

35/09; [2009] VSC 576

SUPREME COURT OF VICTORIA

***DPP v LEE***

Beach J

2 December 2009

**EVIDENCE - CRIMINAL LAW - RULING - APPLICATION BY WITNESS TO BE EXEMPTED FROM GIVING EVIDENCE ON BEHALF OF THE PROSECUTION - SON OF ACCUSED - APPLICATION REFUSED: *CRIMES ACT 1958, S400*.**

In a murder trial, the adult son of the accused applied to be exempted from giving evidence. The witness gave as reasons for his application the fact that some of the things he said in his police statement were untrue and that as his employment involved the climbing of high towers, there could be consequences if he became upset as a result of having to give evidence against his father. The witness's evidence would relate to the issue of the accused's flight to Vietnam and was both important and also was evidence not able to be given by another witness either absolutely or with the same weight.

**HELD: Application refused.**

1. Section 400(3) of the *Crimes Act* ('Act') requires the Court to exempt a witness from giving evidence on behalf of the prosecution if, but only if, it is satisfied that having regard to all the circumstances of the case, the interest of the community in obtaining the evidence of the proposed witness is outweighed by:

- (a) the likelihood of damage to the relationship between the accused and the proposed witness; or
- (b) the harshness of compelling the proposed witness to give the evidence; or
- (c) the combined effect of the matters mentioned in paragraphs (a) and (b).

2. Sub-section (4) of s400 of the Act provides that the relevant circumstances include:

- (a) the nature of the offence charged;
- (b) the importance in the case of the facts which the proposed witness is to be asked to depose to;
- (c) the availability of other evidence to establish those facts and the weight likely to be attached to the proposed witness's testimony as to those facts;
- (d) the nature, in law and in fact, of the relationship between the proposed witness and the accused;
- (e) the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and
- (f) any breach of confidence that would be involved.

3. The evidence of the witness discloses that the relationship between him and the accused is not close. It has not been close for some time prior to the date when the accused left for Vietnam. In the circumstances, there is no significant likelihood of damage being done to the relationship between the accused and the proposed witness in the event that the proposed witness is required to give evidence. Similarly, there is no harshness involved in compelling the proposed witness to give evidence. Specifically, having regard to all the circumstances of the case (including the circumstances referred to in s400(4)), the interest of the community in obtaining the evidence of the proposed witness is not outweighed by the likelihood of damage to the relationship or the harshness of compelling the evidence to be given or the combined effect of these matters.

**BEACH J:**

1. The accused's son, Hai Dang Le, has applied to be exempted from giving evidence pursuant to s400 of the *Crimes Act*. The witness is the adult son of the accused, being approximately 24 years of age. Mr Le appeared in person. However, he was assisted by Mr W. Dwyer of counsel from whom he had received advice concerning his rights under s400.

2. Section 400(3) of the *Crimes Act* requires the Court to exempt a witness from giving evidence on behalf of the prosecution if, but only if, it is satisfied that having regard to all the circumstances of the case, the interest of the community in obtaining the evidence of the proposed witness is outweighed by:

- (a) the likelihood of damage to the relationship between the accused and the proposed witness; or
- (b) the harshness of compelling the proposed witness to give the evidence; or
- (c) the combined effect of the matters mentioned in paragraphs (a) and (b).

3. Sub-section (4) of s 400 provides that the relevant circumstances include:

- (a) the nature of the offence charged;
- (b) the importance in the case of the facts which the proposed witness is to be asked to depose to;
- (c) the availability of other evidence to establish those facts and the weight likely to be attached to the proposed witness's testimony as to those facts;
- (d) the nature, in law and in fact, of the relationship between the proposed witness and the accused;
- (e) the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and
- (f) any breach of confidence that would be involved.

4. This is a murder trial. Without setting out the evidence of the proposed witness in detail, the evidence relates to the issue of the accused's flight to Vietnam. I am satisfied that the proposed evidence is of significant importance in this case and that having regard to the position of the witness and his relationship with the accused, it is evidence that is both important and evidence not able to be given by another witness either absolutely or with the same weight.

5. Mr Lee gave evidence in support of his application. He gave as reasons for his application the fact that some of the things he said in his police statement were untrue and that his employment involves the climbing of high towers. I took his reference to employment to be a reference to possible consequences if he became upset as a result of having to give evidence against his father. The issue of whether some of the things in his police statement are untrue is not an issue that bears in any significant way on this application.

6. Senior Counsel for the Crown sought to make submissions on the application in the absence of the witness. In my view, such a course is not appropriate. I take leave to doubt that it would ever be appropriate to hear submissions upon an application made by a witness who is of full age in the absence of that witness. The approach suggested by the Crown is not supported by any authority and is contrary to principle. Accordingly, I ruled against it in argument.

7. The evidence of Mr Lee discloses that the relationship between him and the accused is not close. It has not been close for some time prior to the date when the accused left for Vietnam. In the circumstances, I am not satisfied that there is any significant likelihood of damage being done to the relationship between the accused and the proposed witness in the event that the proposed witness is required to give evidence.<sup>[1]</sup> Similarly, I am not satisfied that there is any harshness involved in compelling the proposed witness to give evidence. Specifically, I am not satisfied that, having regard to all the circumstances of the case (including the circumstances referred to in s400(4)), the interest of the community in obtaining the evidence of the proposed witness is outweighed by the likelihood of damage to the relationship or the harshness of compelling the evidence to be given or the combined effect of these matters.

8. For those reasons, the application will be refused.

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[1] Cf *R v DJT* [1998] 4 VR 784 at 792 per Brooking JA.

**APPEARANCES:** For the Crown: Ms M Williams SC with Ms CR Gwynn, counsel. Office of Public Prosecutions. For the accused Hoang Thanh Lee: Mr GA Georgiou, counsel. Lewenberg & Lewenberg, solicitors. For the witness Hai Dang Le: in person.