**34/89**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v BROWNE-KERR*

**Crockett, Gray and McDonald JJ**

**6, 7 April, 1 May 1989 — [1990] VicRp 7; [1990] VR 78**

**EVIDENCE – DOCUMENTARY EVIDENCE – PROOF OF DISPUTED HANDWRITING – PROOF BY COMPARISON OF DISPUTED WRITING WITH STANDARD WRITING – STANDARD REQUIRED TO BE PROVED – WHETHER SUCH PROOF ON A *VOIRE DIRE* – WHETHER PROOF ON BALANCE OF PROBABILITIES: *EVIDENCE ACT* 1958, S148.**

**Where in any proceedings it is sought to compare a disputed writing with any other writing, it is necessary that the writing used as a standard be proved (on a *voire dire*) on the balance of probabilities to be the handwriting of the party concerned.**

***Adami v R* [1959] HCA 70; (1959) 108 CLR 605; 33 ALJR 391; *Wendo v R* (1963) 109 CLR 559, applied.**

***R v Ewing* (1983) QB 1039; [1983] 2 All ER 645; and**

***R v Mazzone* (1985) 43 SASR 330, not followed.**

**THE COURT:** *[After setting out the nature of the charges and some of the evidence given in respect of the standard or control documents said to be in the handwriting of the accused, the Court continued]* ... **[7]** The Crown case that the applicant forged each of the fifty seven documents was based on the evidence of the expert witness that, by comparing the two documents Exhibits 'F' and 'G' with the fifty seven documents alleged to have been forged, he was able to conclude that each of those fifty seven documents had been written by the applicant. The two documents Exhibit F and G had no other relevance to the trial. Accordingly, what occurred at the trial with respect to Exhibit G was that, against the objection of counsel for the applicant, that document, which was not otherwise relevant to any issue in the trial, was admitted in evidence as one of the standard or control documents against which the expert witness had compared the handwriting on the documents alleged to have been forged by the applicant.

The reception in evidence of that document (which was not otherwise relevant) for the purpose stated was not permissible at common law – see *Doe d Penny v Newton* (1836) 5 Ad & El 514 (111 ER 260); *Hughes v Rogers* (1841) 8 M & W 123 (151 ER 975); *Doe d Devine v Wilson* (1855) 10 Moo PC 502 at 530 (14 ER 581 at p592); *Doe d Mudd v Suckermore* (1836) 2 Ad & El 703 (111 ER 133), (in which there was a division of opinion between Coleridge J and Patterson J for the exclusion of such evidence and Lord Denman CJ and Williams J for its admission); **[8]** *Adami v R* [1959] HCA 70; (1959) 108 CLR 605 at 616; 33 ALJR 391. *Wigmore on Evidence:* Vol VII (Chadbourn Revision) paras. 1993 and 1994.

On the passing of s27 of the *Common Law Procedure Act* 1854 (17 and 18 Vict c125), evidence of a writing in a civil action was able to be received for the purpose of providing a standard of comparison of handwriting notwithstanding that the document forming the standard was not otherwise relevant to an issue. In 1865 the "Denman's Act" i.e. the *Criminal Procedure Act* 1865 (28 and 29 Vict c18) was enacted. Section 8 of that Act was in its terms practically identical to s27 of the *Common Law Procedure Act*. It provided by s8 that -

> "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses and such writings the evidence of the witnesses respecting the same, may be submitted to the Court and the jury as evidence of the genuineness or otherwise of the writing in dispute."

By s1 of that Act it provided (*inter alia*) that those provisions should "...apply to all Courts of judicature as well criminal as or others and to all persons having by law and by consent of parties, authority to hear receive and examine evidence."

