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SUPREME COURT OF SOUTH AUSTRALIA

R v EASOM

Wells, White & Mohr JJ

14 July 1981 — (1981) 28 SASR 134; (1981) 4 A Crim R 171

CRIMINAL LAW – EVIDENCE – IDENTIFICATION – ADMISSIBILITY OF AND DIRECTIONS TO BE GIVEN TO JURY – DISCRETION OF PROSECUTION AS TO EVIDENCE TO BE PRODUCED AT TRIAL – DUTY OF PROSECUTION TO DISCLOSE INFORMATION TO DEFENCE – DUTY OF PROSECUTION ON COMMITTAL HEARING.

The accused was charged with armed robbery. It was proved that three men entered a dwelling at about 11 pm on the 12th January 1980 and robbed a man and his wife (Mr & Mrs. B) who resided in the house. By March 16 the appellant, Easom, had been arrested and released on bail; one of the conditions of bail being that he report to the police. Mrs B. was told of the bail and reporting condition. One evening she drove to a vantage point in order to see if she could make an identification from the men who attended the police station. She watched from 7:30 to 9 pm but made no identification. That evening the accused reported at 6.10 p.m. The following day she parked about 25 yards from the entrance to the police station. While there she saw "only a few" "two or three" people in the area. After about 15 minutes she caught sight of the accused and identified him to herself. The accused entered the police station and after leaving it he ran across the road in front of Mrs B's Car. No objection was taken at the trial to the admissibility of the evidence of identification.

In the course of investigation into the robbery footprints were found in the grounds of a neighbouring dwelling and photographs and a plaster cast of one of the footprints were taken by the police. The Crown did not produce the photographs or the plaster cast at the trial, or offer to make them available to the defence.

Two of the grounds of appeal were that the evidence of identification should have been excluded and that the Crown concealed evidence relating to the plaster cast and photographs of the footprint and such concealment caused a miscarriage of justice. On the question of identification Wells J said the leading case for this Court is now *Alexander v R* [1981] HCA 17; (1981) 145 CLR 395; (1981) 34 ALR 289; (1981) 55 ALJR 355.

> … "Whenever a case depends wholly or to some degree upon a claim or claims by one or more witnesses that a particular person was present at a time and place, and his presence there at that time is critical in the proof of guilt, it is necessary for a trial judge to give careful consideration to his direction to the jury upon the issue of identification. Where the person identified is well known to the witness, no more than a few words may well suffice. Where however, the conditions in which the person in question was seen presented difficulties to an observer the person was seen for only short time, the circumstances could well have induced heightened emotions in the witness, or there is, in general some other feature in the case that casts a shadow over the witness's mental processes of observation, retention, recollection, or recognition, care must be taken to ensure that the jury is brought to appreciate the dangers of giving too ready an acceptance to evidence of a later identifications …"

In the course of his judgment as to the alleged concealment of evidence by the Crown Wells J. said the whole subject of the duty of the prosecution was examined in the joint judgment of this Court in *In re Van Beelen*. Of the committal stage, the judgment had this to say:

> "Under our method, once a suspect becomes the accused, the second stage of the criminal process is reached and the inquiry takes on a quasi-judicial character. A magistrate then conducts an examination of witnesses for the purpose of determining whether a *prima facie* case has been made out against the accused. This examination provides a safeguard to the accused in order to ensure

> that he cannot be put on trial unless the prosecution has fairly made out a case for him to answer. But it seems to us that the magistrate is concerned only with the hearing of evidence directly relevant to the alleged criminal act and the accused's connection with it. Materials which do not satisfy the tests of relevancy in the sense which we have indicated, or which are calculated to mislead, and which do not, therefore, assist in the presentation of a case proper for the consideration of the magistrate, ought reasonably to be treated as profitless, and rejected. The pursuit of distracting irrelevancies, the probing of miscellaneous suspicions in the hope of discovering something that may bear on the facts in dispute, should not be allowed by the magistrate to confuse the real issue, namely, whether, on the admissible evidence presented at the preliminary examination, the accused should be committed for trial. It seems to us that the prime consideration must be the relevance of the examination of witnesses to the issues raised by the adversary procedure which has become the accepted method of our criminal process. Indeed, it could lead to a miscarriage of justice, contrary to the public interest, if, on committal proceedings, the prosecutor were to tender for examination a witness who would be likely to give testimony that, in the opinion of the prosecutor, genuinely formed, was absurd, dishonest and untruthful, or plainly unreliable. Be that as it may, it appears to us that it is for the prosecution to lead only such supporting evidence as it considers necessary to establish a *prima facie* case."

