SUPREME COURT OF QUEENSLAND

CITATION:	*R v Moore & Tracey* [2021] QSCPR 3
PARTIES:	**R** **v** **MOORE, Paul Mathew** (applicant) **TRACEY, Emily Jane** (applicant)
FILE NO/S:	Indictment 1629 of 2019
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 April 2021
DELIVERED AT:	Brisbane
HEARING DATE:	27 to 29 January 2021 and 1 to 5 February 2021
JUDGE:	Burns J
RULING:	**All of the evidence touching on the purchase by police of a knife block and set of knives and the use of those purchased items to support the drawing of any inference as to the dimensions of any knife that may have been part of a knife block and set of knives located at the residence of the male accused on 21 February 2018 is excluded from evidence at the trial.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – GENERALLY – where the applicants were charged on indictment of one count of murder – where the Crown case was almost entirely circumstantial – where the "murder weapon" could not be found – where the Crown sought to rely on comparison evidence to inferentially prove that the "murder weapon" was a knife taken from the home of the male accused – whether the probative value of that evidence was outweighed by its prejudicial effect – whether that evidence should be excluded in the exercise of the court's discretion *Criminal Code* 1899 (Qld), ss 7(1)(a), 7(1)(b), 7(1)(c) and 8 *Evidence Act* 1977 (Qld), s 130 *R v Carusi* (1997) 92 A Crim R 52, cited *R v CBL and BCT* [2014] 2 Qd R 331, cited

R v Christie [1914] AC 545, followed
Doney v The Queen (1990) 171 CLR 207, cited
Fennell v The Queen (2019) 93 ALJR 1219, cited
R v Hasler; ex parte Attorney-General [1987] 1 Qd R 239, followed
Lai v Western Australia (2012) 225 A Crim R 218, cited
Police v Dunstall (2015) 89 ALJR 677, cited

COUNSEL: J A Fraser for the applicant Moore
L Ackermann for the applicant Tracey
D C Boyle for the respondent

SOLICITORS: Fuller & White for the applicant Moore
Fisher Dore for the applicant Tracey
Director of Public Prosecutions (Qld) for the respondent

[1] The accused, Paul Moore and Emily Tracey, are charged on indictment with one count of murder. In particular it is averred that they murdered James Switez-Glowacz on or about 6 February 2018 at Wynnum West.

[2] Their trial commenced on 27 January 2021 and proceeded for eight hearing days before I ruled that particular evidence opened and then partly led by the Crown in the trial be excluded. In consequence of this ruling, it being common ground at the bar table that the trial could not continue, I declared a mistrial and discharged the jury.

[3] What follows are the reasons for my ruling.

The Crown case

[4] Prior to his death, the deceased and Tracey were in a relationship but living apart, the deceased in a residential unit situated at Wynnum West and Tracey residing on Russell Island. They had a daughter together who was six years of age at the time of his death. During a period of separation, Tracey formed a relationship with Moore and they had two children.

[5] At the time of the deceased's death, Moore lived at an address in Logan Central. According to the Crown case, on the morning of 6 February 2018 Tracey travelled from Russell Island to Logan where she spent the day with Moore. That evening, they left Moore's home and drove a distance of approximately 31 kilometres to the deceased's unit at Wynnum West, arriving just before 8:00 pm. They left the area about 20 minutes later, returning to Logan Central.

[6] On the afternoon of 8 February 2018, the deceased's body was discovered by his father in the downstairs living room of his unit. He had been stabbed to death. The findings on autopsy were consistent with that having occurred on the evening of 6 February.

[7] The Crown alleged that both accused were criminally responsible, in one way or another, for the murder of the deceased.

[8] In the case of Moore it was alleged that he caused the death of the deceased by

stabbing him with an intent to cause death or grievous bodily harm or by enabling, aiding or encouraging Tracey to cause the death of the deceased knowing that Tracey intended to cause death or grievous bodily harm (by obtaining a knife, driving and/or travelling with Tracey to the Wynnum West unit, assaulting the deceased and/or by his deliberate presence at the Wynnum West unit) or by forming a common intention with Tracey to prosecute an unlawful purpose to seriously assault the deceased during the carrying out of which the deceased was murdered, with that outcome being a probable consequence of carrying out the unlawful common purpose.

[9] In the case of Tracey, it was alleged that she caused the death of the deceased by stabbing him with an intent to cause death or grievous bodily harm or by enabling, aiding or encouraging Moore to cause the death of the deceased knowing that Moore intended to cause death or grievous bodily harm (by obtaining a knife, driving and/or travelling with Moore to the Wynnum West unit, assaulting the deceased and/or by her deliberate presence at the Wynnum West unit) or by forming a common intention with Moore to prosecute an unlawful purpose to seriously assault the deceased during the carrying out of which the deceased was murdered, with that outcome being a probable consequence of carrying out the unlawful common purpose.

