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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 1994-012-217294

REGINA

v

DAVID CULLEN BAIN

Hearing: 16 February 2009

Counsel: K Raftery, C L Mander and R P Bates for Crown
H A Cull QC and P A Morten for Defence

Judgment: 4 March 2009

JUDGMENT OF PANCKHURST J
RE S22 HEARSAY NOTICES

Introduction

[1] At the retrial, both the Crown and the defence seek to call and rely upon hearsay evidence. Much of it relates to what various witnesses were told by members of the Bain family, particularly in the period immediately before they were killed.

[2] In these circumstances, counsel on both sides have accepted the view that a significant amount of hearsay evidence must be placed before the jury. I consider this approach is appropriate, and responsible, in the particular circumstances of this case.

[3] I shall shortly consider the hearsay notices relating to a handful of Crown witnesses and one defence witness. The other Crown witnesses who are the subject of s22 notices, were not the subject of argument because I understand it to be accepted that their evidence should be received. The evidence of Detective Ward is an exception. I anticipate a similar position will obtain in relation to the great majority of the defence witnesses in relation to whom notice has been given. However, this observation requires some qualification. I shall return to that issue shortly.

[4] I am concerned to ensure that no witnesses have fallen through the cracks. Should that be the case, counsel may of course raise the matter with me. The Crown has filed three s22 notices, dated 29 August and 9 October 2008 and 12 February 2009. These notices divide the witnesses into three groups:

(a) those who will give evidence at trial of hearsay statements (typically made by one of the victims), which statements are said to satisfy the reliability test in s18 of the Act,

(b) those witnesses who introduce hearsay statements contained in business records said to be admissible pursuant to s19 of the Act, and

(c) hearsay statements of deceased witnesses contained in statements, or affidavits, prepared for the purposes of this proceeding.

[5] The defence has filed two notices dated 23 November 2008 and 12 February 2009.

[6] As best as I can calculate the total number of witnesses affected by s22 notices is as follows:

	(a) Section 18 witnesses	(b) Section 19 witnesses	(c) Deceased witnesses
Crown	21	12	6
Defence	20 (21)	3	2

However, the defence figures require some further comment.

[7] Six s18 witnesses are listed in the November notice and a further 14 in the February notice. However, the narrative contained in the second notice refers to an extra person (D Pokroy), whose name is not in the earlier witness list. Also, the second person in that list (A Hunter) does not appear in the narrative part of the document. It follows, I think, that the correct total is 21 s18 witnesses. The notices list four witnesses in the s19 grouping. Technically, I think this is correct, but since one of these witnesses (Glenda Burt) is deceased I have placed her in the third category.

The relevant principles

[8] Sections 18, 19 and 22 of the Evidence Act 2006 are of central relevance to these applications. However, Ms Cull QC also relied upon s184 of the Summary Proceedings Act 1957 which defines when a deposition or written statement admitted as evidence at a preliminary hearing may be read at trial, despite the unavailability of the witness to appear in person. The section stipulates two requirements, that the deposition or statement was admitted at the preliminary hearing and that the witness is unavailable to attend trial, but otherwise the discretion to allow evidence to be read at trial is unfettered.

[9] Many of the present witnesses did not provide evidence for the purposes of the preliminary hearing of this case in 1994. Some did, but as often as not their evidence is no longer in the exact terms it was in 1994.

[10] These points aside, the first question is whether s184 has been rendered redundant since the passing of the Evidence Act. Section 5(1) of the new Act provides that if there is inconsistency between its provisions and those of another enactment, the other enactment prevails (unless the Evidence Act provides otherwise). However, I doubt this is a situation of inconsistency. Rather these I see these as related provisions. And, s184 remains available to be invoked where the two preconditions for admissibility are met. But, as the present case probably demonstrates, resort to s18 may prove to be a more common and popular route.

