
- [8] Some weeks later, Foster initiated contact with police and raised the prospect with them of assisting them to obtain a confession from the defendant. Foster gave evidence in this pre-trial application.
- [9] He indicated that because of an ABC news program about the circumstances surrounding Novy Chardon's disappearance and a search of a property in February of 2015, and Mr Chardon's reaction to that news program, he was convinced that Mr Chardon was responsible for the death of his wife.
- [10] Whilst Foster made it clear to police at an early stage that he did not wish for a reward, he indicated that he wished to obtain a benefit in that he be transferred to a prison farm, in particular Pallen Creek rather than the residential section of Wolston Correctional Centre.
- [11] Foster indicated that he was given specific instructions by police as to what he couldn't do, but he considered he would handle it himself. He stated:
- “The only way I knew was in selling you've got to get the client feeling comfortable. You've got to win his trust, his confidence and get him to talk. And asking him specific questions as to, you know, the six things you listed, you know, gun, body, where, how, if I asked him those specific questions he had to tell me in his own good time. That good time came the evening before April 1 which triggered that meltdown and then it all spilled out from there and that's when we got the specifics, but with respect to Ben, you know, the police weren't able to get Mr Chardon to say anything in his interviews, why the hell would I listen to their advice on how to do it now.”
- [12] Foster gave evidence that he and the defendant would have long walks around the oval where they would discuss his case and the aspects of his case that were in his favour, particularly the fact that there were no forensics and that he had an alibi.
- [13] Foster accepted during cross-examination in the pre-trial hearing that at the committal proceeding he had indicated that the night of the 31st of March was the first time the defendant actually came out and confessed to killing her.
- [14] Foster also gave evidence at the pre-trial hearing that on three previous occasions he was engaged on behalf of particular organisations to extract information from people.

He indicated that he had previously wore a wire and obtained information for the federal police.

- [15] In Fiji, he also wore a wire and passed information onto the commander and the Prime Minister Frank Bainimarama in order to get information about people who had participated in a coup and plotted the Prime Minister's assassination. He stated that on a third occasion on behalf of the Derbyshire police and passed on information about the criminal activities of other persons.
- [16] He also indicated during his evidence at the pre-trial hearing that he believed the defendant was guilty, he disliked the defendant, he wanted to get the defendant and that he would deliver a confession to police. He confirmed that he had previously said to police that he was 100 per cent confident that he would get the defendant to condemn himself.
- [17] In answer to questions from Counsel for the defendant in relation to recorded phone calls with the officer handling his assistance to police he was asked:²

“You're once again confirming for the police that he will condemn himself and you'll give them his head on a platter?”

Foster: “That was my firm belief at the time, yes.”

“Yes. And that is, provide them with a confession by this man to murder?”

Foster: “Yes”.

- [18] I note that the transcripts of those conversations indicate that Foster told police that the defendant believed that his room was bugged and that he would not talk in the room. In particular, that is referred to at page 275 of the recorded conversations with his police handlers.
- [19] It would seem clear that due to his offer to assist police, Foster was moved into Mr Chardon's cell on 24 March 2015. In particular, Foster gave evidence in relation to his conversations with police about the best way to get a confession. He was referred to page 284 of the recorded conversations with police and was asked:³

“Mr Foster, that's once again another discussion between you and Ben about tactics; the best way to get a confession from him?”

Foster: “Was it about getting a confession? He's telling me to keep him comfortable. I think I'm just thinking out loud, just trying to work out how we

² T 1-71 ll 40-44.

³ T 1-75 ll 27-37.

get him. I think I was just, you know, talking out loud. I don't think he gave it any direction or any advice or anything."

"Just talking about strategy, aren't you? Both of you?"

Foster: "I don't know if it's a strategy. I'm just saying – you know, I said – I'm just saying to him 'I'm just trying to work out how we get him'."

