07/07; [2006] VSCA 248

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v VELLA

Buchanan and Nettle JJ A and Bongiorno AJA

28 June, 22 November 2006 — (2006) 14 VR 592; 167 A Crim R 66

CRIMINAL LAW – EVIDENCE – DOCUMENT USED TO REFRESH MEMORY OF WITNESS – CROSS-EXAMINATION OF WITNESS AS TO DOCUMENT – WITNESS RE-EXAMINED – AFTER COMPLETION OF RE-EXAMINATION APPLICATION MADE BY PROSECUTOR THAT STATEMENT BE TENDERED – APPLICATION GRANTED – WHETHER TIME WHEN APPLICATION CAN BE MADE IS RELEVANT – EFFECT OF DOCUMENT TENDERED – WHETHER PROOF OF FACTS OR ONLY EVIDENCE BOLSTERING THE CREDIT OF A WITNESS – WHETHER COURT IN ERROR IN GRANTING APPLICATION: *EVIDENCE ACT* 1958, S36.

During the trial of V., a witness was cross-examined extensively on a statement he had made to police concerning the events surrounding the charges. After the witness was cross-examined, he was re-examined by the prosecutor and at the end of the re-examination the prosecution sought to have the statement tendered. V. relied on the decision of Harris J in *Hatziparadissis v GFC (Manufacturing) Pty Ltd* [1978] VicRp 17; [1978] VR 181 where his Honour said that tender of a document upon which a witness has been cross-examined, such as to enable its tender to be compelled, must be sought whilst the witness is still under cross-examination and that the right to compel tender could not be enforced after cross-examination ceased. This application was granted by the court giving the reason that it was permitted by s36 of the *Evidence Act* 1958 ('Act'). Upon appeal—

HELD: Appeal dismissed.

1. The court's power to allow into evidence documents upon which a cross-examiner has cross-examined is an instance of the control of the court in the reception of evidence. That power is at large and exists to ensure that justice is done. There is no time limit upon the right to permit a document to be received if a cross-examiner has made it admissible and it is receivable under the ordinary rules.

2. Accordingly, on the assumption that ordering the tender of the witness's statement was appropriate in the circumstances, the fact that that tender was only sought after the witness had been re-examined was irrelevant to the question as to whether the tender should be required.

***Hatziparadissis v GFC (Manufacturing) Pty Ltd* [1978] VicRp 17; [1978] VR 181, overruled.**

3. The effect of the authorities and, in particular High Court cases of *Walker v Walker* [1937] HCA 44; (1937) 57 CLR 630 and *Barnes v Allied Interstate (Qld) Pty Ltd, ex parte Barnes* [1969] Qd R 244, is that, at least where a document is compulsorily tendered because it has been called for and inspected, the probative value of the material in that document must be dealt with by the Court as a matter of fact and such weight must be given to it as the circumstances warrant. It is "evidence in the case." It is difficult to distinguish this situation from the situation in which a document is compulsorily tendered not because it has been called for but because a cross-examiner has cross examined on it outside those matters in it which have been used to refresh the witness's memory. Doubtless, in many cases, such a document will do no more than confirm the evidence of the witness being cross-examined with respect to some or all of that evidence. If that is what it does the proper use of it would be to bolster the witness's credit in a permissible way.

4. In the present case, the witness's statement did no more than repeat what he said in the witness box on the only material issue in the case namely, identity. The proper use of the document confirmed the witness's evidence but did not provide any further evidence against V.

5. Section 36 of the *Evidence Act* 1958 is a provision relating to the use that can be made of a witness's prior out-of-court statement by a cross-examiner particularly for the purpose of contradicting the witness by that statement and, by virtue of the proviso to the section, by the Court itself. The exercise undertaken by the prosecutor in this case was not, in truth, concerned with s36 at all. He was invoking the common law rule derived from *Gregory v Tavernor* [1833] EngR 919; 172 ER 1241; (1833) 6 Car & P 280 referred to by the Full Court in *R v Harrison* [1966] VicRp 12; [1966] VR 72 and by Sir Jocelyn Simon in *Senat v Senat* [1965] P 172; [1965] 2 All ER 505;. In reaching the conclusion that s36 justified the tender of the witness's statement the trial judge was in error.

