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SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

R v JOHNSON & EDWARDS

DM Campbell, WB Campbell and Sheahan JJ

9 June 1981 — [1981] Qd R 440

EVIDENCE – EVIDENCE IN REBUTTAL – RIGHT OF CROSS-EXAMINATION OF WITNESSES CALLED IN REBUTTAL OF CHARACTER EVIDENCE OF OTHER DEFENDANT.

Appeals allowed, convictions quashed. No order made for retrial.

DM CAMPBELL J: There were several grounds of appeal argued on the hearing of this appeal but it will only be necessary to refer to one. That ground is that the trial judge was wrong in refusing to permit cross-examination of Crown witnesses called to give rebuttal evidence of bad character. And on this ground I think the appeal will have to be allowed.

The appellants are detective constable John Frederick Johnson and detective sergeant Terence Peter Edwards of the Queensland Police Force. They have now been tried and convicted twice in the District Court at Brisbane on a charge of extortion under s415 of the *Criminal Code*. The charge on which they were indicted was that on September 1, 1978 near Gympie they orally demanded from Neville Vincent Cater a sum of money, namely, $2,000 without reasonable or probable cause, with a threat that he would be charged with an offence if he did not comply with the demand and with intent thereby to extort money from him. On each occasion they were sentenced to imprisonment for three and a half years.

At the second trial Edwards elected to give evidence in his defence. He called ten witnesses who spoke of his general reputation as a person of good character and testified that they would believe him on oath. The witnesses were a parish priest, two of his neighbours, a family friend, a pastoral assistant connected with his church, a public accountant, a union representative, the family doctor and a superintendent of police.

His co-accused Johnson neither gave nor called evidence himself. Though each man was separately represented the defence was conducted as a joint defence. In signed records of interview which were tendered they both maintained that after carrying out an unsuccessful search of Cater's house on a farm outside Gympie for a stolen floor-polisher they left and drove straight to Eumundio. In his evidence Edwards put the time at about 1 p.m. The Crown case was that after demanding $2,000 from Cater they all went into Gympie where Cater cashed a cheque for $2,000 which he handed to Johnson and that the accused were seen at the Northumberland Hotel in Gympie between 1.55 p.m. and 2.30 p.m. Obviously it was important to Johnson that Edwards' credibility should not be shaken.

To rebut the character evidence the Crown called two witnesses, Mr AG Glynn, a Crown Prosecutor, and Mr DP Breen, a practising barrister whose practice takes him into the criminal courts. Mr Glynn was called to give evidence that Edwards had the reputation of being a dishonest policeman among Crown Prosecutors in Brisbane, and Mr Breen was called to say that Edwards had the reputation of being a dishonest person among certain members of the criminal bar.

After hearing submissions from counsel on both sides as to the right of counsel for Johnson to cross-examine the witnesses, the trial judge ruled as follows:

> "A number of requests were made by Mr Greenwood, counsel for the accused, Johnson. Mr Greenwood sought rulings from me on three points; firstly, that he should be entitled to ask questions of the witness Breen regarding Mr Spender's (Counsel for the accused Edwards) opinion as to Edwards' general credibility; secondly, he claimed the right to cross-examine Mr Breen generally as to the evidence Mr Breen gave in court, even though such evidence was directed purely to the credit of Mr

> Edwards for whom Mr Greenwood does not appear. I reject both applications and consider that Mr Greenwood, acting for Johnson, has no right to cross-examine in relation to the matter. He has asked for a ruling in the event of my ruling that he has no such right. I refuse to exercise my discretion in his favour. The cross-examination of Mr Breen will be by Mr Spender."

His Honour seemed to think that there was a comparison to be drawn between the situation here and the case where co-defendants have a mutual interest in having a defendant's witness accepted. In the course of the argument he said:

> "I thought the rule was that if there was a similarity of incidents or a coincidence of interest between two counsel in a particular witness then the counsel who call him examine him in chief and then the second counsel examine him as if in chief. The second counsel cannot cross-examine if there is a similarity of interest but if you cannot cross-examine surely that does not mean you can lead (the witness) in general."

With great respect, this does not seem to be relevant to anything that the learned judge had to decide; and it is understandable that counsel for Johnson should have been concerned because of the harm that could be done to his client. He expressed his concern saying:

> "I place this on the record that I have the right to cross-examine the witness. It is a witness called for the Crown certainly directly relevant to the case of Edwards but relevant also to the case against Johnson because the credit of one reflects on the credit of the other."

In *R v Hilton* (1972) 1 QB 421 the Court of Appeal held that if A and B are jointly charged with an offence and A chooses to give evidence he may be cross-examined by B whether or not A's evidence is in any way adverse. Giving the judgment of the court Fenton Atkinson LJ said that their Lordships were all:

> "quite satisfied that the practice to allow such cross-examination is well established in our courts and that it is necessary for justice to be done."

The decision was followed by this Court (Wanstall SPJ, Hart and Lucas JJ) in *R v Schuller* (1972) QWN 41, when a ruling of the trial judge to the effect that where there is a joint defence, so that the evidence of the two accused is substantially identical, the repetition of that defence can be secured by the right of the second accused to give evidence instead of by the asking of leading questions, was disapproved. These decisions recognize the fundamental role of pertinent cross-examination in the adversary system. But the matter may be taken further. Section 616 of the *Criminal Code* expressly provides:

> "Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined and cross-examined by his counsel. The term 'Counsel' includes any person entitled to audience as an advocate."