In Victoria legislation in similar terms was enacted in 1860 which was applicable both to civil trials and criminal trials. Section 18 of the *Law of Evidence Consolidated Act* 1860 provided—

> "Comparison of a disputed writing with any writing found to the satisfaction of the Court or person having such authority as aforesaid to be genuine shall be permitted to be made by witnesses and such writings and the evidence of witnesses respecting the same may be submitted **[9]** to the Court or person and the jury or assessors if any as evidence of the genuineness or otherwise of the writing in dispute."

That section was the predecessor of s148 of the *Evidence Act* 1958 which is the contemporary relevant statutory provision relating to the matter of the comparison of handwriting. It provides—

> "Comparison of a disputed writing with any writing proved to the satisfaction of the Court or person having by law or by consent of parties authority to hear receive and examine evidence to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to such Court or person and the jury or assessors (if any) as evidence of the genuineness or otherwise of the writing in dispute."

Accordingly, since 1860, where an issue arises concerning the making of a "disputed writing" in any civil or criminal case, another writing which is not otherwise relevant is able to be received in evidence for the purpose of providing a standard against which the document in dispute may be compared. In *Adami v R* [1959] HCA 70; (1959) 108 CLR 605; 33 ALJR 391, the High Court at p616 in the joint judgment of Dixon CJ, McTiernan, Fullagar, Kitto and Menzies JJ held that under s30 of the South Australian *Evidence Act* 1929-57 a writing not otherwise relevant to any issue could be received in evidence in criminal proceedings in order to constitute a standard against which a document in dispute could be compared. That section provided that the writing to constitute the standard was to be "proved to the satisfaction of the Judge to be genuine". With these words may be compared the provisions of s148 of the *Evidence Act* 1958 which provide that the writing to constitute the **[10]** standard is to be proved to the satisfaction of "the Court or person having by law or by consent of parties authority to hear receive and examine evidence". In our opinion the difference between the terminology of s8 of the *Criminal Procedure Act* 1865 and s30 of the *Evidence Act* of South Australia on the one hand and the provisions of s148 of the *Evidence Act* of this state on the other hand is not material. Nor was it contended otherwise by either party to this application.

Accordingly, where in any proceedings before a Court in this State, whether it be sitting in its civil or criminal jurisdiction, it is sought to compare a disputed writing with any other writing-

> "It is necessary that the writing so to be used as a standard shall be properly proved to the satisfaction of the Judge to be the handwriting of the party concerned" – *Adami v R* (*supra*) at p616-7.

The disputed writings in this case were the documents alleged to be forged by the applicant and being the subject of each of the fifty seven counts – see *R v Nathan* (1862) 1 W & W 317 (FC). Part of the standard against which the documents in dispute were to be compared and, in the event, were compared by the expert witness was Exhibit G. It follows that, before the evidence of the expert could be given as to the comparison made by him between Exhibit G and the documents alleged to have been forged by the applicant, and before Exhibit G could be received in evidence as the basis of that comparison, it was necessary for the trial Judge to be satisfied that Exhibit G was genuine; that is to say that it was in the **[11]** handwriting of the applicant. See also *R v Angeli* [1979] 1 WLR 226 (CA); *R v Ewing* [1983] QB 1039; [1983] 2 All ER 645 and *R v Mazzone* (1985) 43 SASR 330 (CCA).

It is clear from the transcript of the proceedings at the trial that, notwithstanding the submissions made by counsel for the applicant, the learned trial Judge did not perform this exercise before Exhibit G was admitted into evidence or before the expert witness gave his opinion evidence as to the authorship of the documents in dispute by comparing them, wholly or in part, against Exhibit G.

In the course of his submissions, the applicant's counsel contended that the standard of satisfaction that it was necessary for the trial Judge to reach as to whether or not Exhibit G was in the handwriting of the applicant, was satisfaction beyond reasonable doubt. He relied on the

Court of Appeal decision in *R v Ewing*, *supra*. In that case the Court of Appeal Criminal Division comprising O'Connor LJ, Parker and Staughton JJ refused to follow an earlier decision of that Court constituted by Bridge LJ, Thompson and Eastham JJ in *R v Angeli*, *supra*. In that latter case it was held that in both civil and criminal trials the degree of proof necessary to be established in order that the "standard" document be admitted was the civil standard of proof; that is, it was necessary for the Judge to be satisfied on the balance of probabilities.