BUCHANAN JA:

1. I agree with Bongiorno AJA.

NETTLE JA:

2. I have had the advantage of reading, in draft the reasons for judgment of Bongiorno, AJA and I agree with his Honour, for the reasons that he gives.

BONGIORNO AJA:

3. Trevor David Vella was convicted by a jury on 25 May 2005 of intentionally causing serious injury to Dean Robert Yeoman by stabbing or cutting him in the right upper arm. The event occurred at the Watergardens Shopping Centre at Taylors Lakes on 8 April 2004.

4. The day before this event, 7 April, Dean Yeoman, who was a security guard at the shopping centre had been involved in an incident with Vella in which Vella had produced a Stanley knife in the course of a relatively minor disagreement with staff at a Safeway store. In his capacity as a security guard Yeoman had assisted police to remove Vella from the store. At the time of this incident Vella had been riding a mountain bike.

5. The following day, 8 April, Yeoman was again on duty at the shopping centre when, at about 8.20 p.m., he was called by an elderly lady who told him that a male person was riding a bike through the car park heading towards Safeway. She said he was behaving abusively to some young girls in the area.[1] Yeoman saw this person and recognised him as the same person the police had arrested during his shift the night before. He was riding the same bike.

6. With the assistance of two other security guards Yeoman then tried to find Vella and eventually did so near an underground car park. When he approached him Vella pushed him in the chest causing him to fall backwards. Yeoman then felt a sting in his right upper arm and observed that he had been stabbed or cut with a knife. He then saw Vella collect his bike from bushes behind the Safeway store and flee the scene. Yeoman subsequently required surgery to repair his right upper arm.

7. Early the following morning Vella was arrested and charged and on 23 May 2005 was presented before the County Court on one count of intentionally causing serious injury. He pleaded not guilty.

8. In the course of his trial Yeoman gave evidence, the effect of which was that the person who stabbed him was the same person who had been arrested by police on the preceding night, namely the applicant Vella. He was cross-examined extensively on a statement which he had made to police concerning the events of both 7 and 8 April. This cross-examination was directed towards establishing that his memory and/or his observations were unreliable. In the course of that cross-examination the cross-examiner read a considerable portion of Yeoman's statement to him, in small segments, and asked him questions based on these segments.

9. After Yeoman was cross-examined he was re-examined by the prosecutor, at the end of which the judge raised the question of the statement upon which he had been cross-examined. Why His Honour did this is not clear but, probably as a consequence, the prosecutor sought to have the statement tendered, a course resisted by defence counsel. However, after some argument, the trial judge acceded to the prosecutor's application, giving as his only reason for doing so that such tender was permitted by s36 of the *Evidence Act* 1958. His Honour did not advert to the question as to whether he was requiring defence counsel to tender the document or permitting the Crown to do so. As any procedural advantage which might have been conferred upon the Crown by requiring the defence to tender a document was abolished many years ago the difference is, for practical purposes, immaterial.[2]

10. On his application to this Court Vella relied upon two grounds which, he submitted, entitled him to a new trial. They were each concerned with the tender of Yeoman's statement. The first was that the trial judge ought not to have required that statement to be tendered because the Crown did not seek its tender during the course of Yeoman's cross-examination but did so only after he had been re-examined and had thus completed his evidence.

11. In support of this ground (which was not raised at trial by counsel then appearing) the applicant relied upon the decision of Harris J in *Hatziparadissis v G F C (Manufacturing) Pty Ltd.*[3] In that case a medical witness had refreshed his memory whilst giving evidence by reference to a contemporaneous report written by him concerning his examination of the plaintiff. He was cross-examined on parts of that document which he had not used to refresh his memory thus rendering it liable to be required to be tendered by cross-examining counsel.[4] However, no application to compel such tender was made until the doctor had left the witness box.

