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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BELJAJEV

Young CJ, Gillard and Murphy JJ

31 May 1975

EVIDENCE – USE OF TAPE RECORDING – ADMISSIBILITY OF EVIDENCE – PRIOR INCONSISTENT STATEMENTS OF A WITNESS AND AN ACCUSED DISCUSSED – PROOF THEREOF – WHETHER SECTION 35 APPLICABLE: *EVIDENCE ACT* 1958, S35.

When the tape was played over the applicant admitted that what was heard was part of the conversation between him and Hornbuckle on the morning of 14th September and that he had in fact made the relevant prior inconsistent statement. The statements played from the tape with the applicant's admission of their correctness were properly received into evidence in accordance with the ordinary rules of cross-examination without s35 having to be called in aid. No independent proof was required.
***R v Umanski* [1961] VicRp 38; (1961) VR 242, considered.**

THE COURT: The Court has before it an application for leave to appeal by Boris Beljajev who was convicted in the County Court at Melbourne in February of this year on seven counts of receiving contrary to s330 of the *Crimes Act* 1958. ... An interview was recorded in writing and the applicant was said to have read over the record and to have agreed that it was correct. He declined to sign it but he read it over aloud and a tape recording was made of the reading. The tape was played over to the jury in the course of the trial. During the interview the applicant said, after being shown the jewellery, that he had bought it all from one John Molovic.

During the course of his cross-examination by the learned Prosecutor the applicant said that he did not know anything about John Molovic and did not know that name at all. It was put to him that after the interviews which had been recorded, he had had a conversation with Detectives Hornbuckle and Halloran in which the recovery of a fur coat was discussed. The following questions and answers were recorded as part of the cross-examination of the applicant:

> "And did George tell you where he got the fur coat from?---Yes, he told me he got it from the same man as he got the suitcases from.
>
> Yes. And did he tell you how long he'd had the suitcases and the coat?---I think - I don't - I can't remember. I can't remember. You can't remember whether he told you how long? ---No.
>
> What about John Mulavich or Mulvich? Where did he come into it?---I don't know anything about John Mulvich.
>
> You don't know the name at all?---No."

That cross-examination took place on the afternoon of Wednesday, 11th February 1976. The Prosecutor continued his cross-examination the following morning. During the course of that cross-examination the Prosecutor put to the applicant a number of questions designed no doubt to comply with the requirements of the second sentence of s35 of the *Evidence Act* 1958. In other words, the Prosecutor put questions to the applicant designed to draw to his attention a prior statement which the Crown suggested was inconsistent with the testimony he had given that he did not know the name Molovic. His Honour then intervened to make sure that the witness understood what was being put to him and in answer to His Honour the applicant said: "I didn't mention the name Malovich". He also said in answer to further questions put by the Crown Prosecutor concerning this same conversation that he was sure he had not talked to Mr Hornbuckle about a Falcon car.

Later, in the absence of the jury, the Prosecutor informed the learned Judge that the conversation between Mr Hornbuckle and the applicant had been recorded on tape and that he,

the Prosecutor, desired to have the relevant portions of the tape introduced into evidence pursuant to s35 of the *Evidence Act*. Counsel for the applicant then asked for the relevant parts of the tape to be played in Court and that thereafter he be given the opportunity to confer with his client to obtain instructions. His Honour acceded to both these requests. The relevant parts of the tape were then played.

The jury returned to Court and it is common ground that the conversation on a tape was played to the Court. In response to further questions the applicant said that he had not really remembered the conversation, that he had got the name Molovic from the statement he had read and that he had told Hornbuckle a lie when he said that the man's name was Molovic and that he used to drive an old Falcon. He said that he thought he had better tell the police what was in the statement because he wanted to get it (the interview) over with. The tape itself was not marked as an exhibit nor was it otherwise recorded that its contents had been received in evidence.

Apart from authority, it is difficult to see why the answers alleged to have been given by the applicant to Hornbuckle were not relative to the subject matter of the prosecution. In the second recorded interview with the police officers the applicant had said that he had bought the jewellery from John Molovic knowing that it was stolen and had sold it all to Tauser but under cross-examination he had denied saying so and to support his denial had alleged that he knew no one by the name of Molovic. It was, therefore, an issue at the trial whether he had obtained the jewellery from Molovic and any question as to his relationship with a man named Molovic seems clearly to be relative to the subject matter of the prosecution.