[10] Thus, the Crown proceeded against both accused on alternate bases, relying on ss 7(1)(a), 7(1)(b), 7(1)(c) and 8 of the *Criminal Code* (Qld).

[11] The Crown case was almost entirely circumstantial. In that regard, part of what was opened to the jury by the learned Crown prosecutor was as follows:

> "Now, the weapon itself has never been found, so therefore, the inference is that whoever was involved took it. Now, on the 21st of February, the police executed a search warrant on the residence of the male defendant, Mr Moore, and they found there a knife block with two missing spaces. They were able to locate one of the missing knives, but couldn't find one of them. Police obtained a set of similar knives of the same type, and this is the knife that was missing, and I'll just put that up on the screen, if I may.
>
> HIS HONOUR: It's a knife similar to the one that's missing, is that the Crown case?
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> MR BOYLE: Yes. Yes. So, that is the same type of the missing knife. Now, that was shown to Dr Ong.[1] He said that that was a – describes it as a small kitchen knife with a metal blade, 8.5 centimetres long. He said that it could've caused all the wounds on the deceased. I'll tender that, your Honour, that photograph.
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> HIS HONOUR: It will be received as MFIF."

[12] Counsel for both accused made opening statements. For Moore, Mr Fraser told the jury that it was not disputed that his client went to the Wynnum West unit and "was the person" who stabbed the deceased. The real dispute, Mr Fraser said, was whether there was lawful excuse (such as self-defence) for that conduct. Among the "other issues" flagged to the jury by Mr Fraser was "whether or not a knife was

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1 The pathologist who performed the autopsy.

taken to" the unit. For Tracey, Mr Ackermann informed the jury that, although his client travelled with Moore to the unit, she did not inflict any injury on the deceased. Rather, as Mr Fraser said, it was Moore who stabbed the deceased. Mr Ackermann then went on to assert that his client was not guilty of any wrongdoing.

[13] The evidence regarding the so-called "murder weapon" was slow to fully emerge at the trial.

[14] A large number of knives were located in the kitchen and elsewhere in the Wynnum West unit as well as a couple of knives that were found outside the unit (but a considerable distance away). None of them was thought by the investigators to have any forensic relevance; they all tested negatively for blood. Moore's home was searched on 21 February 2018, that is to say, more than two weeks after the death of the deceased. According to one of the scenes of crime officers who gave evidence on the third day of trial, one of the "things of interest" located in the kitchen was a knife block. It was said to be of interest because, assuming it was sold with a set of knives, the officer believed that two of the knives from that set were missing. The premise for this belief was said to be that two of the slots (for knives) in the knife block were empty. One of the knives believed to be missing was located by another police officer in the vicinity of an outside shed but the remaining knife could not be found.

[15] On the sixth day of trial, evidence was led from one of the principal police investigators to the effect that he had purchased a knife block and set of knives at a department store which were "identical" to the knife block and knives found in Moore's residence. When asked how it was determined that the block and knives were identical, he said that the knives in the block were "Homemaker" brand knives and added that enquiries had been made through a retailer about that line of product. The purchased knives were then compared to the knives found in the knife block at Moore's home and the missing knife "identified". Shortly after this evidence was given, the witness was stood down. There was then a discussion in the absence of the jury about the obvious shortcomings of the evidence that had just fallen from the investigator – the evidence was rooted in hearsay, it was not clear who undertook the comparison or how it was done or how reliable the conclusion was that was expressed. Reference was made to the decision of the High Court in *Fennell v The Queen* (2019) 93 ALJR 1219, [72]-[74].

[16] The next day (4 February 2021) the Crown obtained a witness statement from a police scientific officer regarding the comparison of the knives. Although similar in appearance, two of the knives when measured were of slightly different dimensions. However, a witness statement obtained the next day from the wholesaler of the knife block and knives sets explained that such differences were within manufacturing tolerances. The Crown prosecutor indicated that he hoped to lead evidence from both witnesses (along with evidence from a retailer and perhaps also the manufacturer of the knives in question) to support the drawing of an inference that the knife that was "missing" from the block found in Moore's home would have been of similar dimensions to what was described as a paring knife in the purchased set. Further, and in conformity with the opening, the Crown foreshadowed that the pathologist would be asked whether such a knife could have caused the wounds found on autopsy with the expectation that he would respond in the affirmative.

[17] No objection was taken by either defence counsel to the evidence regarding the purchase of a knife block and set of knives until the potential difficulties with that evidence (and the accompanying comparison exercise) were pointed out by the court. Nor was any objection taken to what the Crown opened in these respects until this point was reached in the trial. However, both counsel quickly embraced the concerns of the court and then formally objected to the evidence on the basis that its prejudicial effect outweighed its probative value. They each made application to exclude the evidence in the exercise of the court's discretion.