12. Harris J held that tender of a document upon which a witness has been cross-examined, such as to enable its tender to be compelled, must be sought whilst the witness is still under cross-examination and that the right to compel tender could not be enforced after cross-examination ceased. His Honour referred to the then current Australian edition of Cross on Evidence, the 11th Edition of *Phipson on Evidence*, the 4th Edition of *Halsbury* and *Senat v Senat*[5] as being supportive of his conclusion.

13. In each of those authorities the preconditions necessary to justify the compulsion of a party to tender a document at the instance of another party in the course of a trial are discussed. Although none of them, as his Honour noted, specifically refers to any restriction on a court's power to compel such tender by reference to the time at which such power is invoked, Harris J read them as containing an implied requirement that any right to compel the tender of a document upon which a witness has been cross-examined must be exercised during such cross-examination and not afterwards. In reaching this conclusion his Honour pointed out that if cross-examining counsel is compelled to tender such a document whilst cross-examination is proceeding he can continue cross-examination on the document after he was compelled to tender it if he considered it to be to his client's advantage to do so. It would be otherwise if tender were required at a later stage, although His Honour also pointed out that the witness could always be recalled for further cross-examination if it was appropriate that that course be followed.

14. *Hatziparadissis* was subsequently referred to by a Full Court (McInerney, Anderson and Gobbo JJ) in *R v Trotter.*[6] In that case an application by a prosecutor to have a witness' statement put into evidence by cross-examining counsel some time after the witness had given evidence was rejected by the trial judge who, instead, permitted the statement to be read to the jury by another (police) witness. In the course of considering the legality of the procedure adopted by the trial judge the Full Court noted that "strictly speaking" any demand that the witness's statement be tendered "ought to have been made during the cross-examination." *Hatziparadissis* was cited as authority for this proposition. However, whether *Hatziparadissis* expressed the law on this question correctly or not did not need to be considered by the Full Court as the appellant was successful in his appeal on a number of grounds, including that the procedure followed by the trial judge in putting the contents of the document before the jury in the way he did was erroneous. No question as to the correctness of Harris J's judgment was thus raised in *Trotter*.

15. *Hatziparadissis* was also referred to by Franki J of the Federal Court in *TPC v TNT (Rulings*)[7] but, again, his Honour did not need to consider the question as to the correctness of that decision because, in that case, the application to compel tender appears to have been made during cross-examination.

16. A close consideration of each of the authorities referred to by Harris J in *Hatziparadissis* reveals that, although each of them expounds orthodox principle as to the conditions necessary to permit a party whose witness is being cross-examined on a document to compel the tender of that document, none of them gives rise to an inference that an application for tender must be made whilst the witness is still under cross-examination. His Honour's conclusion to the contrary is, with respect, not justified by those authorities.

17. In 1983 Mr MH McHugh QC (as his Honour then was), in a New South Wales Bar Association seminar on cross examination on documents referred to *Hatziparadissis* as a "very important decision" whilst noting that the requirement for contemporaneity between cross-examination and an application to compel tender had never been required in New South Wales.[8] See also *"Cross-Examination on Documents"* by D K Malcolm QC (as his Honour then was).[9]

18. In *R v McGregor*[10] McPherson J in the Queensland Full Court considered *Hatziparadissis*

and rejected Harris J's view that tender of a document being cross-examined upon must be sought during the course of that cross-examination. In doing so he compared it to *Holland v Reeves*,[11] a very old case in which Alderson B had permitted the tender of a document to be postponed beyond cross-examination of the relevant witness. In *McGregor*, McPherson J considered that no prejudice to the accused could be demonstrated in that case by the trial judge having required defence counsel, on the application of the prosecutor, to tender a document after the relevant witness had left the witness box. Without specifically disapproving of *Hatziparadissis* the court (Andrews SPJ, Sheahan and McPherson JJ) dismissed the appeal.

