45/10; [2010] VSC 397

SUPREME COURT OF VICTORIA

DPP v NICHOLLS

Beach J

1, 6 September 2010 — (2010) 204 A Crim R 306

CRIMINAL LAW – EVIDENCE – SERIOUS CHARGES LAID ALLEGING ASSAULT BY A PERSON ON HIS PARTNER – OBJECTION AT HEARING BY PARTNER TO GIVING EVIDENCE IN RELATION TO THE CHARGES – OBJECTION UPHELD BY MAGISTRATE – APPLICATION BY PROSECUTOR FOR PERSON'S STATEMENT TO BE TENDERED – APPLICATION REFUSED – CHARGES DISMISSED – MEANING OF "NOT AVAILABLE TO GIVE EVIDENCE" – WHETHER MAGISTRATE IN ERROR: *EVIDENCE ACT* 2008, SS18, 65, 67, 135, 137 AND CLAUSE 4 OF PART 2 OF THE DICTIONARY; *CRIMINAL PROCEDURE ACT* 2009, S272(1).

N. was charged with a number of offences against his partner L. When the charges came on for hearing, L. objected to giving evidence pursuant to s18 of the *Evidence Act* 2008 ('Act'). The magistrate upheld L's objection whereupon the prosecutor applied to tender L's statement pursuant to s65(1) of the Act. The magistrate held that L. was not a witness who was "not available to give evidence", upheld a 'no case' submission and dismissed the charges. Upon appeal—

HELD: Appeal allowed. Order quashed. Remitted to the Magistrates' Court to be reheard by a differently constituted Court.

1. There are a number of decisions in which courts have held that if a witness simply refuses to answer questions, that witness is taken not to be available within the meaning of clause 4(1) Part 2 of the Dictionary of the Act by virtue of the operation of paragraph (f). In *Mindshare Communications Limited Taiwan Branch v Orleans Investments Pty Ltd* [2007] NSWSC 976, Hamilton J accepted a submission that the purpose of (f) "is to deal with the situation where the attendance of the witness has been secured, but it is impossible to obtain the evidence, because, for instance, the witness declines to give it on the ground of privilege or simply refuses to give it, whatever threats are made concerning the consequences arising out of a contempt of court".

2. Nothing in s18 of the Act (or the policy underlying it) operates to limit the application of s65 or the operation of clause 4 of Part 2 of the Dictionary. Section 18 permits a family member to be relieved of the obligation of giving evidence because of a possible likelihood that harm would be caused to the family member or to the relationship between that person and the defendant. However, the section says nothing about the use by the prosecution of a statement already given by the family member. The resolution of this appeal falls to be determined by construing the terms of clause 4 of Part 2 of the Dictionary.

3. Notwithstanding the identified difference between the circumstances of the authorities referred to and the circumstances of the present case, there is no relevant point of distinction. There is no relevant difference, for the purposes of s65, between a refusal to give evidence that is without legal foundation and a refusal to give evidence that is authorised by an order of the Court. Further, in *Mindshare*, Hamilton J specifically accepted the possibility that clause 4(1)(f) had operation where a witness declined to give evidence on the ground of privilege. Whilst what Hamilton J said was only *obiter*, it is correct and should be followed.

4. Accordingly, the magistrate was in error in concluding that L. was not available to give evidence about the matters in her statement and it was that error that led to the rejection of the tender of the statement and ultimately to the dismissal of the charges against N.

BEACH J:

Introduction

1. At approximately 4.00pm on 28 December 2008, Danielle Leckning attended the Pakenham Police Station and reported an alleged assault committed by her de facto husband, the respondent, Damien Nicholls.

2. A statement detailing Ms Leckning's allegations was typed and then signed by Ms Leckning at approximately 5.17pm. The statement set out events said to have occurred shortly after 2.00am on 28 December 2008.

3. After receiving Ms Leckning's complaint, the police arrested the respondent and brought him to the Pakenham Police Station. The informant, Constable Hannah Jade Thompson, then conducted a tape recorded interview with the respondent.

4. Following the interview, the respondent was charged as follows:

(a) making a threat to kill, contrary to s20 of the *Crimes Act* 1958;
(b) intentionally causing injury, contrary to s18 of the *Crimes Act* 1958;
(c) recklessly causing injury, contrary to s18 of the *Crimes Act* 1958; and
(d) unlawful assault, contrary to s22 of the *Summary Offences Act* 1966.

