06/10; [2010] VSC 34

SUPREME COURT OF VICTORIA

DPP v WILLIAMS (Ruling No 1)

Lasry J

17, 18 February 2010

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY – RELEVANCE OF – MEANING OF "RELEVANCE" – STATEMENT TO MEDICAL PRACTITIONER THAT ACCUSED FELT LIKE KILLING SOMEONE – STATEMENT TO PSYCHOLOGIST AS TO HIS FEELINGS PRIOR TO THE INCIDENT – WHETHER EVIDENCE SHOULD BE EXCLUDED: *EVIDENCE ACT* 2008, SS55(1), 135, 137.

W. was charged with aggravated burglary, attempted murder and intentionally causing serious injury. On the trial the Prosecution sought to lead evidence from a medical practitioner and a psychologist who both saw W. shortly before the incident. In a conversation with the doctor, W. said that he felt like killing someone and that he had prepared gloves and made covers with tape for his shoes and he was stopped by someone. During the consultation with the psychologist, W. was agitated and expressed concern about what she would do with any information which he gave to her. He said he had a lot he wanted to get off his chest but he was too worried about the consequences of doing so.

Sections 55, 135 and 137 of the *Evidence Act* 2008 relevantly provide:

55. Relevant evidence
(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

135. General discretion to exclude evidence
The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—
(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing; or
(c) cause or result in undue waste of time.

137. Exclusion of prejudicial evidence in criminal proceedings
In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

HELD: Evidence not allowed to be led.

1. The first question to be considered was whether the evidence proposed to be led was relevant pursuant to s55(1) of the *Evidence Act* 2008 ('Act'). A consideration of relevance "... requires consideration of the process of reasoning by which [the] information ... could rationally affect the assessment of the probabilities. The word "rationally" is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.

***Washer v Western Australia* [2007] HCA 48; (2007) 234 CLR 492; 239 ALR 610; (2007) 82 ALJR 33; (2007) 177 A Crim R 386, applied.**

2. There is no question that the test of relevance is a broad one and the Australian Law Reform Commission dealt with a situation in this category when they said: "An indirect connection with a matter in issue is sufficient (eg evidence that an accused expressed an intention to kill the victim leads from the inference that he did in fact have such an intention to the inference that he is more likely than others who did not express such an intention to have killed the victim)."

3. But in this case there are difficulties with the evidence proposed to be led. Assuming the conversation occurred in the manner described by the medical practitioner, this evidence resolved into a conversation which occurred in which W. described that he felt like killing someone and had taken some steps in relation to that but had been stopped or stopped himself. The description is not specific about when the feeling actually occurred, whether it was a current feeling and how he had been stopped. There was no clear statement of a future intention in relation to the victim of this attack. Further, there was no suggestion on the evidence that the specific preparations that W. used

is said to have told the doctor he had made pursuant to his feeling of taping his shoes and wearing gloves were involved in the attack on the victim.

4. Accordingly, the evidence of the medical practitioner was not relevant within the meaning of s55(1) of the Act on the issues contended for by the Prosecution including the aspect of motive.

5. Further, this evidence would have been excluded pursuant to s137 of the Act. The probative value of this evidence, taken at its highest, was significantly outweighed by its prejudicial effect. So far as this evidence was concerned the danger of unfair prejudice was the risk that the evidence would be misused by the jury either to adopt an illegitimate form of reasoning or to give the evidence undue weight.

6. In relation to the evidence proposed to be led from the psychologist, the prosecution was not permitted to lead evidence about the enquiry of W. as to whether the police could be given information from the file of the psychologist. His reasons for the enquiry were thoroughly non-specific, invited speculation and arguably related to events which had already occurred.

LASRY J:

1. The trial of Daniel Williams is about to commence. He is charged with aggravated burglary, attempted murder and intentionally causing serious injury.

2. The events giving rise to these charges occurred on 28 August 2008 when a stabbing occurred at 111 Beverley Street East Doncaster, the victim of which was Michael Murray.