19. In 1989 the Queensland Court of Criminal Appeal (Andrews CJ, Thomas and de Jersey JJ) again considered *Hatziparadissis* in *R v Foggo, ex parte the Attorney-General*,[12] an Attorney-General's reference. On this occasion the court took the view that *Hatziparadissis* was wrongly decided. Thomas J, with whom the other two judges agreed, said:

> "I turn to the other question the subject of the reference. This question concerned the rejection by the learned trial judge of an application by prosecuting counsel requiring the accused's counsel to tender a document upon which he had cross-examined. The basis of his Honour's refusal to permit the document to be put into evidence was that the application came late. In fact, the application was made by the learned prosecutor immediately upon the termination of the cross-examination. His Honour relied upon the decision in *Hatziparadissis v GFC (Manufacturing) Pty Ltd* [1978] VicRp 17; [1978] VR 181 as deciding that such an application must be made during the course of cross-examination. It seems to me that there is no such limitation, and I share the reservation which Mr Justice McPherson obviously felt in *R v McGregor* [1984] 1 Qd R 256, 265; 11 A Crim R 148 in relation to that decision. Whilst not questioning its correctness on its own facts, it should not be taken as enunciating a hard and fast principle of time limits. In my view, the court's power to allow into evidence documents upon which a cross-examiner has cross-examined is an instance of the control of the court in the reception of evidence. That power is at large and exists to ensure that justice is done. I do not recognise any time limit upon the right to permit a document to be received if a cross-examiner has made it admissible and it is receivable under the ordinary rules. Obviously, fairness will frequently require that the application be made promptly, but that, I think, is the main aspect of the judicial discretion to reject a document that the cross-examiner has made relevant. I do not think that the principles upon which a cross-examiner may make a document subject to tender are in doubt, and it is unnecessary to say more on the subject."

20. In deciding the reference in favour of admitting the document tendered after cross-examination had been completed the court held that the trial judge's refusal to receive the document constituted an error of law.

21. The same question has been considered recently by the Western Australian Court of Appeal (Steytler J, E M Heenan and Le Miere JJ) in *Alexander v Manley*.[13] In that case Steytler J reviewed the authorities relied upon by Harris J in *Hatziparadissis* and expressed the opinion that they did not support the proposition that where counsel wished to compel his opponent to tender a document which had been used to cross-examine a witness he had to seek an order for that tender before that cross-examination concluded. His Honour referred to *R v McGregor* and *Re Foggo*. Both EM Heenan and Le Miere JJ, each in separate judgments, also considered *Hatziparadissis* and came to the same conclusion as Steytler J. Le Miere J specifically approved the second paragraph of the judgment of Thomas J in *Re Foggo* quoted above as expressing the law of Western Australia.

22. Harris J in *Hatziparadissis* recognised that where a party is compelled to tender a document after the witness who was cross-examined on that document has left the witness box, unfairness may result. But he also recognised that such unfairness can always be avoided by the trial judge making it a condition of ordering tender that the relevant witness be recalled for further cross-examination or by making some other appropriate procedural order to avoid any injustice.

23. Although the Crown, on this application, raised no question as to the correctness of *Hatziparadissis,* the law of Victoria should be brought into line with that of the other states on this important procedural issue. In the instant case the applicant suffered no prejudice by the course followed by the trial judge. On the assumption that ordering the tender of Yeoman's statement was appropriate in the circumstances, the fact that that tender was only sought after Yeoman had been re-examined should be regarded as irrelevant to the question as to whether the tender should be required. Accordingly, I would not uphold this ground of Vella's application.

24. The second ground relied upon by the applicant was that the trial judge erred in ordering the tender of Yeoman's statement because the conditions necessary for his doing so did not arise out of his cross-examination by counsel for the applicant at the trial.

25. That counsel can cross-examine a witness on a document which has been used by a witness to refresh his memory without being required to tender the document, provided such cross-examination does not go beyond the part of the document which has been so used, cannot be doubted. In *Senat v Senat*[14] the President of the Probate Divorce and Admiralty Division of the High Court, Sir Jocelyn Simon said:

> "In my view the mere inspection of a document does not render it evidence which counsel inspecting it is bound to put in. I think that the true rules are as follows:– Where a document is used to refresh a witness's memory, cross-examining counsel may inspect that document in order to check it, without making it evidence. Moreover he may cross-examine upon it without making it evidence provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness: *Gregory v Tavernor* [1833] EngR 919; 172 ER 1241; (1832) 6 C & P 280. But if a party calls for and inspects a document held by the other party he is bound to put it in evidence if he is required to do so: *Wharam v Routledge* (1805) 5 Esp. 235; 170 ER 797."

