

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CRI-2011-085-6023
[2012] NZHC 3596**

THE QUEEN

v

NICHO ALLAN WAIPUKA

Hearing: 10 December 2012

Counsel: G Burston, T Gilbert and B Tompkins for Crown
P V Paino and S Robinson for Accused Waipuka
I M Antunovic and S Antunovic for Accused Robinson

Ruling: 10 December 2012

RULING (NO 2) OF MILLER J

[1] This ruling records my reasons for allowing the Crown to lead the evidence of Renee Stepien.

Introduction

[2] Renee is the sister of Sylvanna Robinson-Stepien, the partner of the accused Nicho Waipuka. Her evidence related admissions that he made to Sylvanna, who recounted them to Renee, who revealed them to the police, who recorded them in a statement that Renee signed. Renee's evidence at trial of Mr Waipuka's admissions can conveniently be called double hearsay, although that term is not entirely apt for reasons which will become apparent.

[3] For purposes of this mid-trial ruling I assumed that Mr Waipuka will not give evidence. Sylvanna and Renee were called by the Crown, did not answer their summonses, were arrested, and eventually gave evidence as hostile witnesses. Both expressed indignation that the jury should receive hearsay evidence and denounced their out of court statements as unreliable.

The trial issues

[4] At about 5.30am on 10 December 2011 Mr Waipuka attacked the victim, Phillip Cottrell, in Boulcott Street. Mr Waipuka admits punching Mr Cottrell once, without provocation, and claims that Mr Cottrell died after falling to the ground, suffering a fractured skull. The Crown says Mr Waipuka did rather more than that. The trial issues are what blows he struck and whether he struck with murderous intent.

[5] I observe that the co-accused, Manuel Robinson, was at the scene but denies attacking Mr Cottrell or doing anything at all to encourage or assist Mr Waipuka. The Crown says he actually participated in the attack, with murderous intent, or was a party to murder. I need not say much more about his position because Renee's evidence is admissible only as against Mr Waipuka.

The narrative

[6] Mr Waipuka returned home after the attack, and was arrested on [12] December. During the intervening period he and Sylvanna spoke about what had happened to Mr Cottrell, and Mr Robinson visited them.

[7] Sylvanna was interviewed on 13 December 2011. She gave and signed a statement in which she claimed that Mr Waipuka had been away on the night of 9 December but told her that he had gone to a movie and stayed at Mr Robinson's house.

[8] Renee saw Mr Waipuka's photograph in a newspaper on the same day, 13 December, learning for the first time that he had been involved in Mr Cottrell's death. She contacted Sylvanna, to whom she is close. The two women met on 15 December at Featherston, where Renee lives. The discussions which were the subject of Renee's evidence happened then.

[9] On 1 February 2012 three detectives travelled to Featherston to speak to Sylvanna and Renee. They found the two women at the home where Renee cares for her grandparents. The women agreed to accompany the officers to the Featherston Police Station, where they were separately interviewed.

[10] Sylvanna was interviewed by Detective Annalise Ferguson. She changed her first statement. She now said that Mr Robinson came to her home with a friend on the Sunday night. They were edgy. She asked what they were doing and they told her to fuck off. She said it was her place and invited them to go, which they did. She asked Mr Waipuka why they had come. He disclosed that he and Manuel had been in Wellington when some guy got smart to Manuel. She recounted that:

Nicho said "I punched the guy to the ground and then Manuel came along and booted the guy and stole his wallet, and then e ran off".

[11] She added that Mr Waipuka said that Mr Robinson had come around to ask what to do with the wallet he had stolen.

[12] She explained she was "really upset". The next day she read the newspaper, which led with the attack on Mr Cottrell, and the day after that she made her first statement. She then called Renee because she needed to talk to Renee, and they spoke in Featherston a couple of days later.

[13] All of this was recorded in a statement which Sylvanna signed and initialled.

[14] Renee was interviewed by Detective Olivia Gibson. It was her first statement. She explained that the two women had spoken on 15 December in a garden shed which had been turned into a hangout with couches and chairs. They were alone. She asked if Mr Waipuka had said anything about the man's death, and Sylvanna said no. She responded that if Sylvanna did know it would be better to tell the

police, because it might help Mr Waipuka. Sylvanna then began crying and recounted what she knew. She began with Mr Robinson and her cousin Wipuhara Kapene arriving at her place about mid-day on Saturday 11 December. She heard them speak to Mr Waipuka, as follows:

Manuel and Wipuhara then asked Nicho "What do we do bro" and Nicho said "Do about what".

She said that they were both panicky and jumpy. They were like basically what are we meant to do, tell us.

And then they said about the guy that we bashed and got the wallet.

