18/85

SUPREME COURT OF NEW SOUTH WALES

R v PACHONICK

Lee J

24-27 September 1973 — [1973] 2 NSWLR 86

EVIDENCE – DOCUMENT USED TO REFRESH MEMORY OUT OF COURT –- DOCUMENT CALLED FOR AND READ BY CROSS-EXAMINER – WHETHER DOCUMENT THEREBY MADE ADMISSIBLE IN EVIDENCE.

HELD: (1) It is proper in many circumstances for a prosecution witness to refresh his memory, out of court, from a document made contemporaneously with, or soon after, the event about which he is to give evidence.

***R v Richardson* [1971] 2 QB 484; (1971) 55 Cr App R 244, followed.**

(2) If a document is in court and is called for, it must be produced, and if the document is not privileged, the party calling for it may inspect it.

***Ex parte Dustings; Re Jackson* [1967] 87 WN (Pt 1) NSW 98; [1968] 1 NSWR 257; and**
***Mather v Morgan* [1971] Tas SR 192, referred to.**

(3) If a witness refreshes his memory from a document while in the witness box, counsel for the other party may see it, but his inspection of it in no way makes it admissible in evidence.

(4) If a witness refreshes his memory from a document outside the court, counsel for the other party may inspect it, without being obliged to tender it as evidence in the case.

***R v Skalij* ([1972] NSWCCA, unrep), not followed.**

[**NOTES**: (i) Some of the authorities which support (3) above are: *Gregory v Tavernor* [1833] EngR 919; 172 ER 1241; (1833) 6 C & P 280; *R v Harrison* [1966] VicRp 12; [1966) VR 72 at 76; *R v Alexander and Taylor* [1975] VicRp 74; [1975] VR 741 at 752; *Hatziparadissis v GFC (Manuf) Pty Ltd* [1978] VicRp 17; [1978] VR 181 at 182; *Cross on Evidence*, 2nd Aust ed p224. However, cross-examination must be confined to those parts which are used for refreshing the memory of the witness (*Gregory v Tavernor* (*supra*) referred to with approval in *Senat v Senat* [1965] P 172; [1965] 2 All ER 505); or those parts of the document upon which the witness relies for the purpose of his evidence": (*R v Alexander and Taylor* (*supra*)). If cross-examination upon the document extends beyond matters referred to by the witness to refresh his memory, the right to compel tender of the document is available only during the course of the cross-examination: see *Hatziparadissis v GFC (Manuf) Pty Ltd* (*supra*) at p183.

(ii) When the document is produced, inspection should be confined to those parts only which refer to the subject-matter of the case: *Burgess v Bennett* [1872] 20 WR 720; though in *Betts v Betts* [1917] 33 TLR 200, Low J, allowed a general inspection.

(iii) If a party calls for and inspects a document held by the other party, he is bound to put it in evidence if required to do so: *Wharam v Routledge* [1805] 5 Esp 235; 170 ER 797; *Walker v Walker* [1937] HCA 44; [1937] 57 CLR 630.]

LEE J: In this case the facts are that on 28th April 1973, Senior Constable Clarke went to premises in Elizabeth Street, Port Macquarie and there saw the accused, and a woman who had obviously been shot in the chest. The constable gave evidence that the accused said to him: "My God, I did it, I shot her, I shot her". It was put to the constable in cross-examination by counsel for the accused that in fact what the accused said was: "My God, they say I shot her". The constable denies this and affirmed that what the accused had said were the words first quoted above. Constable Clarke was then asked in cross-examination whether he had at the time, or soon thereafter, made any note of what the accused had said on the point, and he stated that some little time afterwards he had made a written statement as to what had happened on his visit to the premises. He was then asked whether, prior to giving his evidence, which began on Monday (the cross-examination took place on Tuesday) he had refreshed his memory from the statement, and he quite freely admitted that he had. Counsel for the accused them said: "I call for the document". It was produced by the Crown Prosecutor, counsel for the accused read it

through and handed it back to the Crown Prosecutor. He did not cross-examine on it, nor did he ask any further questions on that particular point.

The Crown Prosecutor now seeks to tender the document, and contends that the situation is simply one where counsel for the accused has called for a document, which has been produced, and that the rule is that in that situation he is entitled to have the document admitted into evidence. The tender is objected to by counsel for the accused, the submission being that as the witness has admitted that he refreshed his memory from the document, counsel for the accused was entitled to see it without penalty.

It is well established that if a witness in the witness box refreshes his memory from a document, counsel for the other party may see it, and his inspection of it in no way makes it admissible as evidence. What then is the position when the witness refreshes his memory from the document, not in the witness box, but outside the court, as has happened here? Does counsel for the accused have the right to inspect it without bringing about the result that the Crown Prosecutor becomes entitled to tender it as evidence in the case? There is authority which I think should be followed that it is proper in many circumstances for a prosecution witness to refresh his memory, out of court, from a document made contemporaneously with or soon after the events about which he is giving evidence: *R v Richardson* [1971] 2 QB 484; (1971) 55 Cr App R 244. It is clear that if a document is in court and is called for, then it must he produced, and if no question of privilege arises, the party calling for it may inspect it: *Ex parte Dustings: Re Jackson* [1967] 87 WN (Pt 1) (NSW) 98 at p104 per Walsh JA; *Mather v Morgan* [1971] Tas SR 192.

In the case of *R v Skalij*, Court of Criminal Appeal, 23rd June 1972, unreported, Brereton J specifically dealt with the point which is before me. His judgment reads:

> "A suggestion was made that there was some confusion in the policeman's evidence with the details of some other case. It was established that the police had refreshed their memories, though not in the witness box, by reference to a document. His Honour said that counsel for the accused could thus have called for the document without penalty and thus have verified their evidence or otherwise if he chose. I think with deference that this was incorrect. Certainly if a witness uses a document to refresh his memory in the witness box then that document may be called for and inspected and the party calling for it cannot be compelled to put it in evidence. If he is merely shown to have refreshed his memory out of court this rule does not apply, but the document could still have been called for as on subpoena. It would then have been produced to the court and no doubt made available to both sides for inspection. The defence would have been under no obligation to tender it and the Crown could not unless it was admissible. As in fact the document was a policeman's notes it could scarcely have been held to be admissible, so that in the result the direction given was to the correct effect."

The other members of the court do not appear to have dealt specifically with this actual point. With the utmost deference to the view of Brereton J, it does seem to me that, notwithstanding the lack of authority on the point, there is no basis which can be urged as to why there should be a distinction between the practice which applies when the witness refreshes his memory in the witness box, as compared with the case where he does it outside the court before coming into court.

It was the fact that the witness admitted that he had refreshed his memory from the statement made by him soon after, which in my view entitled counsel to see that document, if it was in the court. Counsel's right to see the document flowed from the admission, not from the fact that he "called for" the document. The position is one which in no way resembles the case covered by the rule that, if a party calls for a document, which is produced by the other party, the party producing it may required it to be tendered or may tender it himself. In any event, if the position were to be treated as one similar to that where a document is produced on subpoena, as held by Brereton J in the case just referred to, the result would be the same – the document could not be tendered merely because counsel for the accused was permitted to inspect it. In the circumstances, then, I do not propose to admit the document into evidence and the tender will be rejected.