[18] The discretion potentially engaged by the applications belatedly made by counsel for both accused arises under both common law and statute. At common law, what is often referred to as the *Christie* discretion provides for the discretionary exclusion of non-confessional evidence, including "real" and circumstantial evidence, where the probative value of the evidence is outweighed by the risk of prejudice to an accused.[2] A trial judge may only exclude evidence if, taken at its highest, the probative value of that evidence is outweighed by its prejudicial effect.[3] Section 130 of the *Evidence Act* 1977 (Qld) preserves the power of a court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit the evidence. Under this provision, evidence may be excluded where its probative value is slight but its prejudicial effect is substantial.[4]

[19] It follows that it is not for the trial judge to determine whether the jury will accept the challenged evidence, or even if is likely to do so. Once there is evidence capable of supporting the inference contended by the Crown, it must go to the jury unless it is so prejudicial that the jury is likely to give the evidence – and, especially in this case, the inference said to be capable of being drawn from the evidence – "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".[5] Such a conclusion is consistent with the principles expressed by the High Court in *Doney v R* to the effect that evidence capable of supporting a guilty verdict, even if tenuous or inherently vague or weak, must be left to the jury.[6]

[20] Here, the challenged evidence fell into two categories: first, there was evidence of what the police located at Moore's home – the knife block and incomplete set of knives – and the discovery of what was thought to be one of the missing knives in the vicinity of an outside shed; and, second, there was the evidence regarding the purchase by police of what was believed to be the same (or similar) knife block and set of knives along with the evidence to be called regarding the comparison exercise (from a scientific officer, retailer, wholesaler and/or manufacturer as well as the evidence of the pathologist) and opinion evidence from the pathologist.

[21] If the first category of evidence was accepted by the jury, it would have established that, around two weeks after the death of the deceased, police found a knife block

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2 *R v Christie* [1914] AC 545 at 560 (Lord Moulton), 564-565 (Lord Reading); *Police v Dunstall* (2015) 89 ALJR 677 at 685 (French CJ, Kiefel, Bell, Gageler and Keane JJ).

3 *R v Carusi* (1997) 92 A Crim R 52 at 65-66 (Hunt CJ at CL, with whom Newman and Ireland JJ agreed); *Lai v Western Australia* (2012) 225 A Crim R 218 at 223 (Mazza J, with whom McLure P and Buss J agreed).

4 *R v Hasler; ex parte Attorney-General* [1987] 1 Qd R 239 at 251; *R v CBL and BCT* [2014] 2 Qd R 331.

5 *Cross on Evidence*, Australian ed. [11125](a), citing *Festa v The R* (2001) 208 CLR 593 at [51].

6 *Doney v The Queen* (1990) 171 CLR 207.

housing several knives from a set of knives (but with two empty slots) in the kitchen of Moore's home. Further, it would have been open to the jury to infer that a knife that was part of the set housed in the knife block was found outside and that another knife was missing. Without more, it was difficult to see how such an inference could advance the Crown case in any substantial way but, nonetheless, the evidence was admissible as a piece of circumstantial evidence and I was not persuaded that its prejudicial effect outweighed its probative value.

[22] However, I reached a different conclusion regarding the second category of evidence.

[23] What the Crown hoped to do was to build on the inference to be drawn from the first category of evidence by adding the comparison evidence and opinion evidence from the pathologist to support the drawing of an inference that the knife that was missing from the block found in Moore's home could have been used to kill the deceased. Put another way, the Crown sought to inferentially prove through the admission of both categories of evidence that the "murder weapon" was the knife missing from the block at Moore's home. If the jury accepted that inference, they could go on to reason that either or both accused took the knife with them to the deceased's unit with the intention of using it on the deceased. This evidence therefore went to the heart of the jury's consideration of the criminal responsibility of both accused under ss 7 and 8 of the *Code*.

[24] Although those inferences might be regarded as capable of being drawn if both categories of evidence went before the jury, there would have been available to the accused all manner of alternative rational explanations inconsistent with any notion that the missing knife had been removed from the block and taken by one or both accused to the Wynnum West unit (e.g., it had previously been misplaced, lost or broken and disposed of). Indeed, no evidence was adduced at the trial (or was apparently available) to establish when the knife (if there was ever one) went missing or even whether it was housed in the block earlier on the day when the deceased died. As such, it was not apparent to me how the Crown could ever legitimately exclude all alternative explanations. The evidence was therefore of only slight probative value but it had a particular allure because it was held up by the Crown as a solution to the mystery regarding the source of the "murder weapon". There was accordingly a real danger that, if the second category of evidence was admitted, the ultimate inferences contended by the Crown might unfairly inflame the jury in their consideration of questions that went, as I have said, to the heart of the Crown case. I therefore concluded that the admission of the second category of evidence would have been so prejudicial that the jury was likely to give that evidence (and the inferences contended by the Crown as being capable of being drawn from it) much more weight than it deserved.

[25] For these reasons, I ruled that all of the evidence touching on the purchase by police of the knife block and set of knives and the use of them to support the drawing of any inference as to the dimensions of any knife that may have been part of a knife block and set of knives located at Moore's residence on 21 February 2018 be excluded from evidence at the trial.