01/84

SUPREME COURT OF VICTORIA

R v ERNST and ORS

McGarvie J

10 December 1982

[1984] VicRp 49; [1984] VR 593; [1984] 54 ALR 751; (1983) 78 FLR 315

CRIMINAL LAW – EVIDENCE – DOCUMENTARY HEARSAY – IN BUSINESS RECORD MADE OUTSIDE VICTORIA – WHETHER ADMISSIBLE IN CRIMINAL PROCEEDING: *EVIDENCE ACT* 1958 SS3, 55(2).

Section 55(2) of the *Evidence Act* 1958 provides (insofar as relevant):

"In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall be admissible as evidence of that fact if the document is, or forms part of, a record relating to any business and made in the course of that business..."

Section 3(1) of the *Evidence Act* 1958 provides:

""Business" includes public administration and any business profession occupation calling trade or undertaking whether engaged in or carried on by a statutory authority, or by any other person, whether or not it is engaged in or carried on for profit."

The defendants were charged with conspiring to import cannabis resin into Australia. At their trial, the prosecution sought to admit statements in certain documents made in Sri Lanka as part of the records of a business carried on in that country. Counsel for the defendant argued that s55(2) is limited to records of businesses carried on in Victoria and accordingly, the statements are not admissible into evidence.

RULING: (1) The legislation indicates no intention to restrict s55(2) of the *Evidence Act* 1958 to documents made or businesses carried on within Victoria or within Australia.
***R v Jenkins* (1970) Tas SR 13; and**
***R v Perry (No 4)* (1981) 28 SASR 119 applied.**

(2) Accordingly, s55(2) may be applied to admit statements in documents made in Sri Lanka as part of the records of a business carried on in that country.

McGARVIE J: *[After setting out the provisions of ss55(2) and 3(1) of the* Evidence Act *1958, His Honour continued]:* ... **[968]** The argument is that the word "Crown" in the definition means the Crown in right of Victoria, so the word "business" should be taken to mean a business carried on in Victoria. This definition was contrasted in argument with the definition of "business" in s7A(1) of the *Evidence Act* 1905 of the Commonwealth which expressly applies to a business carried on in Australia or elsewhere. **[969]** In my opinion both history and judicial decisions are against the argument. It is convenient for the purposes of this ruling, to assume without deciding, that the word "Crown" in the Victorian definition means the Crown in right of Victoria.

The *Evidence Act* 1946 made admissible in civil proceedings a statement made in a document forming part of a continuous record, by a person with a duty to record matters from his own knowledge or from information supplied by persons expected to have knowledge of the matters dealt with in the information Section 3(1)(b). There was nothing to suggest that this provision was limited to documents made in Victoria, and in my opinion it applied to documents wherever made. A definition along the lines of the present definition of business in the Victorian Act appeared in Tasmanian legislation. Section 40A(5) of the *Evidence Act* 1910 inserted by Act No. 9 of 1965, assented to on 22nd June 1965, provided:

> "'Business' includes any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on by the Crown or by a statutory authority or by any other person."

That definition was adopted in Victoria in the *Evidence (Amendment) Act* 1965 which was assented to on 21st December 1965 and which dealt with the admissibility of books of account. The *Evidence (Documents) Act* 1971, which made statements in business records admissible in criminal as well as civil proceedings, slightly expanded that definition and introduced the present definition of business. As statements in documents wherever made had, in my opinion, been admissible in civil proceedings since 1946, Parliament would be most unlikely to have intended by the use of the word "Crown" in **[970]** the definition in 1971 to limit admissible statements in civil and criminal proceedings to documents made in Victoria. It is more likely that the word was included to make clear that the definition of business covered organisations of the Crown. These organisations might otherwise have been thought to be beyond the ambit of the word "business".

The Act of 1971 was based on the report dated 31st March 1971 of a sub-committee of the Chief Justice's Law Reform Committee whose chairman was McInerney J. There was no suggestion in that report that proof by statements in business records should be limited to those of businesses conducted in Victoria. The Tasmanian section, including the definition mentioned above, was held by the Court of Criminal Appeal of Tasmania to apply to the records of a business conducted in Victoria. *R v Jenkins* (*supra*). Chambers J there said:

> "In my opinion, the section upon its proper interpretation applies to records of businesses conducted not only in this State or in other parts of the Commonwealth of Australia, but anywhere in the world." (p32).

In South Australia where the definition was:

> "'Business' means business, occupation, trade, or calling and includes the business of any Government or local Governmental body or instrumentality."

Cox J held that a record of the Victorian Police Department was admissible as a business record. *R v Perry (No. 4)* (*supra*) 119 at pp121-2. **[971]** It was argued that the definition in s4 of the Victorian Act should be given a restrictive construction in accordance with the approach of limiting the operation of criminal legislation where there is ambiguity. However, the provision neither creates a crime nor imposes a penalty. It makes particular evidence admissible in criminal proceedings for both prosecution and defence. Further, because of the definition, the word "business" when used in s55(2) in respect of criminal proceedings must bear the same meaning as when used in s55(1)(b) in respect of civil proceedings.

There is much authority to the effect that provisions such as s55(2) are "designed to liberalise rules of evidence and should not be restrictively construed". *Morley v National Insurance Co* [1967] VicRp 61; (1967) VR 566 at 567 per McInerney J. See: *Wielgus v Wielgus* [1959] VicRp 30; (1959) VR 193 and *Cullis v Hammersley Iron Pty Ltd* (1970) WAR 170 at 175. There is no apparent reason why Parliament would intend to limit the word "business" to a business in Victoria. When dealing with unofficial documents the general rules of evidence do not normally draw a distinction between the admissibility of those created in Victoria and those created beyond Victoria.

In addition to the Commonwealth provision mentioned earlier, comparable legislation in New South Wales (*Evidence Act* 1898, Part 11c), Queensland (*Evidence Act* 1977-1981 s5 and Part VI) and Tasmanian (*Evidence Act* 1910, Division 28 of Part III) expressly applies to the records of a business carried on within the territory of the legislature or elsewhere. **[972]** If the Victorian section is not confined to businesses conducted within Victoria I see no justification of confining it to businesses conducted within Australia. Under s55 the interests of justice in a particular case may always be met by the discretion under ss(9) to decline to admit a document in evidence despite its admissibility. In my opinion the legislation indicates no intention to restrict s55(2) to documents made or businesses carried on within Victoria or within Australia. I rule that if the requirements of the section are satisfied, ss(2) of s55 may be applied to admit statements in documents made in Sri Lanka as part of the records of a business carried on in that country.

Solicitor for the Crown: D. Yeaman, Crown Solicitor.
Solicitor for the accused Jerome Ernst: Legal Aid Commission.
Solicitor for the accused Ashworth Morris Ernst: Legal Aid Commission.
Solicitor for the accused Ashworth Morris Anthony Ernst: Legal Aid Commission.