3. On the evidence in the depositions, Mr Murray and the accused had known each other for about five years at the time of the incident. Murray, who is the primary prosecution witness, says that the accused was his assailant. In his statement he described being at home on 28 August 2008 at about 4.00pm when the accused knocked at the door and enquired about video games. The accused is said to have enquired as to whether anyone else was at home. They then went to Murray's bedroom where video games were examined and after some remark by the accused about the colour of Murray's hair, the accused is alleged to have produced a knife and then attacked Murray.

4. In a defence response dated 25 January 2010 the accused indicates that he will deny that he entered Murray's home and attacked him as Murray alleges.

5. Mr Johns of counsel for the accused has objected to two portions of the evidence proposed to be led by the prosecution in support of its case on the basis of relevance and, failing that, discretionary exclusion pursuant to ss135 and 137 of the *Evidence Act* 2008. The first of those is evidence from Dr Abha Ram who, at the time of the incident involving Mr Murray, was a medical practitioner working at a clinic in Blackburn Road East Doncaster. The accused man was a patient of that clinic and had been for some time. In a statement made by her on 5 September 2008 she alleges that in a conversation with her on Wednesday 27 August 2008 – the day before the incident with Mr Murray – the accused told her that he "…felt like killing someone." He is alleged to have said that he had prepared gloves and made covers with tape for his shoes and he was stopped by someone. I do not understand that there is any evidence from Murray that his assailant was wearing gloves or had tape over his shoes. Dr Ram was of the view from what she was told that the person he was wanting to kill was his marijuana supplier. According to Ram's statement, she prescribed medication and referred him to a psychologist Joanna Zhu.

6. The second piece of evidence objected to by Mr Johns is the evidence of the psychologist Ms Joanna Zhu. Ms Zhu consulted with the accused on 27 August 2008 and describes him being agitated and expressing concern about what she would do with any information which he gave to her. She informed him that in particular circumstances police might have to be informed and he is claimed to have said that if that was the case he would not talk to her although he said he had a lot he wanted to get off his chest but he was too worried about the consequences of doing so.

Dr Ram's evidence

7. I will deal first with the evidence of Dr Ram. Dr Ram gave evidence on a *voir dire* before me. Apart from her statement to police, which was brief, she also was referred to the notes or records

of the clinic for which she worked as well as her evidence given at the committal proceedings in July 2009.

8. In her evidence, a challenge was made as to her account of the conversation she claimed to have had with the accused on 27 August 2008 and also as to when it occurred. Dr Ram said she had no notes of the conversation and was relying on her memory. She was questioned by Mr Johns at some length about when the conversation occurred. It was put to her, and she seemed at times to accept, that the conversation with the accused must have occurred on 14 August 2008 rather than 27 August 2008. The clinical notes seem to support that because those records make it clear beyond argument that it was on that date that Dr Ram referred the accused to a psychologist. Further, although the records do show that Dr Ram saw the accused on 27 August 2008, the entry for that date seems significantly inconsistent with what she described as having occurred.

9. Assuming that it is appropriate to proceed on the basis that the conversation did occur on 14 August 2008 rather than 27 August 2008, that means the conversation occurred 14 days before the incident. Ms Quin of counsel for the Director of Public Prosecutions has submitted that even if that were so, the evidence would still be admissible as going to establish intention on the part of the accused when the offences were committed and, indeed, is evidence that could be used to establish he was the offender, which he denies. I agree that if the evidence were otherwise relevant, not much turns on a lapse of 14 days between the statement of the accused to Dr Ram and the happening of the events at the basis of the charges against the accused[1].

