11/87

SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v PRATURLON

Full Court, Street CJ, O'Brien CJ of Cr D, Slattery CJ at CL

29 November 1985

EVIDENCE – CROSS-EXAMINATION OF WITNESS – WITNESS'S EVIDENCE CONTRARY TO EVIDENCE OF OTHER WITNESSES – WHETHER PERMISSIBLE TO PUT TO WITNESS THE CONTRARY EVIDENCE – WHETHER PERMISSIBLE TO INVITE WITNESS TO CRITICISE OTHER WITNESSES.

It is elementary and fundamental to the fair and proper conduct of cross-examination, that it is not permissible to put to one witness the proposition that the evidence of that witness is to the contrary of the evidence of other witnesses, so as in effect to invite a witness to express an opinion as to whether other witnesses are telling the truth.

NOTE: *Cross on Evidence*, 3rd Aust. ed. (1986) states at para. 9.71:
"A witness ought not be invited to criticise other witnesses. [A] witness ought not be asked whether another witness is telling lies or has invented something. Any witness, of course, can be asked if what another witness said is true. But he should not be asked whether he "contradicts" him: *North Australian Territory Company v Goldsborough Mort & Company* (1893) 2 Ch 381 at 385 (CA). He can be asked if he knows of any reason why the other witness should be hostile to him or should tell a false story about him. But if he says that what the other witness has said is not true, he should not be asked to enter into that witness's mind and say whether he thinks the inaccuracy is due to invention, malice, mistake or any other cause ... No attempt should be made by the cross-examiner to drive any witness, least of all the accused, into saying that any other witness, least of all a detective, is a liar: *R v Leak* [1969] SASR 172 (FC)."

STREET CJ: *[After dealing with matters not relevant to this Report, His Honour continued]*: ... **[3388]** The particular matter, however, which in my view attracts a grave degree of concern is the manner in which the Crown Prosecutor cross-examined her. It seems to me that the approach adopted by the Crown Prosecutor in one aspect of his cross-examination, bearing in mind that she was aged but ten, and bearing in mind his position of apparent authority in the court by virtue of his office as Crown Prosecutor (see *Alister & Others v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41 at 59; (1984) 58 ALJR 97) involved a forensic excess by the Crown that calls for the severe strictures from this court.

As will appear, what the Crown Prosecutor did was contrary to a comparatively elementary rule of cross-examination, namely that it is not permissible to put to one witness the proposition that the evidence of that witness is to the contrary of the evidence of other witnesses, so as in effect to invite a witness to express an opinion as to whether other witnesses are telling the truth. In *North Australian Territory Company v Goldsborough Mort & Company* (1893) 2 Ch 381 at 385, Lord Esher said of evidence being taken on commission:

> **[3389]** "... in the present case the witness when examined under the commission was also asked questions as to what other people had said in the previous examination under sect 115; that is, he was told what they had said, and was asked whether he contradicted their evidence. Such questions ought never to have been put; they were objected to, and the commissioner who had no power to disallow them, took down the objections as he was bound to do. If at the trial before the court an endeavour were made to read these questions and answers, the court would at once say that such questions ought never to have been asked, and would decline to admit them as evidence."

That principle is, I repeat, elementary and is fundamental to the fair and proper conduct of a cross-examination. It was blatantly infringed in this case. As will appear from the passages I shall quote, when cross-examining this ten year old girl, Joanne, the Crown Prosecutor pointed out to her her three friends in the back of the court and expressly suggested to her that what she was saying was contrary to what they had sworn on their oath in the court. I start at p398 of the transcript:

"Q. The three girls at the back of the court Joanne, that's Michelle, Megan and Kelly, have all given sworn evidence that on an occasion in early December the three of them and you were present at the rear of Mr Praturlon's home and Mr Praturlon called out to you and told you all that he was going to have a shower and invited you to come and watch him, given evidence that the four of you at different stages went up to the window of the bathroom."