[11] Counsel also relied on *R v L* [1994] 2 NZLR 54 (CA). This case concerned whether the written statement of a rape complainant should be admitted pursuant to s184 at trial, the complainant having died subsequent to the preliminary hearing. She had not been cross-examined at that hearing. Richardson J, in delivering the decision of the Court, isolated several principles relevant to the exercise of the s184 discretion. The discussion contained a focus upon the absence of the opportunity for cross-examination of the complainant and how this should impact in relation to the discretionary evaluation.

[12] To my mind five principles may be taken from *R v L*:

1. The exercise of a discretion of this nature involves the need to strike a balance between the interests of the State and the public in enabling prosecution cases to be properly presented on the one hand, and the fundamental requirement that an accused receives a fair trial on the other.

2. The opportunity to cross-examine witnesses is ordinarily a basic requirement of a fair trial. Section 25(f) of the New Zealand Bill of Rights Act 1990 recognises cross-examination as one of the minimum standards of criminal procedure.

3. That said, the entitlement to cross-examine witnesses is not an immutable right, otherwise statutory provisions of the present

kind would be stultified: *R v Gera* [1978] 2 NZLR 500 (CA) at 504.

4. In exercising the discretion some weight may appropriately be given to the place and value of a judicial direction requiring care to be taken before acting upon evidence untested by cross-examination, but the ultimate test is whether in all the relevant circumstances admission of the hearsay evidence would so tilt the balance as to imperil the right to a fair trial.

5. Ordinarily the quality of the evidence will be all-important in determining whether it may be safely admitted. In *R v L* the Court said at 63:

> If the testimony appears to be inherently reliable and there is nothing in any other evidence or in the surrounding circumstances casting any doubt on its trustworthiness the Court may properly conclude on that material that cross-examination would not have made any relevant difference.

R v L, of course, involved a complainant's evidence of rape, which was the crucial evidence of the relevant crime. I think the quotation for *R v L* must be read with this in mind.

[13] While these principles remain instructive, the admissibility of hearsay statements under the new Act is governed by ss 16 - 22. Assuming that the hearsay statement is relevant, and the maker of that statement is unavailable, the focus in determining admissibility is the reliability of the statement. Hence, the new provisions reflect an approach which follows the path established in such cases as *R v Baker* [1989] 1 NZLR 738 (CA), *R v Manase* [2001] 2 NZLR 197 (CA) and *R v Harmer* [2003] 3 NZLR 575 (CA).

[14] Section 18(1)(a) contains the general admissibility principle, namely whether "the circumstances relating to the statement provide reasonable assurance that the statement is reliable". Section 16(1) provides that:

> **circumstances**, in relation to a statement by a person who is not a witness, include –
> (a) the nature of the statement; and
> (b) the contents of the statement; and
> (c) the circumstances that relate to the making of the statement; and
> (d) any circumstances that relate to the veracity of the person; and
> (e) any circumstances that relate to the accuracy of the observation of the person

Importantly, it is the veracity and accuracy of the maker of the statement which is relevant (not that of the witness who reports the hearsay statement).

[15] To my mind reliability also underpins the admissibility of hearsay statements contained in business records pursuant to s19. Although neither s19 itself, nor the relevant definitions of "business" and "business record" in s16(1), expressly refer to reliability, the relevant requirements: personal knowledge, a duty to record or the existence of an ongoing record and a business context, cumulatively provide the requisite reasonable assurance of reliability.

[16] Although in deference to Ms Cull's submissions I have considered s184, the fact is that both sides rely upon the Evidence Act in seeking to introduce evidence of hearsay statements. It does not necessarily follow that the principles developed in relation to the exercise of the s184 discretion are irrelevant. Section 8 of the new Act preserves an overriding discretion to exclude evidence if its probative value is outweighed by its prejudicial effect. In assessing this question regard must be had to the right of a defendant to offer an effective defence: s8(2). It follows, I think, that the absence of a right to cross-examine the maker of a hearsay statement remains a relevant consideration, particularly in instances where the s8 discretion enters the equation. This may perhaps be more likely where the hearsay statement is not a spontaneous one reported by someone who happened to be present at the time, but rather a formal written statement obtained by an officer in the course of a police investigation.