10. In determining the issues I have to deal with, it is necessary to examine the particular piece of evidence as it appears in the statement of Dr Ram. She said:

> *On Wednesday the 27th August 2008, Daniel attended at the surgery and I saw him. During the consultation Daniel told me that he felt like killing someone. He had prepared gloves and made covers with tape for his shoes and he was stopped by someone. He didn't mention to me what weapon he was going to use. I think the person he was going to kill was a drug, by that I mean marijuana, supplier.*

11. During her evidence at the committal proceedings, asked to re-state what had occurred in the conversation[2], she said:

> *...he said to me that he felt like killing someone and he had taped his shoes and he had covered his shoes with tape and he had gloves and possibly the person that he was going to kill or whatever was probably some drug supplier who was supplying him with drugs and making him do bad things.*

The witness then gave the following evidence:

> Question*: I take it from that what you're detailing to me is a conversation or a statement from Daniel Williams talking about something that had happened in the past. Was that your understanding of it that something stopped him?*
> Answer*: The day before.*
> Question: *And someone had stopped him, is that right?*
> Answer: *Someone stopped him or he stopped himself, I'm not sure.*
> Question: *So it was the situation that he was telling you, you say, that he had these plans but these plans had been stopped either by him or by someone else?*
> Answer: *Yes.*

12. The first question to be considered is whether the evidence is relevant pursuant to s55(1) of the *Evidence Act* 2008:

> *The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*

13. A consideration of relevance "...requires consideration of the process of reasoning by which [the] information... could rationally affect the assessment of the probabilities. The word "rationally" is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial"[3].

14. Mr Johns' argument is essentially that the evidence is irrelevant for a number of reasons. First he submitted it related to a past event. Second, the conversation occurred two weeks prior to the events of 28 August 2008. Third, the evidence is non specific. Fourth, the evidence is vague to the extent that it concerns a marijuana dealer as the target of these feelings and is at odds with the prosecution case. The victim of the attack, Michael Murray, says in his police statement of 2 October 2008 that he stopped seeing the accused "a year and a bit ago". In his evidence at the committal[4] he denied selling illegal drugs to the accused although he did describe the accused going to his house from time to time to buy marijuana from Murray's father. During those visits he claimed they had nothing to do with each other.

15. Ms Quin has submitted that the evidence is relevant to the question of the intention of the accused to kill at the time he attacked Mr Murray, if the prosecution can establish that he did. As I followed it, Ms Quin submitted it would be relevant for the jury when they come decide what inferences can be drawn about the conduct that occurred on 28 August 2008. But the issue in this case will concern who carried out the attack on Mr Murray. The accused will deny through his counsel that it was him. It is of course correct that intention must also be established by the prosecution to the required standard.

16. Ms Quin also submitted that the evidence is relevant to the question of motive for what she submitted would otherwise be regarded as a motiveless crime. Ms Quin did not elaborate on that reasoning but I assume it relates to the evidence given by Dr Ram that whoever that person was, they were making the accused "do bad things". Ms Quin did not go on to say that it was the prosecution case that that utterance of the accused, if it was made, must relate to the victim Murray because it was the prosecution case that he was in fact the supplier of drugs to the accused.

17. There is no question that the test of relevance is a broad one and the Australian Law Reform Commission dealt with a situation in this category when they said[5]:

> An indirect connection with a matter in issue is sufficient (eg evidence that an accused expressed an intention to kill the victim leads from the inference that he did in fact have such an intention to the inference that he is more likely than others who did not express such an intention to have killed the victim).

18. But in this case there are difficulties with the evidence proposed to be led. Assuming the conversation occurred in the manner described by Dr Ram[6], this evidence resolves into a conversation which occurred, on one view, two weeks before the incident with Mr Murray in which the accused described that he felt like killing someone and had taken some steps in relation to that but had been stopped or stopped himself. The description is not specific about when the feeling actually occurred, whether it was a current feeling and how he had been stopped. There was no clear statement of a future intention in relation to the victim of this attack. Further, as I have earlier noted, there is no suggestion on the evidence that the specific preparations that the accused is said to have told Dr Ram he had made pursuant to his feeling of taping his shoes and wearing gloves were involved in the attack described by Mr Murray.

