

CITATION: *R v Corp & Hewitt* [2011] NTMC 003

PARTIES: R
V
Joseph Patrick Hewitt, Wade Hewitt and
Cameron Corp

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Northern Territory

FILE NO(s): 21017610, 21017609, and 21017608

DELIVERED ON: 28 January 2011

DELIVERED AT: Darwin

HEARING DATE(s): 16, 17, 18 November 2010

JUDGMENT OF: Morris SM

CATCHWORDS:

CRIMINAL LAW -- EVIDENCE --DISCRETION TO EXCLUDE -- FAIRNESS --
RECALL OF CROWN WITNESS TO RE-ESTABLISH CREDIT

REPRESENTATION:

Counsel:

Informant: Ms Armitage
Defendants: Mr Elliott
Mr Johnson
Mr Berkley

Solicitors:

Informant: ODPP
Defendants:

Judgment category classification: B
Judgment ID number: [2011] NTMC 003
Number of paragraphs: 19

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21017610, 21017609, 21017608

BETWEEN:

R
Informant

AND:

**Joseph Patrick Hewitt, Wade Hewitt and
Cameron Corp**
Defendants

REASONS FOR DECISION

(Delivered 28 January 2011)

Ms MORRIS SM:

- 1) Mrs Susan Anne Melhuish gave evidence in this hearing on 17 November 2010. She was called to give evidence by Counsel for the Crown and recounted events relating to the criminal charges to which the three defendants have pleaded not guilty.
- 2) Mrs Melhuish gave her evidence in chief, was cross examined and was released from the court.
- 3) The next day Counsel for the Crown applied to the court to recall Mrs Melhuish in order to re-examine her on matters raised in cross examination. During her cross examination, Mrs Melhuish was asked questions about a phone call that she made to police at the time of the alleged offences. This call was made on the 000 emergency number.

- 4) The application to recall Mrs Melhuish is in order to play a recording of the 000 call and for her to identify her voice and confirm the content of the conversation.
- 5) During her cross examination Mrs Melhuish's credit was attacked in relation to her recall of the events in question, her own actions during the events, as well as in her recollection of what she told police during the 000 call. Defence counsel put to her that her evidence given in court about that call was not consistent with a version recorded in a document (not tendered in evidence) that had been provided to them by the Crown on the morning of the evidence. That document was taken from the police computer system (Promis) and I am told was the 000 call taker's summary or notes of the conversation. It did not purport to be a transcript of the call.
- 6) It was also put to Mrs Melhuish that what she told the police in the 000 call was incorrect. "I suggest to you that what you told the police was really something that you had made up, that there wasn't this period that anguish that was in your mind, this wasn't this urgency, and that you made all this information up?"¹
- 7) Ms Armitage for the Crown, in her application to recall Mrs Melhuish submitted that "the content of the conversation is different to that which was put to her in cross examination. And it appears that though – I'm not suggesting through any fault of my learned friends, but what was put to her was an inaccurate account of the conversation. And it's relevant to this court given those circumstances and the way that has been used to attack Ms Melhuish's credit, to have that matter rectified with an accurate version of that conversation before the court in

¹ Transcript of hearing, p 192

evidence. And also for the purpose of re-establishing credit which is a proper purpose of re-examination”².

- 8) The application to recall Mrs Melhuish is opposed by all three Defendants.
- 9) The Defendants submit that to allow Mrs Melhuish to be recalled would be unfair and thus I should exercise my discretion and disallow the recall of the witness and the evidence.
- 10) The Defendants submitted they had been provided with a police computer document, relied on its contents in order to cross examine and made ‘tactical, forensic and strategic decisions in good faith based upon it’³. Mr Elliott submitted that “If the Crown has not check whether it’s accurate, the Crown should not be able to give it to us, we proceed on the basis of it and then say, ‘By the way, we want to show that what we gave you and you accepted in good faith is wrong’”⁴. Mr Johnson submitted “we accept in good faith the accuracy of the document without a real opportunity, both practically and realistically, to have done anything to check that document.”⁵
- 11) Mr Berkley submitted “the question you have to ask yourself is whether it is fair to introduce it against the accused because it has got a dual purpose. One is to be either as a prior consistent statement and secondly as to introduce it against the accused at this stage, and that, in my submission, is the real crux of the matter....you should ask yourself whether it is fair to introduce it against the accused in those circumstances and/or as a self-serving statement, given that my friend wants to bolster credibility with it, in circumstances in which there was

² Ibid; p 322

³ Ibid; p 323

⁴ Ibid; p 324

⁵ Ibid; p 329

absolutely no prohibition on the defence from conducting the cross-examination in that way”⁶

- 12) In reply Ms Armitage submitted that the contents of the 000 call had not been led in evidence by the Crown, but were raised in cross examination for the purposes of attacking her credit. What she was seeking to do was to re-establish credit. The contents of the 000 call would not establish the truth of the contents, but would go to the credit of Mrs Melhuish in relation to the evidence she gave.
- 13) A trial judge has discretion to allow the recall of a witness.⁷ In these circumstances the Crown has not closed its case and it cannot be said that the recall of the witness would be ‘splitting’ the case of the Crown.
- 14) Where credit has been the subject of cross-examination, re-examination of the witness can be such to restore credit.⁸ The evidence being sought to be tendered does not go to ‘bolster’ the credit of the witness, but to restore it.
- 15) In *Goldsmith v Sandilands* (2002) 190 ALR 370 McHugh J stated:

“Another exception to the finality rule is that sometimes a party may be permitted to tender evidence that a witness has made an earlier statement that is consistent with the witness' evidence. If the evidence of a witness concerning a material fact is attacked on the ground that the witness has recently invented or reconstructed the evidence, the party calling the witness may tender evidence proving a previous consistent statement of the witness (*The Nominal Defendant v Clements* (1960) 104 CLR 476).”

⁶ Ibid p 330

⁷ *MWJ v The Queen* (2005) 80 ALJR 329

⁸ *Wojcic v Incorporated Nominal Defendant* [1969] VR 323

- 16) Defence have submitted that it would be 'unfair' to allow the witness to be recalled, given their reliance on the document provided them being the notes from Promis of the conversation between the operator and Mrs Melhuish. There is no evidence before me that this document was held out to be anything other than it is, that is, the notes the operator typed into the system. It did not purport to be a transcript. It was open to the defendants to call for or subpoena the recording (and apply for an adjournment if necessary to do so).
- 17) The evidence intended to be called was not unlawfully or improperly obtained. It would not, in my view, be unfair to admit to the evidence merely because the Defendants used other sources as a basis to cross examine the witness and question her credit. They did so at their own peril.
- 18) I do not consider that the principle stated by Coldrey J in *R V Heaney* [1998] 4 VR 636 at 644, being "The unfairness discretion will also come into play where some impropriety by law enforcement officers or their agent has eroded the procedural rights of the accused, occasioning some forensic disadvantage" goes so far as to cover the circumstances of this case. There has been no actual, intended or accidental impropriety on behalf of officers or the Prosecuting counsel. There has been no effect upon the reliability of the material sought to be tendered.
- 19) I allow the recall of Mrs Melhuish for the purposes proposed by the Crown.

Dated this 28 day of January 2011

Elizabeth Morris
STIPENDIARY MAGISTRATE