Crown witnesses

[17] There is opposition to the admission of evidence from two Crown witnesses, both of whom died comparatively recently.

Dr Thomas Pryde

[18] Dr Pryde was a general practitioner in Dunedin. He gave evidence at the first trial. He died on 20 December 2007. On 20 June 1994 he went to Every Street and verified the deaths of five members of the Bain family. At about 11.00 am that day he examined the accused at the police station. He found a number of minor injuries. These were photographed and also marked by Dr Pryde on a body diagram.

[19] Section 22(3) provides that a copy of the hearsay statement, if made in writing, must accompany the notice. The Crown has provided a witness statement signed by Dr Pryde on 27 August 2007, the 1994 witness statement he signed for the preliminary hearing and the notes of evidence of Dr Pryde's evidence-in-chief, cross-examination and re-examination at the first trial. In substance the two signed witness statements are very similar.

[20] In them Dr Pryde referred to three minor areas of bruising on the accused's face as "recent" and detailed the size of each area in centimetres. However, at trial he was asked in evidence-in-chief what he meant by recent bruising and responded "Roughly it would be about 10 hours old". In cross-examination he was challenged concerning the 10 hour estimate and said that he could rule out a four hour timeframe, but five hours, while most unlikely, he could not rule out. In re-examination he adhered to the 10 hour estimate, but acknowledged a margin of error of 3-4 hours either side.

[21] This evidence is hotly contested. Other medical witnesses have expressed opinions concerning the difficulty of estimating the age of bruising. This issue comprises the essential basis of the opposition.

[22] I have already given a ruling concerning two aspects of Dr Pryde's evidence. These were whether it was competent of him to express an opinion that bruising was "recent" and whether the accused's failure to respond to a question directed to the cause of his facial injuries, was admissible. I ruled in the evidence on both points, although subject to observations that extracts from Dr Pryde's evidence at the first trial could be read to the jury, if desired, and that the evidence of non-response could

be edited to remove a pejorative ring from it (paras [96], [100] and [101], 8 September 2008 judgment). The Court of Appeal found no error in my approach (2009 NZCA 1 at paras [65] – [76]).

[23] It is probably unfortunate that a ruling was given concerning the admissibility of elements of Dr Pryde's evidence, divorced from the present inquiry as to exactly how the hearsay evidence would be introduced at trial. Consistent with the observation that material from Dr Pryde's evidence at the first trial could be introduced (if the defence favours that course), the Crown has tendered both the 27 August 2007 witness statement and the record from the first trial. However, Ms Cull adamantly opposed use of material from the trial record. She pointed out that not only was Dr Pryde's evidence concerning the ageing of bruising challenged in cross-examination in 1995, but the evidence was strongly criticised at subsequent hearings of this case. In these circumstances she submitted the Crown should have obtained a comprehensive witness statement from Dr Pryde in 2007. Otherwise, it was not known whether he still subscribed to the views he expressed at the first trial, or whether he resiled from them, in whole or in part, in light of the subsequent criticism.

[24] I consider there is substance in these arguments. When Dr Pryde was re-briefed in August 2007 it was known that his evidence concerning the recency of the bruising was contentious. Yet, the new witness statement merely referred to "recent" bruising, without further elaboration. Now the Crown seeks to supplement that signed witness statement by the addition of extracts of evidence from the first trial. This is not only untidy, but means that whether in 2007 Dr Pryde still subscribed to the views expressed in his trial evidence, is unknown. I regard this as a serious deficiency. It is apparent from the record of the previous trial that Dr Pryde's opinion evidence concerning the age of the bruising, in terms of hours, was extempore and the cross-examination was necessarily an immediate response to this further detail. To at this stage supplement the written statement with extracts from the trial evidence will perpetuate these features and also let in evidence which was not reaffirmed by the witness in his 2007 statement.