This passage from *Senat v Senat* was specifically approved and applied by the Full Court in *R v Harrison.*[15]

26. Prior to commencing cross-examination of Yeoman on his statement defence counsel at the applicant's trial elicited from him that he had read the statement prior to giving evidence and obtained his assent to the proposition that that reading had served to refresh his memory of the events described in it. Counsel did not explore the extent to which he had done so or any other matters going to his use of the document. However, later in the cross-examination Yeoman qualified his evidence that he had read the whole statement by saying that he had skipped at least one section of it and later still said that in looking at the statement that day ". . . the main things I looked at were times, refreshing my memory on the times, the dates and that sort of stuff." The cross-examiner did not challenge these qualifications, being apparently content to rely upon the general assent he had elicited from the witness at the beginning of his cross-examination.

27. Counsel's cross-examination of Yeoman covered almost the whole of his statement. It was a cross-examination which put at risk the compulsory tender of that statement once Yeoman qualified his earlier evidence as to his reading of it. To protect the statement from the risk of compulsory tender, cross-examining counsel had to confine his questions to those parts of the document which Yeoman had used to refresh his memory. By not ascertaining, with appropriate precision, the extent of Yeoman's use of the statement the cross-examiner ventured into dangerous territory. If he did cross examine beyond the areas of the document which Yeoman had used to refresh his memory it became relevant and admissible at the option of the prosecutor, subject to the trial judge's discretion, within the principles expounded in *Senat* and *Harrison* and other authorities dealing with this topic.

28. In the course of argument as to whether defence counsel should be compelled to tender Yeoman's statement the trial judge referred to s36 of the *Evidence Act* 1958. This reference was taken up by the prosecutor who put an argument to the effect that that section was applicable to the circumstances prevailing. In due course his Honour ruled that s. 36 applied to the document so as to render it admissible. Consistently with this ruling he later directed the jury that they could use Yeoman's statement, not as to the truth of the facts asserted in it, but only to test the veracity of his oral evidence given at the trial.

29. Section 36 of the *Evidence Act* 1958 is a provision relating to the use that can be made of a witness's prior out-of-court statement by a cross-examiner particularly for the purpose of contradicting the witness by that statement and, by virtue of the proviso to the section, by the Court itself. Its purpose was to remove a number of inconvenient consequences of the former common law rule derived from *The Queen's Case.*[16] The exercise undertaken by the prosecutor in this case was not, in truth, concerned with s36 at all. He was invoking the common law rule derived from *Gregory v Tavernor*[17] referred to by the Full Court in *R v Harrison*[18] and by Sir Jocelyn Simon in *Senat v Senat.*[19]

30. In reaching the conclusion that s36 justified the tender of Yeoman's statement the trial judge was in error. Whether such error could have had any effect upon the trial depends upon whether the document ought otherwise to have been tendered; a question which depends upon a number of matters including discretionary considerations which appear to have been neither argued nor ruled upon. Indeed, because the argument was concerned mainly with s36 the trial judge (and counsel) paid no attention to the central question as to whether defence counsel had cross-examined outside those parts of Yeoman's statement from which he had refreshed his memory – the only basis upon which tender could be compelled in the circumstances. Had they adverted to this question an appropriate enquiry might have been conducted (on the *voir dire* if necessary) to determine, with some precision, whether cross examining counsel had in fact questioned the witness so as to enable the prosecutor to invoke the rule.

31. However, the only issue in this trial was the identity of Yeoman's assailant. Yeoman clearly identified the applicant as being the man who had been at the shopping centre the night before he was assaulted. There was other evidence also which tended to identify him – particularly his bicycle. The only evidence which tended otherwise was a failure by Yeoman to identify him from a spread of photographs shown to him by police. The applicant did not give evidence.