After discussing leading authorities, including *Richardson v R* and *Adel Muhammed el Dabbah v Attorney-General for Palestine*, the judgment turns to the next stage:

> "We move to the third stage of our criminal process, namely the criminal inquest – the trial of the accused after his committal for trial. It is our opinion that the discretion residing in the Crown Prosecutor as to whether or not a particular witness should be called by him at the trial is no less extensive than that which obtains in relation to the calling of witnesses at a preliminary examination. And it seems to us that the discretion need not necessarily be exercised by counsel prosecuting at the trial, but that it may properly reside in the law officers of the Crown who have the duty of instructing the prosecuting counsel. The opinion of responsible and experienced law officers that a witness ought not properly be called for the Crown because the witness is incapable of giving evidence relevant to the vital facts in issue, or because the witness is likely to mislead the jury, or to deflect the jury from its function of trying the issues raised by a criminal adversary procedure, ought not to be lightly case aside ..."

However, we acknowledge that the discretion which vests in the Crown not to call witnesses for the Crown case at the trial is circumscribed by the following rules:

> 1. Where the Crown calls a witness who did not give evidence at the committal proceedings, the accused should be given reasonable notice of the Crown's intention to call that witness and should be furnished with a proof of the witness's proposed evidence (*R v Greenslade*; *R v Devenish*)
> 2. Where the Crown does not propose to call a witness who gave evidence on the committal proceedings, it should, unless there are strong and satisfactory reasons to the contrary, have the witness available in court so that counsel may have the opportunity of calling him, as his own witness, if he so wishes. (*R v Woodhead*; *R v Cassidy*).
> 3. Where the Crown has in its possession the statement of a person who can give material evidence, but decides not to call him, it must make him available as a witness for the defence, but need not supply the defence with a copy of the statement taken. (*R v Bryant and Dixon*).
> 4. Where the Crown has in its possession a statement of a credible witness who can speak of material facts 'which tend to show the prisoner to be innocent', it must either call that witness or make his statement available to the defence. *Dallison v Caffery* [1965] 1 QB 348; [1964] 2 All ER 610; [1964] 3 WLR 385 per Lord Denning MR)

... it must be observed that the principle enunciated by Lord Denning postulates three attributes of the evidence which is within the power of the witness to give. It must be credible, in the sense, so it seems to us, of having a show of truth, reasonableness and worth; of being capable of belief. It must be material in the sense of being admissible and relevant to the issues, or to the vital facts in issue. And it must to establish the innocence of the prisoner. The Court was unanimous in dismissing the appeal on all grounds.

Selected Cases: *Alexander v R* [1981] HCA 17; (1981) 145 CLR 395; (1981) 34 ALR 289; (1981) 55 ALJR 355; *In re Van Beelen* (1974) 9 SASR 13; *Richardson v R* [1974] HCA 19; (1974) 131 CLR 116; (1974) 3 ALR 115; (1974) 48 ALJR 181; 18 ALT 275; *Adel Muhammed el Dabbah v A-G for Palestine* (1944) AC 156; [1944] 2 All ER 139; *R v Greenslade* (1870) 11 Cox CC 412; *R v Devenish* [1969] VicRp 95; (1969) VR 737; *R v Woodhead* [1847] EngR 1017; (1847) 2 Car & Kir 520; 175 ER 216); *R v Cassidy* [1858] EngR 417; 175 ER 634; (1858) 1 F & F 79); *R v Bryant and Dixon* (1946) 31 Cr App R 146; 110 JP 267; *Dallison v Caffery* (1965) 1 QB 348 at p369; [1964] 2 All ER 610; [1964] 3 WLR 385 and *R v Lucas* (FC) [1973] VicRp 68; (1973) VR 693.