- [20] Foster confirmed to Counsel for the defendant that prior to the alleged confession on 31 March 2015, it was his true belief that Mr Chardon had killed his wife. He also agreed that he believed that the defendant was not "evil".
- [21] It is clear that Foster became a human source for police on 13 March 2015 and was then subsequently relocated to his cell with an indication that there would be recording equipment placed in the cell at some stage. It is clear from the material before me that there was no equipment in place on 31 March and Foster knew that.
- [22] However it is clear that on the evening of 31 March 2015 when Foster and the defendant were in their cell, Foster alleged that a confession occurred. There was no recording equipment operational at this time.
- [23] Although at the pre-trial hearing, Foster stated that he was not aware until afterwards that the conversation had not been recorded. This was in fact incorrect as it is clear from the material in support of the application that Foster was well aware at the time that the recording was not operating on that evening. I also note that initially he stated that he had made notes of that conversation on the evening. Subsequently it would seem those notes could not be found and he accepted that he did not make any notes.
- [24] Those inconsistencies about his actual knowledge of notes and recordings cause me to have concerns about the reliability of the circumstances surrounding the alleged confession.
- [25] It would seem clear that on the morning of 1 April 2015, Foster rang his handler and purported to outline the details of the alleged confession. In a recorded message on that date, Foster spoke to his police handler and gave an outline of the confession it is alleged that the defendant made to him the night before. In particular, he gave details about the use of a gun and how it was used. In that conversation, he particularly referred to the fact that the defendant had a "meltdown" and got "very emotional". He also referred to other details the defendant is alleged to have given him about the circumstances surrounding the killing.
- [26] It was clear from that conversation that Foster was aware of the significance of getting the defendant to confirm the alleged confession he had made on 31 March in subsequent conversations.
- [27] On the evening of 1 April, recording equipment was in place and a recording occurred of the conversation between Foster and the defendant. It is clear that no statements

against interest were recorded and the particulars of the alleged confession were not broached in any way during that conversation.

[28] I also note that despite the allegation by Foster that the defendant had been a broken man the night before, having listened to the commencement of that conversation, there is no indication of that alleged emotional meltdown. The conversation is in fact remarkably upbeat.

[29] In terms of whether the confession should be admitted, it is clear that the relevant principles were outlined by the High Court in the decisions of *Swaffield* and *Pavic*, but also more particularly in relation to a confession made to another prisoner in *R v Fraser*.⁴

[30] Justice Davies summarised the principles after referring to the decisions of the High Court in both *Swaffield* and *Pavic*:

“In that case, the joint judgment of Toohey, Gaudron and Gummow identified four bases for rejection of statements by an accused, three of which were arguable in that decision of *Fraser*. In particular, firstly, that it was not voluntarily made, that it would be unfair to admit it and that it would be unacceptable to admit it on ground of public policy.”

[31] Firstly, was the confession voluntarily made? It would seem to me that there is a very real doubt that the confession was made at all.

[32] In circumstances where the defendant himself was acutely aware that his cell was bugged it is unlikely that he would have made a confession of the detail and length alleged by Foster.

[33] Furthermore, the confession was made to Foster, who accepts that he had made up his mind that the defendant is guilty of the offence and was determined to get a confession out of him.

[34] Furthermore, it was given to him in circumstances where Foster was clearly seeking to obtain a benefit for himself and where it was clear that Foster considered he was cleverer than the police and was determined to show them he could get what they could not. There can be no doubt in my mind having listened to Foster that self-aggrandisement and arrogance played a significant role in these events.

[35] And thirdly, Foster is a convicted criminal who has a series of convictions for dishonesty. I have very real cause to doubt whether the alleged confession was made at all. In short I am not satisfied there was a voluntary confession as I am not satisfied there was a confession at all.

⁴ [2004] QCA 92 (*Fraser*).

- [36] In terms of the second question as to whether it would be unfair to admit an alleged confession, this principle was set out in the decision of *Swaffield* and *Pavic*. Justice Kirby enunciated the relevant principle as follows:

“In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or by a person acting as an agent of the police) in unfair derogation of the subject’s rights to exercise a free choice to speak or to be silent. Or it will be crossed where police have exploited any special characteristics of the relationship between the suspect and their agent so as to extract a statement which would not otherwise have been made.”