32. In the circumstances all that the tendering of Yeoman's statement contributed to the evidence against the applicant was that he had been identified by Yeoman at the time of the assault, thus supporting Yeoman's evidence to the same effect from the witness box. No possibility of a miscarriage of justice could be demonstrated as a result of the statement being before the jury even if it was wrongly admitted by the trial judge.

33. The trial judge directed the jury that they could use Yeoman's statement to test his honesty and reliability. He told them that it was not direct evidence of its content unless adopted by Yeoman in his evidence in the witness box. Support for the correctness of this direction can be found in the Australian Edition of *Cross*.[20] The author of that work offers the view that, at least in a criminal case, a document which becomes evidence by virtue of being required to be tendered by a cross-examiner who cross-examines beyond those parts of the document used by the witness to refresh his memory, is admissible only as a prior consistent statement to bolster the witness's credit. The author cites two English cases, *R v Virgo*[21] and *R v Sekhon*.[22]

34. In *Virgo* the Court of Appeal had to consider the status of diary entries which had been used by a witness to refresh his memory of dates and events in which he was involved. The diary was admitted into evidence without objection. The Court held that those entries were not capable of amounting to corroboration of the evidence of the witness who was an accomplice of the accused. Although that conclusion was unremarkable, in the course of reaching it Geoffrey Lane LJ, speaking for the Court, said that the nature of the diary entries was such that if the jury thought they were genuine they might show a degree of consistency in the witness – much in the way that a prompt complaint by a victim of sexual assault might be used by a jury as bolstering the complainant's evidence. The Court was adamant that they were not evidence of their contents.

35. In the second case referred to in Cross, *Sekhon*, the jury had requested access to a police log used by a police officer to refresh his memory in the witness box. The Court, in the course of setting out a series of propositions concerning documents used to refresh memory, considered the police log admissible but described it as a "tool" to assist the jury to evaluate the truth of the evidence given in the witness box by the witness. It went on to say:

> "Although normally the document when admitted is not evidence of the truth of its contents, in those cases where it provides, because of its nature, material by which its authenticity can be judged, then in respect of that material and only for the purpose of assessing its authenticity it can amount to evidence in the case."

36. Some of the cases in this area use the expression "evidence in the case," or a similar expression when referring to the effect of a document compulsorily tendered even if it seems the phrase is not always intended to convey an identical meaning: *Wharam v Routledge*;[23] *Senat v Senat*;[24] *Calvert v Flower*;[25] *Gregory v Tavernor*;[26] *Walker v Walker*;[27] *Barnes v Allied Interstate (Qld) Pty Ltd, ex parte Barnes*.[28]

37. In *Walker v Walker*, a case where a document which had been called for and inspected

was required to be tendered, after citing a passage from *Calvert v Flower* (supra) Dixon J said:

> "The important part of the rule which Lord Denman states is that the party calling for a document and inspecting it must, if required, put it in as part of his case; it is evidence tendered by him. When it is in evidence as part of the proof adduced by him, its probative value must be dealt with as a matter of fact. If the matters which are contained in the document are completely irrelevant to the issues then, of course, they must be thrown out of consideration. But if it contains statements of fact in relation to relevant matters, then it becomes a medium of proof to which such weight may be attached as circumstances warrant. Whether in the end it tells in favour of the party who insisted that it should be put in or in favour of the party calling for it will, of course, depend on the facts of the case, but the purpose of the rule is to enable the party producing the document to have it put in evidence so that he may rely upon it."[29]

Latham CJ, with whom McTiernan J concurred, made a similar observation[30] as did Evatt J.[31] Starke J said that it did not follow that every statement in such a document tendered because of a call was evidence of the fact. That question, his Honour said, was for the Court to decide.

