Bullfry and the 'mess of puttage'

'Victoria is another country, they do things differently there' – Jack Bullfry QC after LP Hartley and 'The Go-Between'.
The scene: a cold morning before a tough CCA

Furthermore, and finally, there was, your Honours, a complete failure of the 'puttage' – to put it bluntly, there was very serious 'non-puttage'.[1]

The what, Mr Bullfry? Is that a golfing term; or are you channelling Esau?

The *puttage*, your Honours – not pottage – and nothing to do with golfing greens.

I am afraid that 'puttage' is a neologism that I have not come across before in the superior courts of New South Wales, Mr Bullfry – and I, for my own part, would not encourage its use.

If I may quote from a reputable reference your Honour – 'although the expression is colloquial, its useful brevity makes it acceptable in court'. It refers to what your Honours would probably prefer to be called the 'rule in *Browne v Dunn*' – in Victoria the notion of summing up the opposing case to controvert the witness has been described for a very long time as 'the puttage'. In other words, the complaint is that the opposing advocate did not 'put' or 'suggest' various matters to the witness to get his or her denial as a matter of procedural fairness.

But Mr Bullfry, surely Lord Goddard LCJ made it clear long ago that a question in terms of 'puttage' as you (and, as it seems, our Victorian brethren) so inelegantly express it, is inadmissible as to form. In *R v Bacon*[2] he says this about a witness confronted by 'the puttage':

> If the witness were a prudent person, he would say, with the highest degree of politeness: 'What you suggest is no business of mine. I am not here to make suggestions at all. I am here only to answer relevant questions. What the conclusions to be drawn from my answers are is not for me, and as for suggestions, I venture to leave those to others …' *It is right to remember in all such cases that the witness in the box is an amateur and the counsel who is asking the questions is, as a rule, a professional conductor of argument, and it is not right that the wits of one should be pitted against the wits of the other in the field of suggestions and controversy.*

And as Campbell JA has noted, '*Browne v Dunn* is a case more often talked about than actually read'.[3]

Well that may be because it is an extremely difficult case to find – it is in 1893 6 R 67 – a novice might think it is contained in that distinguished series of Scottish Session Cases reported by *Rettie* but as Winston Churchill once famously remarked, when you look at the volume and the date, they do not coincide – *Browne v Dunn* is obscurely reported in a short-lived series called simply, *The Reports*. And indeed Hayne J (a very distinguished Victorian) made the very point in *Axford v The Queen*[4] during argument for special leave that Lord Goddard made in *Bacon*. His Honour said:

> But on the view of the rule in *Browne v Dunn* which you [the applicant] advocate, it leads to prosecutors engaging in that mess of *puttage* which is sometimes seen, 'I put it to you that you intended to kill her', answer, 'No'; 'I put it to you that', et cetera, answer, 'No'; the jury, the accused, nobody is better informed. This accused knew the issue was, did he intend to kill or, as he had it, there was a dreadful accident in which her throat was cut.

And section 42 of the Act specifically permits counsel to put a 'leading question' to a witness in cross-examination. Now, 'leading question' is, perplexingly, defined to include a question 'which assumes the existence of a fact the existence of which is in dispute … and as to the existence of which the witness has not given evidence before the question is asked'.

But Mr Bullfry, is that right? On that basis it would be possible to ask an accused: 'when did you stop beating your wife?'

Well, your Honours, the whole of the law in this area is discussed by Steytler J in *Stack v State of Western Australia*[5] where his Honour concludes that there was always a power to disallow any leading question in cross-examination if as a matter of fairness the presiding judge so decided. And here we submit matters fundamentally went awry because the Crown case was not 'put' specifically to the accused.

But, Mr Bullfry, it was quite clear what the Crown case was. Your client, perhaps improbably, claimed to have misdirected the chainsaw while 'trimming' the garden hedge, at a time when his wife was nearby, hanging out some washing. Why he was using a chainsaw in the first place to attack rose bushes is a matter of speculation about which the jury was entitled to take its own view. And you will recall Sir James Fitzjames Stephen's infamous and cynical dictum that once you know parties are married, you remove any need to prove a motive. Here, in addition, he had told the widow who lived next door that he expected to be able to 'make her an offer she could not refuse' within the next fortnight. Add that to the insurance recently taken out over the deceased's life, and the attempt to claim it was all an unfortunate accident begins to take on a different forensic complexion.

Well, if your Honours are against me on the primary point, I had better move to the sentencing. As to that, we submit that not enough weight, (if any at all) was given to the testimony which referred to his unhappy domestic situation, and the ridicule which his gardening efforts customarily attracted.

I am afraid captious uxorial references to a continuing gardening failure do not justify those actions implicit in the jury's finding, Mr Bullfry. The appeal is dismissed, and the sentence is confirmed.

Endnotes

1. In Victoria, the argument is usually put in terms of non-puttage – see *Buchwald v The Queen* [2011] VSCA 445 per Hansen JA passim.
2. (1925) 18 Criminal Appeal Reports 174, 178 – 179.
3. *Khamis v Regina* [2010] NSWCCA 179 at [2] – [3].
4. [2000] HCA Trans 171 seeking leave to appeal from the decision of the Western Australia Court of Criminal Appeal at [1998] WASCA 100.
5. [2004] WASCA 300 at [76] – [105]. And see per Young J in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 17 – 18.