Then Nicho said "I told you not to grab the wallet". Then Manuel said he was scared and didn't know what to do.

Nicho then said not to worry about it and that he would sort it out and he told them to leave.

[15] Renee explained that Sylvanna then recounted what Mr Waipuka said to her when she asked him what was going on, as follows:

Nicho then said that when Manuel and I went to town we got a bit drunk and we were just roaming around Wellington on foot until early hours this morning.

They went down this street and saw a guy walking down there. He looked a bit gay so Manuel started to get smart to him. This was from across the street.

Then the guy stopped and turned around and said something like "What are you guys doing around the streets as this time, shouldn't you be at home".

Manuel didn't like what the guy said, like he took offence to it. He walked across the road yelling at him.

He got right up into his face and pushed him. The guy stumbled so Manuel pushed him again.

The guy said "What the hell are you doing this for".

Nicho then thought that the guy was going to hit Manuel so he walked across the road towards him and just punched him straight in the face.

He then punched him again. This punch made him fall to the ground and he banged his head.

Nicho said that when he banged his head on the ground he was bleeding from his head. She didn't say where on his head though.

Then he said that Manuel started to check the guys pockets. He said the guy was still alive because he was still moaning.

Nicho then said that Manuel grabbed a brown wallet and started to go through it.

Nicho then said that he told him to put it back but Manuel said no I'm keeping it.

Then Manuel kicked the guy in the head really hard. Nicho said that he also kicked him a couple of times in the back of the head.

Manuel kept going at it and told Nicho that he wanted to knock him out because he was still moaning and groaning.

He said that Manuel did it until he stopped making a noise.

When she had finished telling me what Nicho had said I asked her if she was honestly telling me the truth.

She said she was telling me the truth and that is what Nicho had told her. She said she trusted me and that is why she told me.

[16] It will be seen that Renee's account of what Mr Waipuka told Sylvanna was much more detailed than Sylvanna's own.

The sequence of events at trial

[17] Both women eventually gave evidence on Monday 10 December 2012. Sylvanna was called first. She was soon declared hostile and Mr Burston was permitted to cross-examine her. She admitted making her own statements to the police but variously claimed they were all lies or that the officers interviewing her made it all up. She accused the police of blackmail and corruption, saying that in some unspecified way they had forced her to make the second statement. She denied saying the things recorded in Renee's statement. She also claimed that she did answer her summons, appearing at court on the first day of trial. (As to that, I record in passing that I have no doubt she knew she was required to attend during the trial and chose to avoid the police.)

[18] Renee was then called. She too was declared hostile. She did not claim that the detective invented her statement, but she did say it was lies and claimed that she had been placed under unfair pressure.

[19] I required both women to remain at Court while the remaining evidence relating to their statements was called.

[20] Mr Burston called Detective Gibson. Her account, which was not challenged and which I accept, was that the police had been looking for Renee for some time, and she had failed to keep an appointment with them at Masterton. The two women were reluctant to come to the door, but eventually did so and let the officers in. The detectives said that someone had died and they needed to speak to the two women about what they knew. The two women came reluctantly to the door but after inviting the police in agreed to go to the Police Station for interview. They were not forced to go, or detained, or threatened. At the station Renee was given breaks and food. The detective asked Renee for her account, which was given without interruption, then had Renee repeat it while she typed it onto a computer, both of them sitting side by side and looking at the screen. Renee spoke freely, and was anxious that Sylvanna not know she had done so. The statement was signed and initialled, Renee signing beneath the usual words reciting that the statement was true and was made knowing she might be prosecuted if it was not.

[21] I gave Mr Paino the opportunity to have Detective Ferguson recalled also (she had already given evidence earlier in the trial), but he chose not to take it. He accepted that he had no evidential foundation on which to base an argument that the circumstances in which Sylvanna's second statement was made were such as to make it unreliable.

Double hearsay?

[22] Renee's evidence of what Mr Waipuka said is hearsay as defined; it is a statement of a non-witness (Mr Waipuka) which the Crown offered to prove its truth. The definition of "hearsay statement" in the Evidence Act 2006 is:

hearsay statement means a statement that—

- (a) was made by a person other than a witness; and
- (b) is offered in evidence at the proceeding to prove the truth of its contents

[23] Of course Mr Waipuka is an accused, and a statement of an accused is admissible independently of the hearsay provisions (sections 16-22) under s 27 of the Act. If it were simply a case of Sylvanna recounting what he said to her the statement would plainly be admissible unless excluded under some other provision of the Act, such as s 28 (reliability). Section 28 provides so far as relevant:

28 Exclusion of unreliable statements

(1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer a statement of a defendant if—

- (a) the defendant [or, if applicable, a co-defendant] against whom the statement is offered raises, on the basis of an evidential foundation, the issue of the reliability of the statement and informs the Judge and the prosecution of the grounds for raising the issue; or
- (b) the Judge raises the issue of the reliability of the statement and informs the prosecution of the grounds for raising the issue.

