

Leith McDonald Ratten - - - - - - *Appellant*

v.

The Queen - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STATE OF VICTORIA

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE
1ST JULY 1971

Present at the Hearing :

LORD REID

LORD HODSON

LORD WILBERFORCE

LORD DIPLOCK

LORD CROSS OF CHELSEA

[Delivered by LORD WILBERFORCE]

The appellant was convicted, on 20th August 1970, after a trial before Winneke C.J. and a jury, of the murder of his wife. His application to the Full Court of the Supreme Court of Victoria for leave to appeal was dismissed on 16th September 1970. By special leave he now appeals to the Board.

The appellant lived with his wife, the deceased, and three young children, in Echuca, a small country town in the State of Victoria. The deceased was eight months pregnant. The appellant, for over a year, had been carrying on a liaison with another woman and it was suggested by the prosecution, though not admitted by the appellant, that his relations with her had reached a critical state.

The death of the deceased took place in the kitchen of her house on 7th May 1970 as the result of a gunshot wound. The evidence established the times of certain events as follows:

- (i) At 1.09 p.m., the appellant's father S. R. Ratten telephoned to the appellant from Melbourne; the call was a trunk call and so was timed and the time recorded. It lasted 2.9 minutes. The conversation was perfectly normal: Mr. S. R. Ratten heard the voice of the deceased woman in the background apparently making comments of a normal character.
- (ii) At about 1.15 p.m. a telephone call was made from the house and answered at the local exchange. The facts regarding this call are critical and will be examined later.

- (iii) At about 1.20 p.m. a police officer, calling from the local police station telephoned the appellant's house and spoke to the appellant. By this time the appellant's wife had been shot. Thus the shooting of the deceased, from which she died almost immediately, must have taken place between 1.12 p.m. and about 1.20 p.m.

The death of the deceased was caused by a wound from a shotgun held by the appellant. The appellant's account was that the discharge was accidental and occurred while he was cleaning his gun. There were in the kitchen, when the police arrived soon after the shooting, two double barrelled shotguns and a rifle, with cleaning materials. The gun from which the shot was fired was an old one, not normally used by the appellant, which had been sent in February/March 1970 to a gunsmith for examination. It was returned unloaded and placed in the appellant's garage where it remained until brought into the kitchen on 7th May 1970. The appellant was unable to explain how it came to be loaded. It was in fact found by the police to have been loaded in each of its two barrels and both barrels had been fired. The right barrel had misfired, but there was an imprint of the firing pin on the cartridge. The left barrel was discharged.

The appellant was thoroughly experienced in the use of firearms.

It is clear that on the facts summarised above there was a *prima facie* case against the appellant, and the case against him would depend on whether the prosecution could satisfy the jury, on this circumstantial evidence, that the killing was deliberate or whether the jury would accept his account of an accident.

It was relevant and important to enquire what was the action of the appellant immediately after the shooting. His evidence, which he first gave in a signed statement to the police on 8th May 1970, was that he immediately telephoned for an ambulance and that shortly afterwards the police telephoned him upon which he asked them to come immediately. He denied that any telephone call had been made by his wife, and also denied that he had telephoned for the police. It should be added that he gave evidence from the witness box at the trial, maintaining his account of events.

In these circumstances, and in order to rebut the appellant's account, the prosecution sought to introduce evidence from a telephonist at the local exchange as to the call made from the house at about 1.15 p.m.

The evidence as given by the telephonist (Miss Janet L. Flowers) was as follows:

"... I plugged into a number at Echuca, 1494 and I said—I opened the speak key and I said to the person 'Number please' and the reply I got was 'Get me the police please'. I kept the speak key open as the person was hysterical.

His Honour—You what?

Witness—I kept the speak key open as the person was in a hysterical state [later, the witness added that the person sobbed] and I connected the call to Echuca 41 which is the police station. As I was connecting the call the person gave her address as 59, Mitchell Street."

The witness then said that the caller hung up but that she (the witness) after consulting her superior spoke to the police and told them that they were wanted at 59 Mitchell Street. It was in consequence of this that, as narrated above, the police telephoned to the house at about 1.20 p.m. and spoke to the accused. Echuca 1494 was the number of the appellant's house.

There were a number of matters to be considered as to the evidence relating to this telephone call.

The first, and probably the most critical, was whether it was made by the deceased woman at all. The quotation given above from the witness' examination-in-chief showed that she was permitted to give her evidence in her own words which, as is normally the case where a person testifies to a matter of sense perception, combined elements of fact and of inference from fact. The conclusion, which the witness expressed, that the speaker was a woman, was derived by inference from the fact, which she later stated, that the voice was high pitched and of high inflexion. This inference clearly called for critical examination. In the first place there were inherent difficulties in accepting that the deceased woman should have made the call—apparently without interference—so shortly before the shooting—as to which the prosecution could offer no explanation. Secondly, and even more significantly, the reliability of the inference, that the voice was that of the accused, was affected by the fact that the police officer who very shortly afterwards spoke on the telephone to a person who was undoubtedly the appellant, described his voice as hysterical, with a high inflexion—substantially the same description as was used by the telephonist. The telephonist was cross-examined by Counsel for the appellant, and the learned Chief Justice directed the jury as to the significance of her evidence and on the question whether they should accept it as establishing that the voice was that of the deceased woman. The matter was again debated in the Full Court and their judgment contains a careful passage in which the adequacy of the direction by the trial judge was examined and endorsed. In view of this it was not possible for Counsel for the appellant further to attack the direction, on this point, before the Board, and he, rightly, did not do so. Their Lordships must therefore proceed with the appeal on the basis, that the jury was properly directed that, on the evidence, they might find that the telephone call, at 1.15 p.m. or thereabouts, was made by the deceased woman.