- [37] It seems very clear that the defendant exercised his right not to speak further with police in very clear terms on 28 February 2013.
- [38] The Crown accepts that the court would conclude that Foster was an agent of the State. It would also seem clear to me, having considered the transcript of the conversations between the police handler and Foster that the instructions to Foster were such that it was made clear they would not assist him in how to conduct himself and they made it clear at various stages that he was not to interrogate the defendant.
- [39] There is no allegation that facts were supplied to Foster by police. It would seem to me however that there is some evidence of police directing the questioning of the defendant in general terms about the events in question and how to approach topics, but I do not consider it was improper.
- [40] In *Fraser*, a confession by one prisoner to another was held to be admissible, in circumstances where he said that there was no doubt about the reliability of the evidence in that case. As Justice Davies acknowledged, much of it was tape recorded and the circumstances in which it was conveyed were conducive to its reliability. Moreover, he considered that for the most part, the material was objectively verifiable. In that case, it was clear that the appellant was not exercising his right to silence, but rather was speaking freely to police, and indeed at his request he was telling police that he had disposed of the bodies for Squeaky “thereby implying that it was Squeaky who had committed the murders”.
- [41] In this case, the Crown argues that it is not unfair to use the confessional statements against the defendant because there are many aspects of the evidence given by Foster that are corroborated by the evidence, particularly in circumstances where it is clear that the police did not provide Foster with any information. The Crown argues there is a large body of information provided by Foster that could only have come from the defendant, including the following information from his statement by police:

“The deceased had a boyfriend but the police had found no forensic evidence in the house. The applicant had obtained a carpet cleaner from Woolworths and cleaned the carpet on the morning of her last sighting. That there had been a rug over the top of the carpet in the deceased’s

bedroom. That the applicant had hired Mick Featherstone. That the deceased's car had been left somewhere near Movieworld and then moved. A reference to it all being the lawyer's fault and the fact that not only had the applicant travelled to his factory on the day of the deceased's disappearance but also that the deceased's passport was left in a drawer at the house."

- [42] I accept that many of those factors are referred to by Foster in his statement to police about the alleged confession however, it is clear that many of those facts, if not all, were in the public arena.
- [43] Foster himself states that he was following the newspaper reports and the television programs in relation to the disappearance of Novy Chardon. It is also clear that he and the defendant did discuss the case and in particular it is clear that the defendant pointed out some of the flaws in the prosecution case, particularly that there were no forensic evidence as well as discussing some aspects of the case with Foster. He was well aware of the factual background of the case.
- [44] In my view, however none of the material provided by Foster which go to the alleged confession on 31 March 2015 by the defendant about his actions on the evening of 6 February in relation to the death of Novy Chardon are capable of any independent verification given that Novy's body has never been found.
- [45] In my view therefore the reliability of the alleged confession is further brought into doubt.
- [46] It is clear however that reliability is only one factor, as was made clear by the majority in *Swaffield* and *Pavic*.
- [47] In my view, there are further grounds for excluding the alleged confession on the basis that it would be unfair to the defendant to admit that material. I consider the prejudicial effect of the alleged confessions does outweigh its probative value.
- [48] As Justice Fraser made clear in *R v BCU*,⁵ it is not just the question of a weakness that constitutes prejudice but rather, prejudice comprehends a danger that the jury may use the evidence improperly or in a way which goes beyond its probative value to give it more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task.
- [49] I am concerned that should the alleged confession go to the jury, they would attach more weight to it than it deserves.
- [50] This is clearly a circumstantial case.

⁵ [2014] QCA 292.

- [51] Many of those aspects of the case are referred to in Foster's statement about the alleged confession on 31 March 2015.
- [52] My concern is the jury may well accept that because many of the aspect of the statement are verifiable, the aspects that are not verifiable are promoted to a status which does not accord with their reliability.
- [53] Not only has the alleged confession not been recorded, it was apparently made to a witness who is a convicted criminal with a history of fraud. He also stood to obtain a benefit from his cooperation with police.
- [54] Concerningly, despite initially alleging that he took contemporaneous notes, that is clearly not the case. He then later alleged that he believed the recording was being made at the time, also in circumstances which are not able to be believed. It is also clear from the evidence of Foster that he had a distinct dislike of the defendant, he was convinced of his guilt and he was determined to get a confession to police.
- [55] Furthermore, the circumstances of the recording that was subsequently made on 1 April where the alleged confession is not even peripherally referred to, when it was clear Foster was told he should try and obtain some corroboration of the alleged confession, make it highly unlikely that the confession occurred on 31 March as alleged.
- [56] I am satisfied therefore that the alleged content of all conversations between Peter Foster and the defendant from 31 March 2015 should be excluded from the trial of the defendant.