In *R v Ewing* the Court held that in applying s8 of the *Criminal Procedure Act* 1865 the standard of proof necessary to satisfy the Judge that the "standard" document was genuine was in civil cases the **[12]** civil standard of proof and in criminal cases the criminal standard. In delivering the judgment of the Court, O'Connor LJ at p1047 stated -

> "It follows that when the section is applied in civil cases the civil standard of proof is used and when it is applied in criminal cases the criminal standard should be used. Were it otherwise, the situation created would be unacceptable, where conviction depends on proof that disputed handwriting is that of the accused person and where that proof depends on comparison of the disputed writing with samples alleged to be genuine writings of the accused; we cannot see how this case can be said to be proved beyond reasonable doubt, if the Crown only satisfies the Judge, on the balance of probabilities that the allegedly genuine sample were in fact genuine. The jury may be satisfied beyond a reasonable doubt that the crucial handwriting is in the same hand as the alleged genuine writing but if there is a reasonable doubt about the genuineness of such writings, then that must remain a reasonable doubt about the fact that the disputed writing was that of the accused and the case is not proved."

*R v Ewing* was followed on that point by the South Australian Court of Criminal Appeal in *R v Mazzone* (1985) 43 SASR 330. With great respect to the members of the Court in *R v Ewing* we are of the view that the Court failed to distinguish between the issue of fact relevant to the admissibility of the evidence concerned and the probative value of that evidence necessary to be considered by the jury when determining the ultimate issue of fact in the case. That distinction was drawn by the High Court in *Wendo v R* [1963] HCA 19; (1963) 109 CLR 559; [1964] ALR 292; 37 ALJR 77, a decision which, of course, binds this Court. In that case the Court considered whether or not it was necessary for a trial Judge, who was required to determine on a *voire dire* whether a confessional statement was made voluntarily, to be satisfied of that fact beyond **[13]** reasonable doubt before admitting the statement as evidence. At p572 in the joint judgment of Taylor and Owen JJ it was said - *[After setting out this passage, the Court continued]* ... **[14]** The learned trial Judge in our view was correct in so far as he indicated, as previously remarked, that it was ultimately for the jury to say whether it was satisfied that the "Business Questionnaire" (Exhibit G) was in the writing of the applicant so as to "validate" the expert's opinion. This was emphasised by the trial Judge in answering a question asked by the jury after it had retired to consider its verdict. The foreman asked his Honour - "What we would like to know is – what qualifies a document to be a "control document". To this question, the Judge replied:-

> "It has to be proved to be in the handwriting of the accused man. It must be proved beyond reasonable doubt to be in hand-writing of the accused man only then can it be a control document."

However, it is our view that the trial Judge was not correct in categorising Exhibit 'G' as an "ordinary item" of proof as he did at the outset of the trial when objection was taken to the admissibility of the document. This is because, as we have endeavoured to explain, the document was only admissible in evidence by reason of the application of s148 of the *Evidence Act* 1958. That being the case, it was necessary before that document was admitted in evidence, and before the expert witness could **[15]** rely on it as a standard against which to compare the document in dispute, for the trial judge to be satisfied that it was in the writing of the applicant.

Furthermore, as we have just said, the standard of satisfaction was a standard, not beyond reasonable doubt but, rather, on the balance of probabilities. On the Judge's being so satisfied, but not until he was, the document was able to be admitted in evidence and relied upon as a standard. It was then that the standard of proof beyond reasonable doubt had to be applied by the jury.

*[After further consideration of the trial judge's ruling, the Court granted the application for leave to appeal, quashed the verdicts and sentences and directed a retrial.]*

Solicitor for the appellant: JT Stevens.
Solicitor for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.