5. The charges came on for hearing before O'Donnell M in the Magistrates' Court at Dandenong on 16 February 2010. During the course of the hearing, Ms Leckning objected to giving evidence pursuant to s18 of the *Evidence Act* 2008.[1] Section 18 provides:

"18. Compellability of spouses and others in criminal proceedings generally
(1) This section applies only in a criminal proceeding.
(2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of an accused may object to being required—
(a) to give evidence; or
(b) to give evidence of a communication between the person and the accused—
as a witness for the prosecution.
(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.
(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.
(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.
(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that—
(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused, if the person gives the evidence; and
(b) the nature and extent of that harm outweighs the desirability of having the evidence given.
(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following—
(a) the nature and gravity of the offence for which the accused is being prosecuted;
(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
(d) the nature of the relationship between the accused and the person;
(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the accused.
(8) If an objection under this section has been determined, the prosecutor may not comment on-
(a) the objection; or
(b) the decision of the court in relation to the objection; or
(c) the failure of the person to give evidence."

6. The Magistrate upheld Ms Leckning's objection. In the course of upholding the objection, her Honour said:

"Well, frankly, if she's making that choice, to continue the relationship with him with two children, she's entitled under the law to make that choice. There's not much I can do. In those circumstances, it's not a flimsy relationship: it's a ten year relationship with two children. ...
Well, I don't think that there is any options I can see other than to grant her that exemption under the *Evidence Act*."

7. The prosecution of the respondent then continued, with the prosecutor making application to tender Ms Leckning's statement pursuant to s65 of the *Evidence Act* 2008.

8. Ultimately, her Honour rejected the tender of Ms Leckning's statement. Her Honour held that Ms Leckning was not a witness who was "not available to give evidence" within the meaning of s65(1) of the *Evidence Act*.

9. Following the rejection of the tender of Ms Leckning's statement, the Magistrate upheld a no case submission and dismissed the charges against the respondent. Subsequently, her Honour ordered the Chief Commissioner of Police to pay the respondent's costs.

10. The Director of Public Prosecutions (on behalf of the informant) now appeals to this Court against the Magistrate's decision. The appeal is brought under s272(1) of the *Criminal Procedure Act* 2009, which provides for an appeal on a question of law only.

The grounds of appeal

11. The grounds of appeal are as follows:

> "1. The learned Magistrate erred in law in holding that the complainant was not an 'unavailable witness' for the purposes of the *Evidence Act* 2008 (Vic).
>
> 2. The learned Magistrate erred in law in refusing to admit the complainant's witness statement under s65 of the *Evidence Act* 2008 (Vic).
>
> 3. The learned Magistrate erred in law in dismissing the charges and discharging the defendant [respondent]."

12. In the event that one of these grounds is successful, the appellant seeks the quashing of the orders made below and remittal to the Magistrates' Court for hearing and determination according to law.

Section 65 of the *Evidence Act*

13. Section 65 of the Evidence Act contains nine sub-sections. In this proceeding, only sub-ss (1) and (2) are relevant. Those sub-sections provide:

> "(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> (2) The hearsay rule[2] does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
> (a) was made under a duty to make that representation or to make representations of that kind; or
> (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
> (c) was made in circumstances that make it highly probable that the representation is reliable; or
> (d) was—
> (i) against the interests of the person who made it at the time it was made; and
> (ii) made in circumstances that make it likely that the representation is reliable.
> Note Section 67 imposes notice requirements relating to this subsection."

The Magistrate's decision

14. The Magistrate rejected the tender of the statement and acceded to the no case submission. Her Honour's reasons were as follows:

> "I have had a look at the *Evidence Act*. Effectively, in relation to this matter, section 18(7) allows me, which I already have done, that:
> If there's a likelihood that harm would or might be caused to the person or the relationship between the person and the accused if the person gives evidence, and the nature and extent of that harm outweighs the desirability of having the evidence given, then I must grant the exemption.
>
> And clearly in relation to this matter Ms Leckning has sought that exemption, and given public policy really requires me to grant it. In relation to section 65, the prosecutor put that given that she is not available to give evidence, her statement should be tendered through that section. I think that that is, although a clever argument, not one that is going to be sustainable. The reality is section 18 is in the legislation for a reason and that reason is to prevent both spouses and partners from being forced or compelled to given (sic) evidence against their husbands or partners. I have been using section 65 to circumvent that public policy consideration, is not an appropriate use for that section. And on a completely simple level the witness is available and sitting in court, and is simply refusing to give evidence.
>
> That is not a situation where she is unavailable because she is overseas, which is where that section would often apply. Public policy is, therefore, on Ms Leckning's side in this matter. In relation to the

> no case submission, the prosecution case at its highest, has evidence of the informant and photos of Ms Leckning. The problem is there is no evidence attached to the photos as to how the injuries occurred. The record of interview, although there are some admissions to grabbing and pushing, effectively denies all of the allegations put to me by the informant and corroborator. No evidence can be now led by the prosecution to support how Ms Leckning sustained injuries to her arms in the photograph. Accordingly, I have been left with the position of no choice, but to grant the no case submission in this matter."