But Mr Kelly submitted that in *R v Umanski* [1961] VicRp 38; (1961) VR 242 this Court decided that evidence which went only to credit could not be received pursuant to s35 of the *Evidence Act* and was only admissible under the common law if it tended to show that the witness against whom it was tendered was biased or partial in relation to the parties or the cause. In *R v Umanski* the applicant had been convicted of a charge of incest with his stepdaughter. One of the grounds of his application for leave to appeal was that the trial judge wrongly excluded certain evidence. The trial judge ruled that the evidence sought to be led of a prior inconsistent statement would be inadmissible on the ground that the cross-examination of the wife merely went to her credit and that counsel in such a case was bound by her answers. His Honour said that s35 was inapplicable because the former statement which the wife did not admit making was not "relative to the subject matter" of the prosecution. The Full Court did not in terms deal with this ruling although they may be said to have accepted it for they proceeded (at p244) to consider whether s35 abrogated the common law rule under which evidence tending to show bias or partiality on the part of a witness might be received. The Court concluded that the section did not abrogate the common law rule and that the question for decision was whether the evidence would have tended to show bias or partiality. In the result the Court decided that it would not.

The decision in *R v Umanski* is thus limited authority upon the meaning of the phrase "relative to the subject matter" in s35 but, in our opinion, it does not require us to conclude here that the questions and answers played from the tape were inadmissible. In *Umanski's case* the witness in question was not the accused and the statement sought to be given in evidence related not to the subject matter of the prosecution but, as the reasons of the Full Court show, to the partiality or bias of the witness. In the present case the evidence of the applicant's statements to Hornbuckle was directly relevant to the subject matter of the prosecution. The reasons of the Court in *R v Umanski* (*supra*) should not, in our opinion, be treated as showing that evidence which goes to credit only cannot be received pursuant to s35. Indeed statements proved pursuant to s35 can generally only be used to impeach or support the credit of the witness by establishing that the witness has told a story different from that which he had given in the witness box. The mere proof of a prior statement of a witness other than a party to the litigation is no proof of the facts set out in the prior statement.

There is, however, a further ground upon which the argument for the applicant must fail. Since the applicant admitted that what was heard when the tape was played in Court was part of a conversation between him and Hornbuckle and since it was relevant to his relationship with Molovic, the case was not one involving s35 of the *Evidence Act* at all. (Cf. *R v Titijewski* [1970] VicRp 48; (1970) VR 371 per Winneke CJ at p375 and per Smith, J at p377) When the tape was played over the applicant admitted that what was heard was part of the conversation between

him and Hornbuckle on the morning of 14th September and that he had in fact made the relevant prior inconsistent statement. The statements played from the tape with the applicant's admission of their correctness were properly received into evidence in accordance with the ordinary rules of cross-examination without s35 having to be called in aid. No independent proof was required. But since the applicant's prior statements were relevant to an issue at the trial, they might have been given in evidence without recourse to s35: see *A-G v Hitchcock* [1847] EngR 616; (1847) 1 Exch 91; 154 ER 38; (1847) 16 LJEx 259 in which Pollock CB said (at p99):

> "... the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it have such a connexion with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him."

In the Australian edition of *Cross on Evidence* it is said (at p11): "When a court permits a tape-recording to be played over, it is acting on real evidence if it treats the intonation of the words as relevant." And it is established in a number of authorities that material recorded on tapes may be received in evidence provided its accuracy is proved: *R v Travers* (1958) 58 SR (NSW) 85; *R v Maqsud Ali* (1966) 1 QB 688; [1965] 2 All ER 464; *R v Nilson* [1968] VicRp 26; (1968) VR 238; *R v Robson* [1972] 2 All ER 699; [1972] Crim LR 316; [1972] 1 WLR 651; 56 Cr App R 450. It is, of course, unusual for the Crown to use a statement of the accused for the first time after he has given evidence and whilst he is being cross-examined. (see *R v Rice* (1963) 1 QB 857 at p867; [1963] 1 All ER 832; (1963) 47 Cr App R 79; [1963] 2 WLR 585). But there were clearly adequate reasons for the Crown's doing so in this case. It was not until the applicant gave evidence that the Crown knew that he would say that he did not know anyone by the name of Molovic and although, as we have said, the evidence played from the tape was clearly admissible, it was no doubt initially excluded from the Crown case on the ground that the particular conversation between the applicant and Hornbuckle was so largely concerned with other matters that its introduction into evidence would be unfairly prejudicial to the applicant.

There was no objection by the applicant's counsel to the course which the learned trial judge took and it has been held in the English Court of Criminal Appeal that it will not entertain an appeal based upon the wrongful reception of evidence if no objection to it was taken at the trial: see *R v Sanders* (1919) 1 KB 550 and cf; *R v O'Brien* [1920] NSWStRp 52; (1920) 20 SR (NSW) 486 at p493; 37 WN (NSW) 154 and *Stirland v DPP* [1944] AC 315 at p327; [1944] 2 All ER 13; (1944) 30 Cr App R 40. In the last mentioned case Viscount Simon LC pointed out that the failure of counsel to object to inadmissible evidence will not always be fatal to the success of an appeal based on the reception of that evidence. In view of our conclusion that the evidence was admissible, however, it is unnecessary for us to consider this aspect of the matter further.

For these reasons the application for leave to appeal must be refused.
