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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v SIMIC

Young CJ, Menhennitt and Jenkinson JJ

30 April 1979 — [1979] VicRp 49; [1979] VR 497

CRIMINAL LAW – CHARGE OF MURDER – UNSWORN STATEMENT MADE BY ACCUSED – NO ONUS ON ACCUSED TO GIVE SWORN EVIDENCE – CLASSIFICATION OF AN UNSWORN STATEMENT – THE LAW DOES NOT JUDGE AN UNSWORN STATEMENT TO BE A SEPARATE OR A LOWER CLASS OF EVIDENCE.

On application for leave to appeal against a conviction for murder, one of the grounds was that the trial judge in his charge to the jury "unduly stressed the effect of the accused having given unsworn evidence from the dock." The following comments were made by the Court of Criminal Appeal:

1. Referring to the implication (by the judge) that there was an onus on the accused to give sworn evidence, the Court discussed ss399 and 418(d) of the *Crimes Act*. Their Honours stated: "none of those sections discloses, in our opinion, any intention to prohibit the presiding judge from informing the jury that an accused who makes an unsworn statement has exercised a free choice between that course and giving evidence on oath", and went on to say "in our opinion, nothing which the learned Judge said could reasonably have been understood as implying that there was an onus on the accused to give sworn evidence or that he had refrained from giving evidence because he or his advisors feared that his lack of credibility would have been demonstrated while he was in the witness box, or that the unsworn statement could not be relied upon."

2. As to the inference that the unsworn statement was of a separate or lower class from evidence on oath, the Court referred to the Full Court judgment in *R v Simpson* [1956] VicLawRp 57; (1956) VLR 490, particularly at p495; [1956] ALR 623. After discussion their Honours went on: "the judge may not direct the jury that the law requires them to regard an unsworn statement as of no probative value (as was done, in effect, in the charge under consideration in *R v Simpson supra*) or to regard it as having a probative value or effect different from that to be allowed sworn testimony (as was done in the charge under consideration in *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619; 17 ALR 566). He may not represent the unsworn statement to be, in law – that is, in the judgment of the law – a separate and lower class of evidence.

Judgment of the probative quality or value, or effect – the weight of the unsworn statement is for the jury. And if the judge gives the jury clearly to understand that the law commits that judgment to them, he makes no representation that the law judges an unsworn statement to be a separate or a lower class of evidence by pointing out to them that the unsworn statement lacks the sanction of an oath and cannot found a charge of perjury, or by pointing out that exposure to questioning in the witness box is a very useful means of determining the truthfulness and the accuracy of those on whose historical narratives the jury's verdict is to be based, or by explaining that the law permits no question of the maker of an unsworn statement. A jury may, upon a consideration of those matters – those infirmities – judge the unsworn statement to be a class separate from – and lower in their estimation than – sworn testimony from the witness box."