The resolution of this appeal

15. The central question in this appeal concerns the construction of the words "is not available to give evidence about an asserted fact" in s65(1).

16. Clause 4 of Part 2 of the Dictionary[3] provides:

> "**4 Unavailability of persons**
> (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if—
> (a) the person is dead; or
> (b) the person is, for any reason other than the application of section 16 (Competence and compellability—judges and jurors), not competent to give the evidence about the fact; or
> (c) it would be unlawful for the person to give evidence about the fact; or
> (d) a provision of this Act prohibits the evidence being given; or
> (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
> (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.
>
> (2) In all other cases the person is taken to be available to give evidence about the fact."

17. The appellant relies upon paragraph (f) of clause 4(1). It submits that, having secured the attendance of Ms Leckning at trial, all reasonable steps were taken to compel Ms Leckning to give evidence – but without success, because Ms Leckning was exempted from giving evidence pursuant to s18.

18. Whilst there are no cases directly on point, there are a number of decisions in which courts have held that if a witness simply refuses to answer questions, that witness is taken not to be available within the meaning of clause 4(1) by virtue of the operation of paragraph (f).[4] In *Mindshare Communications Limited Taiwan Branch v Orleans Investments Pty Ltd*,[5] Hamilton J accepted a submission that the purpose of (f) "is to deal with the situation where the attendance of the witness has been secured, but it is impossible to obtain the evidence, because, for instance, the witness declines to give it on the ground of privilege or simply refuses to give it, whatever threats are made concerning the consequences arising out of a contempt of court".[6]

19. The respondent submitted that the authorities to which I have just referred are distinguishable. The point of distinction was said to be that in each case, the relevant witness simply refused to give evidence. In the present case, there was said to be a difference between a simple refusal to give evidence and an objection to being required to give evidence being upheld under s18 of the *Evidence Act*.

20. Reliance was placed by the respondent upon the Second Reading Speech in relation to clause 18 of the Evidence Bill. In his Second Reading Speech, the Attorney-General said in respect of clause 18:[7]

> "Clause 18 of the bill makes it clear that members of families of a defendant in a criminal proceeding are competent and compellable witnesses. However, such persons may object to giving evidence as a witness for the prosecution and, in certain circumstances, will not be required to give evidence. In this regard, members of a family include spouses, de facto partners (including same sex partners), parents, natural and adoptive children and children living in the household of a de facto as though they are the children of the defendant. This provision seeks to strike a balance between maintaining and protecting families and facilitating the administration of justice."

21. In my view, nothing in s18 (or the policy underlying it) operates to limit the application of s65 or the operation of clause 4 of Part 2 of the Dictionary. Section 18 permits a family member to be relieved of the obligation of giving evidence because of a possible likelihood that harm would

be caused to the family member or to the relationship between that person and the defendant. However, the section says nothing about the use by the prosecution of a statement already given by the family member. The resolution of this appeal falls to be determined by construing the terms of clause 4 of Part 2 of the Dictionary.

22. Notwithstanding the identified difference[8] between the circumstances of the authorities I have referred to[9] and the circumstances of the present case, in my view, there is no relevant point of distinction. There is no relevant difference, for the purposes of s65, between a refusal to give evidence that is without legal foundation and a refusal to give evidence that is authorised by an order of the Court. Further, in *Mindshare*,[10] Hamilton J specifically accepted the possibility that clause 4(1)(f) had operation where a witness declined to give evidence on the ground of privilege. Whilst what Hamilton J said was only obiter, it is, in my view, correct and should be followed.[11]

23. In further support of her submissions, counsel for the respondent sought to argue that the failure by the Victorian Parliament to enact s19 of the Commonwealth *Evidence Act* and the New South Wales *Evidence Act* supported the construction for which she contended. Section 19 of the Commonwealth and New South Wales Acts limits the application of s18 in those Acts, so that a member of the family of a defendant in criminal proceedings may be compelled by the prosecution to give evidence in certain types of proceedings relating to alleged assaults on children and other forms of domestic violence. However, whilst s65 and clause 4 of Part 2 of the Dictionary fall to be construed in their context, the absence of an equivalent of s19 of the Commonwealth and New South Wales *Evidence Acts* does not alter the construction or operation to be given to s65 and clause 4.