The next question related to the further facts sought to be proved concerning the telephone call.

The objection taken against this evidence was that it was hearsay and that it did not come within any of the recognised exceptions to the rule against hearsay evidence.

In their Lordships' opinion the evidence was not hearsay evidence and was admissible as evidence of fact relevant to an issue.

The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially", *i.e.*, as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965. "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact it was made." (*l.c.* p. 970). A fuller statement of the same principle is provided by Dean Wigmore in his work on Evidence §1766. He emphasises, as their Lordships would emphasise, that the test of admissibility, in the case last mentioned, is relevance to an issue.

The evidence relating to the act of telephoning by the deceased was, in their Lordship's view, factual and relevant. It can be analysed into the following elements.

- (1) At about 1.15 p.m. the number Echuca 1494 rang. I plugged into that number.
- (2) I opened the speak key and said number please.
- (3) A female voice answered.
- (4) That voice was hysterical and sobbed.
- (5) The voice said "Get me the police please".

The factual items numbered (1)–(3) were relevant in order to show that, contrary to the evidence of the appellant, a call was made, only some 3–5 minutes before the fatal shooting, by a woman. It not being suggested that there was anybody in the house other than the appellant, his wife and small children, this woman, the caller, could only have been the deceased. Items (4) and (5) were relevant as possibly showing (if the jury thought fit to draw the inference) that the deceased woman was at this time in a state of emotion or fear (cf. *Aveson v. Kinnaird* (1805) 6 East 188 p.193, per Lord Ellenborough C.J.). They were relevant and necessary, evidence in order to explain and complete the fact of the call being made. A telephone call is a composite act, made up of manual operations together with the utterance of words (cf. *McGregor v. Stokes* [1952] V.L.R. 347 and remarks of Salmond J. therein quoted). To confine the evidence to the first would be to deprive the act of most of its significance. The act had content when it was known that the call was made in a state of emotion. The knowledge that the caller desired the police to be called, helped to indicate the nature of the emotion— anxiety or fear at an existing or impending emergency. It was a matter for the jury to decide what light (if any) this evidence, in the absence of any explanation from the appellant, who was in the house, threw upon what situation was occurring, or developing at the time.

If, then, this evidence had been presented in this way, as evidence purely of relevant facts, its admissibility could hardly have been plausibly challenged. But the appellant submits that in fact this was not so. It is said that the evidence was tendered and admitted as evidence of an assertion by the deceased that she was being attacked by the accused, and that it was, so far, hearsay evidence, being put forward as evidence of the truth of facts asserted by his statement. It is claimed that the learned Chief Justice so presented the evidence to the jury and that, therefore, its admissibility, as hearsay, may be challenged.

Their Lordships, as already stated, do not consider that there is any hearsay element in the evidence, nor in their opinion was it so presented by the trial judge, but they think it right to deal with the appellant's submission on the assumption that there is: *i.e.*, that the words said to have been used involve an assertion of the truth of some facts stated in them and that they may have been so understood by the jury. The Crown defended the admissibility of the words as part of the "*res gestae*" a contention which led to the citation of numerous authorities.

The expression "*res gestae*", like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways:

1. When a situation of fact (*e.g.* a killing) is being considered, the question may arise when does the situation begin and when does it end.

It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in *O'Leary v. The King* (1946)

73 C.L.R. 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J. said " Without evidence of what, during that time, was done by those men who took any significant part in the matter and specially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event " (p. 577).

2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the *res gestae* or part of the *res gestae*, i.e., are the relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the *res gestae*. A classical instance of this is the much debated case of *Reg. v. Bedingfield* (1879) 14 Cox C.C., and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been the victim of assault or accident.

The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or

actually happening, it ought to be received. The expression "*res gestae*" may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings.

A few illustrations may be given. One of the earliest and as often happens also the clearest, is that of Holt C. J. at *nisi prius* in *Thompson v. Trevanion* (1693) Skin. 402. He allowed that "what the wife said immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage" might be given in evidence, a statement often quoted and approved. *Reg. v. Bedingfield* (u.s.) is more useful as a focus for discussion, than for the decision on the facts. Their Lordships understand later indications of approval (*R. v. Christie* [1914] A.C. 545 *Teper v. The Queen* [1952] A.C. 480) to relate to the principle established, for, though in a historical sense the emergence of the victim could be described as a different "*res*" from the cutting of her throat, there could hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.