19. In what might be regarded as a similar case of *R v Acuna*[7] to which I was referred, the accused was clearly uttering statements of future intention – "I just want to kill someone" and when asked who, "don't care anyone at random" – albeit that this was said three months prior to the murder with which he was charged. As I follow it, there was no contest that he was the person who caused the death – the issue was whether the prosecution could prove murderous intent. Coghlan J formed the view that such evidence was relevant and admissible in a case where the defence sought to challenge the ability of the Crown to prove intention and voluntariness. It was evidence, Coghlan J concluded, which the jury could use in deciding whether the accused had turned his mind to the act of killing. In that case the killing was a random killing consistent with the earlier utterance of the accused.

20. In this case, the one aspect of the conversation about which the witness is uncertain is who the target of the feeling was to be. In her statement she had said "…I think the person he was going to kill was a drug, by that I mean marijuana, supplier.." and in her committal evidence she had said "…possibly the person that he was going to kill or whatever was probably some drug supplier..". It appears common ground that the victim of the attack was not the drug supplier

of the accused. In addition, taking into account all of what was allegedly said, it could not be confidently concluded that it represented any statement of a future intention.

21. I have therefore come to the view that the evidence is not relevant within the meaning of s55(1) of the *Evidence Act* on the issues contended for by the prosecution including the aspect of motive.

22. In the event that I was in error on the issue of relevance of this evidence, I would nonetheless have excluded the evidence pursuant to s137 of the *Evidence Act* 2008. In my opinion, and for the reasons I have already given in dealing with the issue of relevance, the probative value of this evidence, taken at its highest, is significantly outweighed by its prejudicial effect. That conclusion is reached on the assumption that it is accepted that the conversation with Dr Ram occurred in the terms in which she describes it in her police statement. In my opinion, the reliability of the evidence is open to significant question having seen Dr Ram give evidence on the *voir dire* although there appears to be some debate as to the extent to which such a consideration is relevant to the exercise of the discretion under s137.

23. So far as this evidence is concerned the danger of unfair prejudice is the risk that the evidence will be misused by the jury either to adopt an illegitimate form of reasoning or to give the evidence undue weight[8].

Ms Zhu's evidence

24. I turn then to the evidence of Ms Zhu.

25. As I perceived the submissions, Mr Johns was concerned that Ms Zhu not be permitted to give evidence about the accused enquiring of Ms Zhu on 27 August 2008 as what she would do with information he gave her. Her statement then says:

> *He asked if the police came to me for his file would I have to tell them about what he said.*

She informed him that she might be compelled to disclose to others, including the police, what he had told her. Her statement continued:

> *Daniel said that if that was to be the case he would not tell me anything. Also he told me not to write anything down and directed me to put my pen down. He said that he had a lot he wanted to get off his chest, but he was too worried about the consequences to do so.*

26. The accused went on to describe difficulties with his family relationships and the blame that he felt been attributed for problems which befell his younger brother.

27. I am not sure there is any issue between the prosecution and the accused on this matter. I would not permit the prosecution to lead evidence about the enquiry of the accused as to whether the police could be given information from the file of Ms Zhu. His reasons for the enquiry are thoroughly non-specific, invite speculation and arguably relate to events which have already occurred.

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[1] See *R v Serratore* [2001] NSWCCA 123.
[2] Depositions at page 102
[3] Per Gleeson CJ, Heydon & Crennan JJ in *Washer v Western Australia* [2007] HCA 48; (2007) 234 CLR 492; 239 ALR 610; (2007) 82 ALJR 33; (2007) 177 A Crim R 386.
[4] Transcript at pages 3-4
[5] ALRC 26, vol 1, para 641
[6] This an assumption I would not by any means be prepared to make if I were the trier of fact.
[7] [2008] VSC 165 per Coghlan J
[8] *R v Yates* 2002] NSWCCA 520.

APPEARANCES: For the DPP: Ms C Quin, counsel. Office of Public Prosecutions. For the Accused Williams: Mr S Johns, counsel. Balmer & Associates, solicitors.