24. The issue of whether a family member whose objection is upheld under s18 of the Act thereby becomes "taken not to be available to give evidence about a fact" could have been put beyond doubt by the insertion of a paragraph in clause 4(1) similar to paragraph (b) – but dealing with a person who is not compellable and objects to giving evidence. However, the omission of such a paragraph does not, in my view, tell against the construction I have given to paragraph (f) based upon the words of the paragraph and the authorities to which I have referred. There are many circumstances covered by (f) which could have been the subject of a distinct paragraph of clause 4(1).

25. It follows that the Magistrate erred in law when she concluded that Ms Leckning was not available to give evidence about the matters in her statement. It was this error that led to the rejection of the tender of the statement, and ultimately to the dismissal of the charges in response to the no case submission.

Other issues

26. In the event that I concluded that the Magistrate erred in concluding that Ms Leckning was not a person who was "not available to give evidence about an asserted fact", both sides sought to advance argument concerning the operation and application of s65(2)(b) and (c). The appellant contended that s65(2)(b) and (c) operate to allow the tender of Ms Leckning's statement. The respondent contended to the contrary.

27. The short answer to both contentions is that the issues raised by s65(2)(b) and (c) raise matters of fact which have not been the subject of any determination below. There is no basis for this Court to embark upon the necessary fact finding inquiry. This Court's function is more limited. Further, there remains an issue between the parties as to whether the notice requirements of s67 of the *Evidence Act* have been complied with. This, again, is a matter to be determined by a court of first instance, after the relevant facts have been ascertained.

28. Additionally, if (after determining the facts) a Court was to conclude that either s65(2)(b) or (c) was satisfied, and s67 was complied with,[12] then, in any event, issues would arise as to the possible exclusion of the statement under either s135 or s137 of the *Evidence Act*.

Conclusion

29. For the reasons given above, the orders made below must be quashed and the matter remitted to the Magistrates' Court for rehearing in accordance with these reasons.[13]

30. During the course of argument, an issue arose as to whether (in the event I concluded that the orders below must be quashed and the matter remitted for re-hearing) the matter should be remitted to the Magistrates' Court as originally constituted. The appellant submitted that the matter should be remitted to a differently constituted court because the Court as originally constituted expressed the view that what the prosecutor was trying to do in using s65 was "clever", and done in an attempt to "circumvent" the policy behind s18. In the end, counsel for the respondent was content, if the matter was to be remitted, for it to be remitted to a differently constituted court. Having regard to the views of the Magistrate expressed when the matter was first heard, I think it desirable for the matter to be remitted to a differently constituted court.

31. I will hear the parties on the precise form of order and any question of costs.

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[1] Section 18 of the *Evidence Act* is the re-enactment of the repealed s400 of the *Crimes Act* 1958, as to which see *R v DJT* [1998] 4 VR 784, 792 and *DPP v Lee* [2009] VSC 576.
[2] My footnote: The hearsay rule is contained in s59(1) of the *Evidence Act*, which provides:
"Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation."
See the definition of "hearsay rule" in Part 1 of the Dictionary.
[3] Which has operation by virtue of s3 of the *Evidence Act*.
[4] See *R v Sneza Suteski* [2002] NSWSC 218; (2002) 128 A Crim R 275, and then on appeal *R v Suteski* [2002] NSWCCA 509; (2002) 56 NSWLR 182; 137 A Crim R 371; *R v Alchin* [2006] ACTSC 53; (2006) 200 FLR 204 and *R v Darmody* [2010] VSCA 41, [24]-[26]; (2010) 25 VR 209.
[5] [2007] NSWSC 976.
[6] *Ibid* at [14]-[18].
[7] Hansard, Legislative Assembly, 26 June 2008, p2634.
[8] See paragraph [19] above.
[9] See paragraph [18] above.
[10] [2007] NSWSC 976.
[11] *Australian Securities Commission v Marlborough Goldmines Limited* [1993] HCA 15; (1993) 177 CLR 485; (1993) 112 ALR 627; (1993) 10 ACSR 230; (1993) 67 ALJR 517, 492; *Siemens Limited v Schenker International (Australia) Pty Ltd* [2004] HCA 11; 216 CLR 418, 467 [154]; 205 ALR 232; 78 ALJR 508.
[12] Or a direction given under s67(4), as to which see s192 of the *Evidence Act*.
[13] For the avoidance of doubt, this will involve Ms Leckning making any objection under s18 of the *Evidence Act* she cares to make again at the re-hearing, based on the circumstances as they then exist.

APPEARANCES: For the appellant DPP: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions. For the respondent Nicholls: Ms JV Gleeson, counsel. Neesham White Gentle, solicitors.