In a lower key the evidence of the words of the careless pedestrian in *O'Hara v. Central S.M.T. Co.* (1941 S.C. 363) was admitted on the principle of spontaneity. The Lord President (Normand) said that there must be close association: the words should be at least *de recenti* and not after an interval which would allow time for reflection and concocting a story (l.c. p. 381). Lord Fleming said "Obviously statements made after there has been time for deliberation are not likely to be entirely spontaneous, and may, indeed, be made for the express purpose of concealing the truth" and Lord Moncrieff refers to the "share in the event" which is taken by the person reported to have made the statement. He contrasts an exclamation "forced out of a witness by the emotion generated by an event" with a subsequent narrative (pp. 389-90). The Lord President reaffirmed the principle stated in this case in an appeal to this Board in *Teper v. The Queen* [1952] A.C. 480, stressing the necessity for close association in time, place and circumstances between the statement and the crucial events.

In Australia, a leading authority is *Adelaide Chemical and Fertiliser Co. Ltd. v. Carlyle* (1940) 64 C.L.R. 514 in which the High Court considered the admissibility of a statement made soon after the breaking of a sulphuric acid jar over his legs by the injured man. This question was not decisive to the decision, but was discussed by Starke J. and Dixon J. with numerous citations. Both emphasise and illustrate the uncertainty of decided cases and legal writers on the question of admissibility of statements of this type and on the question what they may be admitted to prove. Dixon J. with some caution reaches the conclusion that although English law, in the general view of lawyers, admits statements only as parts or details of a transaction not yet complete, while in America, greater recognition is given to the guarantee of truth provided by spontaneity and the lack of time to devise or contrive, yet English decisions do show some reliance on the greater trustworthiness of statements made at once without reflection.

In an earlier case in the High Court (*Brown v. The King* (1913) 17 C.L.R. 570) where evidence was excluded, Isaacs J. and Powers J. in their joint judgment put the exclusion on the ground that it was a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main narration but arising as an independent and additional transaction. (l.c. p. 597).

In *People v. De Simone* (121 N.E. 761) the Court of Appeals of New York admitted evidence that a passer-by immediately after a shooting

had shouted "He ran over Houston Street" Collin J. referred to deeds and acts which are "forced or brought into utterance or existence by and in the evolution of the transaction itself, and which stand in immediate causal relation to it." The evidence was, expressly, not admitted as part of the *res gestae*, because it was not so interwoven or connected with the principal event (viz. the shooting which the person did not see) as to be regarded as part of it.

These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.

Before applying it to the facts of the present case, there is one other matter to be considered, namely the nature of the proof required to establish the involvement of the speaker in the pressure of the drama, or the concatenation of events leading up to the crisis. On principle it would not appear right that the necessary association should be shown only by the statement itself, otherwise the statement would be lifting itself into the area of admissibility. There is little authority on this point.

In *R. v. Taylor* [1961] (3) S.A.L.R. 616 where witnesses said they had heard scuffles and thuds during which the deceased cried out "John, please don't hit me any more, you will kill me", Fannin J. said that it would be unrealistic to require the examination of the question (sc. of close relationship) without reference to the terms of the statement sought to be proved. "Often the only evidence as to how near in time the making of the statement was to the act it relates to, and the actual relationship between the two, will be contained in the statement itself". (l.c. p. 619.)

Facts differ so greatly that it is impossible to lay down any precise general rule: it is difficult to imagine a case where there is no evidence at all of connection between statement and principal event other than the statement itself, but whether this is sufficiently shown must be a matter for the trial judge. Their Lordships would be disposed to agree that, amongst other things, he may take the statement itself into account.

In the present case, in their Lordships' judgment, there was ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards. They were closely associated in place and in time. The way in which the statement came to be made (in a call for the police) and the tone of voice used, showed intrinsically that the statement was being forced from the deceased by an overwhelming pressure of contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the accused with his gun. Even on the assumption that there was an element of hearsay in the words used, they were safely admitted. The jury was, additionally, directed with great care as to the use to which they might be put. On all counts, therefore, their Lordships can find no error in law in the admission of the evidence. They should add that they see no reason why the judge should have excluded it as prejudicial in the exercise of discretion.

One other matter was raised. It was said that the learned Chief Justice did not properly direct the jury as to the alternative possibility of bringing in a verdict of manslaughter. Their Lordships are clearly of opinion that this contention is without substance. The Chief Justice directed the jury that they must first consider whether the accused was guilty of murder and that only if, and when, they found him not guilty

of murder should they go on to consider whether he was guilty of manslaughter. This procedure was entirely correct and no objection was taken to a direction in this form at the trial. No ground of appeal relating to this aspect of the direction was stated to the Full Court. On the detailed formulation of the direction, if objection may be taken to one sentence in the summing up relating to the requirement of unanimity, their Lordships are of opinion that this was amply put right and that there was no possibility that the jury might have been misled. In any event, the point taken is not of a character which this Board can entertain.

Their Lordships have previously announced that they must humbly advise Her Majesty that this appeal be dismissed.

In the Privy Council

LEITH McDONALD RATTEN

v.

THE QUEEN

**DELIVERED BY
LORD WILBERFORCE**