[25] In my view the proper course is to restrict Dr Pryde's evidence to his 2007 witness statement. While the fact that he gave the further detail on oath and in the face of cross-examination might ordinarily provide reasonable assurance of reliability (s18(1)(a) of the Act), I am persuaded for the reasons already discussed that the probative value of the further evidence is outweighed by the risk it will have an unfairly prejudicial effect at trial. This further ruling does not contradict the earlier one. The suggestion, endorsed by the Court of Appeal, that the defence may elect to have extracts of evidence from the first trial introduced, has not been taken up. Instead, that suggestion has been effectively negated by the successful opposition to the s22 notice as it relates to this witness.

Mrs Kathleen Mitchell

[26] The evidence of this witness was also the subject of a s344A ruling in my 8 September 2008 judgment (paras [114] – [116]). I ruled that both Mrs Mitchell's evidence as it stood in 1994-95, and an addition to it, was admissible. However, Mrs Mitchell died on 25 August 2008 (between the hearing of the s344A application and delivery of the judgment). Accordingly, it is now necessary to consider her evidence with reference to the hearsay principles.

[27] Mrs Mitchell's evidence was admitted by consent in 1995. She then said that the accused delivered her copy of the Otago Daily Times between 6.10 and 6.15 am on 20 June 1994. Although she did not see the accused that morning, she was aware of his presence on account of her dog barking and she switched on a light and called out "Hello" at a time she thought the accused was on the steps to her balcony.

[28] Later that morning the accused told a police officer, Detective Dunne, when asked whether anyone saw him in the course of his paper round, that an old lady on the corner of Everton and Somerville Streets would have heard him because he takes the paper up to her doorstep and her dog barks.

[29] When re-interviewed in September 2007 in anticipation of the retrial Mrs Mitchell added to her previous statement. She said that she had not really wanted to be involved in 1994. And, contrary to the impression conveyed in her

earlier statement, it had not been normal practice for the accused to deliver the paper to her balcony as had occurred on the relevant morning. About a year before then she had asked him not to come onto the balcony, because this caused her dog to bark. Thereafter the paper was delivered to her bedroom window or to the gate of the balcony and the accused only came onto the balcony on 20 June 1994.

[30] The revised witness statement includes this:

> Because of Boris barking, I did glance out onto the balcony.
>
> The Accused wasn't too far onto the balcony – once I'd seen him, he didn't need to come any further.
>
> He said hello, and I replied hello.
>
> I am sure that I said 'hello' back to his initial 'hello'.
>
> I did see him and said 'hello'.
>
> It was only fleeting and it was really just acknowledging his presence.
>
> The circumstances that morning were unusual and since that day I have often thought about it.

[31] Ms Cull submitted that the changed content to Mrs Mitchell's statement should not be admitted, since it was unreliable and untested by cross-examination. In response to an observation from me that it was hardly appropriate to admit part and exclude part of a signed witness statement, counsel responded that the appropriate course was to exclude the evidence as a whole.

[32] To my mind the submission involved a focus upon factor (d) of the definition of "circumstances" in s16(1) of the Act. That is, the belated changes made to Mrs Mitchell's statement were "circumstances that relate to the veracity of the person" and, in this instance, were said to rob the hearsay statement of a reasonable assurance of reliability. Alternatively, the submission engaged s8 of the Act and sought exclusion of the evidence because its probative value was outweighed by the risk of its unfairly prejudicial effect.

[33] I am satisfied that Mrs Mitchell's evidence is admissible. While there are grounds for concern that she has changed her account and cannot be cross-examined as to the changes, I think the reliability of the hearsay statement is reasonably

assured. The nature and contents of the witness statement, the circumstances in which it was made and the circumstances relevant to the accuracy of any observation contained in the statement, all favour its admission. In particular, the circumstance that the accused spoke to a police officer about the events that very day tends to affirm the reliability of the witness's statement. It is in but one respect that there is scope for concern. Mrs Mitchell's changed statement introduces the dimension of normal practice – whether for about a year the accused had not in fact ventured onto the balcony at her request. This is the significant feature and of course it forms the effective basis of the present opposition. The jury will know of the change. The need for care will be evident. Particularly if Mrs Mitchell's evidence of normal practice is put in issue, a warning to the jury may be required. That is a question for trial.