38. Similar observations to those of the majority in *Walker* were made by the Queensland Full Court and subsequently the High Court in *Barnes v Allied Interstate (Qld) Pty Limited ex parte Barnes*.[32]

39. The effect of these cases and, in particular, the High Court cases of *Walker* and *Barnes,* is that, at least where a document is compulsorily tendered because it has been called for and inspected, the probative value of the material in that document must be dealt with by the Court as a matter of fact and such weight must be given to it as the circumstances warrant. It is "evidence in the case." It is difficult to distinguish this situation from the situation in which a document is compulsorily tendered not because it has been called for but because a cross-examiner has cross examined on it outside those matters in it which have been used to refresh the witness's memory. Doubtless, in many cases, such a document will do no more than confirm the evidence of the witness being cross-examined with respect to some or all of that evidence. If that is what it does the proper use of it would be to bolster the witness's credit in a permissible way.

40. Such was the case here. Yeoman's statement did no more than repeat what he said in the witness box on the only material issue in the case, namely whether the applicant, who had been at the shopping centre the night before, was his assailant on the night in question. The proper use of the document, in this case, would be to confirm Yeoman's evidence, not to provide any further evidence against the applicant. It is not necessary in this case to consider the proper use of the document had it contained further relevant material not deposed to by the witness in the witness box, although the High Court cases would suggest that that material would go before the jury as proof of the facts asserted if these facts were relevant to an issue in the case.

41. Even if the judge in this case had been entitled to direct the jury on this aspect of the matter more specifically than he did, such a direction would have been less favourable to the applicant than his direction actually was and, accordingly, no miscarriage of justice can be demonstrated. The applicant cannot succeed on this ground.

42. Because of the importance of the question of the correctness of Harris J's judgment in *Hatziparadissis* I would grant the applicant leave to appeal but dismiss the appeal.

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[1] The reason the lady gave for alerting Yeoman was excluded from Yeoman's statement when it was eventually admitted into evidence.
[2] Section 5 *Crimes Act* 1976 (8870) amended s417 of the *Crimes Act* 1958 to give defence counsel the right to address the jury after the prosecutor whether the defence has adduced evidence or not.
[3] [1978] VR 181.
[4] *Senat v Senat* [1965] P 172 at 175; [1965] 2 All ER 505; *R v Harrison* [1966] VicRp 12; [1966] VR 72.
[5] [1965] P 172 at 177; [1965] 2 All ER 505.
[6] (1982) 7 A Crim R 8.
[7] (1983) 56 ALR 647.
[8] (1985) 1 Aust Bar Rev 51 at 60.
[9] (1986) 2 Aust Bar Rev 267 at 276.
[10] [1984] 1 Qd R 256 at 265; 11 A Crim R 148.
[11] (1835) 7 Car & P 36; 173 ER 16 at 18.
[12] (1989) 2 Qd R 49; 39 A Crim R 395.
[13] [2004] WASCA 140; (2004) 29 WAR 194.

[14] [1965] P 172; [1965] 2 All ER 505.
[15] [1966] VicRp 12; [1966] VR 72.
[16] [1820] EngR 563; (1820) 2 Brod & Bing 284; 129 ER 976; 6 Eq Rep 112.
[17] [1833] EngR 919; 172 ER 1241; (1833) 6 Car & P 280.
[18] [1966] VicRp 12; [1966] VR 72.
[19] [1965] P 172 at 177; [1965] 2 All ER 505.
[20] *Cross on Evidence* (Aust. Ed.) [17245].
[21] (1978) 67 Cr App R 323.
[22] (1986) 85 Cr App R 19 at 23.
[23] (1805) 5 Esp 236; 170 ER 797.
[24] [1965] P 172 at 175; [1965] 2 All ER 505.
[25] (1836) 7 C&P 386; 173 ER 172.
[26] (1833) 6 Car & P 280; (1833) 172 ER 1241.
[27] [1937] HCA 44; (1937) 57 CLR 630.
[28] [1969] Qd R 244 and in the High Court [1968] HCA 76; (1968) 118 CLR 581; 42 ALJR 348.
[29] At 636.
[30] At 635.
[31] At 638.
[32] [1969] Qd R 244 and in the High Court [1968] HCA 76; (1968) 118 CLR 581; 42 ALJR 348.

APPEARANCES: For the Crown: Ms G Cannon, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the applicant Vella: Mr DA Dann, counsel. Doogue & O'Brien, solicitors.