The learned judge was in error in thinking that there was a discretion vested in him to allow or disallow cross-examination by Mr Greenwood; the only discretion in him was to do his best to restrain excessive or unnecessary or abusive cross-examination: see *R v Kalia* (1975) Crim LR 151; and *Mechanical and General Inventions Co. Ltd v Austin* (1935) AC 346, Viscount Sankey LC at p359.

It was argued before us by the Crown that the application by Johnson's counsel was limited to asking Mr Breen the single question, Whether Mr Spender was one of the members of the criminal bar who had expressed any view to him about Edwards? Evidently counsel for the defence considered that it would be less embarrassing and objectionable if such a question were put by Mr Greenwood rather than by Mr Spender himself. We were referred to the passage in the transcript where counsel for Johnson is reported as saying:

> "It is for that reason and for that reason only that I seek to enter the matter."

The same counsel did not represent the accused on the hearing of the appeal, but we were informed by Mr Thomas, who led for the Crown, that he informed counsel for the defence at the trial that if Mr Breen was asked the question counsel wished to ask he would get an unfavourable answer.

There are a number of things that can be said about this – the implication being that Mr Greenwood would not have persisted with his claim to cross-examine Mr Breen. Counsel had the right to choose whether to cross-examine or not. Although the application was originally confined to asking a particular question, it became as it unfolded an application to cross-examine generally. This appears clearly at the end of Mr Greenwood's submission. A final decision about cross-examination could not have been made by Mr Greenwood before the conclusion of Mr Spender's cross-examination. Having read the cross-examination, and without wishing to appear at all critical of Mr Spender, I can conceive of other counsel in Mr Greenwood's position wishing to put further questions to Mr Breen. The application seems to have been argued in relation to his evidence only. His Honour prefaced his ruling by saying:

> "Counsel for the accused Edwards said that he had no request to make in relation to any exclusion statement being made or not made in relation to the witness Glynn."

But what His Honour was referring to was a suggestion from the Crown that Mr Breen should be asked in examination-in-chief to exclude from the members of the criminal bar for whom he purported to speak persons in the court room. It was taken that the ruling forbidding cross-examination by counsel for Johnson applied both to Mr Breen and Mr Glynn. As I have indicated, in my opinion the ruling was wrong in law. The jury were out for twenty-five hours before returning with a verdict in the first trial and for almost the same time in the second trial, so the outcome could not be regarded by any means as a foregone conclusion. It is no doubt unfortunate that the second trial should have miscarried also, but despite the most pains-taking summing up I find it impossible to say that the accuseds' chances of being acquitted were not reduced by the ruling that was made.

However, there are some other matters which were not raised at the trial or by the grounds of appeal which should not be passed over. When Mr Thomas intimated during the defence case that he would be calling rebuttal evidence His Honour said:

> "It seems to me the Crown is entitled to call evidence in relation to the alleged bad character of Edwards."

At the close of the defence case Mr Thomas stated:

> "Your Honour, with the leave of the court I should open to the jury the evidence that I am not entitled to call by way of rebuttal on the issue introduced by the defence of the character of Mr Edwards."

No objection was taken by counsel for the defence to the calling of such evidence, and it was at this stage that Mr Greenwood stated that he wished to make an application in the absence of the jury for what he called "a procedural ruling" (it was in fact a request for a ruling as to whether he would be permitted to ask Mr Breen the question mentioned). To some extent I think His Honour was led into error at the end of a long trial.

In *R v Walsh* (COA No. 13 of 1981) this court considered it was undesirable for the Crown to make an application to call evidence in rebuttal in the presence of the jury. There is no absolute right in the Crown to call such evidence. The learned judge does not appear to have approached the matter initially as calling for a careful exercise of judicial discretion. Permission to call rebuttal evidence should not be granted unless it is reasonably clear that an accused would not be unfairly prejudiced by the admission of the evidence: *Shaw v The Queen* [1952] HCA 18; (1952) 85 CLR 365 at p383; [1952] ALR 257, per Fullagar J. If Edwards' credibility were undermined it would, as I have pointed out, be detrimental to Johnson. This might not be unfair but it was a joint trial and the effect could not be ignored on him, Moreover – and more important – the jury would be likely to be unduly impressed by the status of the witnesses the Crown wanted to call. Calling Crown Prosecutors and members of the bar in criminal trials in these circumstances seems to me to be very undesirable from a number of points of view. Although the point was not taken at the trial, I doubt that Mr Breen's evidence was admissible. He did not state that Saunders had a reputation for dishonesty among the generality of members of the criminal bar but that he had such reputation among certain members. How limited the number was became plain when he was cross-examined. Character evidence of this kind is only admissible if it is evidence of the reputation that he had generally. The leading case is *R v Rowton* (1865) 10 Cox CC 25, [1865] EngR 53; 169 ER 1497 at 1501; [1865] Le & Ca 520, where Cockburn CJ said that the law was correctly stated in *Phillips on Evidence* (vol. 1, 10th ed. p506) as follows:

> "The inquiry must be as to the general character; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period would not then being to act a dishonest, unworthy part. Proof of particular transactions in which the defendant may have been concerned is not admissible as evidence of his general good character."

Since being convicted by two juries of extortion, the accused have spent five and a half months all told in jail pending the hearing and determination of appeals. Consequently, I do not think it right to order a new trial.