[34] Nor do I consider that s8 is engaged. The position in relation to Mrs Mitchell is far removed from that of the complainant in *R v L*, for example. There the complainant provided the only evidence to establish the disputed element of the crime, being the absence of consent. Here, Mrs Mitchell's potentially disputed evidence concerns a contextual circumstance of the delivery of her newspaper, when the occurrence of the delivery (to the doorstep) is common ground. In short, the contentious feature of the evidence can be managed at trial without a risk of prejudice to the accused.

Defence witnesses

Raymond Pritchard

[35] In 1998 Mr Pritchard, a retired laboratory technician, made an affidavit in the context of the application for the exercise of the prerogative of mercy. Before retirement he worked for 15 years at the Otago Medical School. He came forward in 1997 following publicity concerning the phenomenon of post mortem gurgling.

[36] His affidavit included this:

> 2. During the course of my work there were many occasions on which I experienced the phenomenon of gurgling noises emanating from dead

> bodies. In my experience this has happened particularly when there has been a collection of fluid and/or gases in the lungs which escapes and makes gurgling noises, sometimes spontaneously but more often when the body is moved.

Mr Pritchard is now deceased.

[37] Mr Raftery submitted that this opinion evidence should not be admitted essentially for two reasons. The first was that the evidence lacked the contextual detail required to enable the jury to properly evaluate it and, second, that the appropriate course was to secure another mortuary technician to give similar evidence. In this regard Mr Raftery observed that if gurgling by dead bodies was a known phenomenon, there must be other witnesses available to give evidence to this effect.

[38] I am satisfied that the evidence of Mr Pritchard is admissible. The matters raised in opposition I regard as relevant to the value of the evidence, and ultimately to the weight it might be accorded. But in terms of reliability, and whether the circumstances relating to the statement provide a reasonable assurance of reliability, there is not in my view a basis upon which to exclude the evidence.

Other defence witnesses

[39] Mr Raftery also made submissions relating to a number of other defence witnesses. These were: Cyril Wilden, Maryanne Pease, Joseph Karam, Brian Murphy (from the 23 November 2008 notice), J M Basquin, L Miller, D Palmer, J Withers, J Dunn, E Blackwell, Dr Copeland, S Stirling, D Pokroy, Glenda Burt and Robert Matches (from the 12 February 2009 notice). Counsel did not necessarily oppose the admission of hearsay statements via the various witnesses. However, he signalled a number of admissibility issues pertaining mainly to parts of the hearsay content. In at least one instance he questioned whether there was any need for a hearsay statement, since the point appeared to be susceptible of resolution by an agreed fact.

[40] I did not understand it to be intended that I should give rulings in relation to these further witnesses. Many of the submissions were directed to defence counsel

and to a suggested need for further information before it would be appropriate to determine the admissibility of certain of the hearsay statements.

[41] A further difficulty emerged in relation to the witnesses listed in the 12 February 2009 notice. In relation to them christian names were not generally provided and only a brief narrative account of the contents of the hearsay statement was given. Mr Raftery questioned whether the narrative accounts were sufficient to comply with s22(2)(c) of the Act, whereby the written notice must, in relation to hearsay statements made orally, specify "the contents of the hearsay statement". Ms Cull contended that the content of the intended hearsay was sufficiently conveyed by the narrative referable to each witness.

[42] Unfortunately, I am not in a position to advance matters. I apprehend that there will be discussion between counsel in an endeavour to better identify the witnesses by name and to address the concern as to the adequacy of the information as to the contents of the hearsay statements. But, beyond that, it appears that in some instances at least there will remain a contest as to the admissibility of some parts of the hearsay statements. These will have to be dealt with at trial.