There was then an objection. Surprisingly, the objection was not to the tenor of the cross-examination; it was to the accuracy of the Crown's summary of the effect of the evidence of the other three girls. The Crown was afforded an opportunity of putting the question again:

"Q. They've given evidence that Mr Praturlon called out to the four of you and told, on an occasion in early December 1983, and that Mr Praturlon said that he was going to have a shower and invited you all to look at him in the shower, in the bathroom. Now, have you got anything to say about that? A. No.
Q. Do you remember an incident like that? A. No.
Q. You say it definitely didn't happen? A. Yes.
Q. Its not a question of your memory, it's not a question of you not remembering is it? You see it is possible that you just don't remember? A. Might be.
Q. If it's a possibility that you just don't remember is what you're saying that it may have happened, it may not have happened, you just don't remember? A. Yes.
Q. Now each of them has then said on oath, like, the same oath that you took, that they, that all four of you then went up to the bathroom window at different stages and looked into the bathroom window. What do you say about that evidence ... is it a situation -
Mr Young: No just a moment you've asked a question.
Crown Prosecutor: Q. What do you say about that? A. I didn't.
Q. Is it a situation there also that you just don't remember?
Objection ...
Q. Is that again a situation where your memory has failed you or you just don't remember? A. I don't know.
Q. Well is it a situation like the first question I asked you, that you just don't remember whether or not it happened, is that what you're saying, is that what you're telling the court? A. I think so.
Q. So that you're just unable to say whether it did happen or didn't happen, is that right? A. Yes.
Q. Now each of them has then said that they looked through the bathroom window and, together with you this is, and that they saw Mr Praturlon in the bathroom in the nude and that his penis was erect, are you able to say anything about that? A. No.
Q. Is it the same situation that your memory has failed you? A. No I can remember that.
Q. You can or you can't? A. Yes but I weren't there I don't think.
Q. Joanne the three girls have then given evidence that Mr Praturlon was rubbing his penis, do you have any memory of that? A. No.
Q. The three girls have given evidence that they then saw Mr Praturlon in the bathroom rubbing his penis, do you have any memory of that?
Q. Do you remember an incident like that? A. No.
Q. Are you saying that you just don't remember whether or not it happened or that it didn't happen? A. I don't think it happened.
Q. I don't think it happened. A. Yes.
Q. Now they've then given evidence that Mr Praturlon, that some white stuff came out of his penis, do you remember anything like that happening? A. No.
Q. Now what's your memory like normally Joanne? A. I don't know."

The line of cross-examination persisted. It was, I repeat, an infringement of a basic rule denying permissibility of cross-examination along these lines and must necessarily attract the greatest of concern. If I felt that there were the slightest basis for concern that the appellant may have suffered any prejudice as a result of this impermissible line of cross-examination, then I would unhesitatingly have said that the appeal should succeed. As it happens, notwithstanding her tender years, the girl Joanne was apparently proof against the oppression inherent in being confronted by the evidence of her three friends and the aura of a court hearing and forced in effect to repudiate what she was told had been their sworn evidence; she maintained throughout a negative attitude to the Crown Prosecutor's cross-examination.

Although I have approached the answers that she gave with a strong predisposition towards finding in favour of the appellant that there might thereby have been worked some prejudice to him, I am unable to conclude that this was in fact so. I repeat, had there been the slightest basis for concern that he had suffered as a result of prejudicial evidence given by her in the face of such cross-examination, then I would have had no hesitation in proposing that the appeal should succeed. As it is I must content myself with a strong condemnation of this line of cross-

examination having been pursued in this way and express the conclusion that it has not, in my view, led to any miscarriage.

It follows that the challenge to the conviction has not been made good and I propose that the appeal should be dismissed.

O'BRIEN CJ of Cr D: I agree.

SLATTERY CJ at CL: I also agree.

STREET CJ: The order of the Court is that the appeal is dismissed.

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