(2) The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

(3) However, subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered only as evidence of the physical, mental, or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made.

(4) Without limiting the matters that a Judge may take into account for the purpose of applying subsection (2), the Judge must, in each case, take into account any of the following matters that are relevant to the case:

- (a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):
- (b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):
- (c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:
- (d) the nature of any threat, promise, or representation made to the defendant or any other person.

[24] The real difficulty arises because of the “double hearsay” nature of Mr Waipuka’s statements when admitted through Renee. That raises obvious reliability

issues. And s 28, which concerns reliability, does not apply directly to Sylvanna's statement; it is concerned with the reliability or otherwise of what the accused said.¹

[25] Nonetheless what Sylvanna said to Renee about Mr Waipuka's admissions is in principle admissible. Although convenient, the term "double hearsay" is not entirely apposite here, for Sylvanna and Renee were both witnesses and a statement of a witness at the trial is by definition not hearsay. Both witnesses were available for cross-examination on what was said to them and what they subsequently recounted about it. In these circumstances nothing in the Act expressly excludes Renee's evidence of what Sylvanna told her. Rather, the legislation treats the remoteness of her evidence from Mr Waipuka as a factor going to reliability for purposes of s 28. This was a policy choice to do away with some complexities of the former hearsay rules. The Commission considered that "the number of times a statement is repeated is sometimes, but by no means always, indicative of its reliability and each case should be treated on its merits."²

[26] I accept that the Court must assess the reliability of the double hearsay statement. Strictly the inquiry is conducted under ss 6, 7 and 8, which apply in any case not governed by the Act.³ Relevant reliability considerations are not confined to those listed in s 28(4), a provision which is plainly addressed to the circumstances of the statement by the accused.

[27] I record for completeness that s 35 does not apply to an accused's statement which is offered under s 27, and Sylvanna's out of court statement to Renee was not consistent with her evidence at trial, so did not bring s 35(1) into play. I express no view about whether s 35 would apply in other circumstances.

[28] Ultimately defence counsel did not suggest that the Court lacks jurisdiction to admit 'double hearsay' in the present circumstances. But Mr Burston could show me no case in which the Court has done it. The possibility has been noted, but that is

¹ *R v Cochrane* [2011] NZCA 111 at [17].

² Law Commission *Evidence Volume 1 : Reform of the Law* (NZLC R55, 1990) at [69].

³ Section 12.

all.⁴ There may be three reasons for that. First, in many cases the third person, in this case Renee, will add nothing to what the second person, in this case Sylvanna, has to say. The issue has arisen here because Sylvanna herself recounted to the police only part of what Mr Waipuka evidently told her. Second, the Court must assess the reliability of both the original statement and the statement by the listener to the third person who ultimately relates it in evidence. One or other out-of-court statement may have been given in circumstances that adversely affect its reliability.⁵ Finally, the Court must similarly assess the probative value of both statements.⁶ Detail and emphasis may change in the telling, and the Court must assess that by reference to the details recounted and omitted, the circumstances of each statement, and the quality of the witnesses. It has been suggested that:⁷

Given the justifiable concerns about double hearsay notwithstanding the lack of a specific exclusion, it will presumably most usually be the case that a “twice removed” statement will not be viewed as sufficiently reliable pursuant to s 18, or sufficiently probative, pursuant to s 8.

Assessment of the statements

[29] I begin with reliability. The question is whether I am satisfied on the balance of probabilities that the circumstances in which each statement was made were not likely to adversely affect its reliability. This inquiry focuses on the circumstances of the statements rather than their content.

[30] Mr Waipuka made his statement to Sylvanna at their home. Nearly two days had passed since Mr Cottrell was attacked. They spoke in private, on a topic which commanded their urgent attention. The only pressure brought to bear was their mutual anxiety and Sylvanna’s desire to know what had happened. It was not suggested that either of them was affected by alcohol or drugs. I am satisfied that there is nothing about these circumstances that might adversely affect the reliability of admissions that he made to her about his own role in Mr Cottrell’s death. The

⁴ *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [43]; *R v Gwaze* [2009] NZCA 430, [2010] 1 NZLR 430 at [88]; and *Key v R* [2010] NZCA 115 at [26].

⁵ Section 28(2).

⁶ Section 8.

⁷ *The Evidence Act 2006 Act & Analysis* Mahoney McDonald Optican Tinsley.

most that can be said is that he might downplay his own role by exaggerating that of Mr Robinson.

[31] The statement that Sylvanna made to Renee was made in circumstances where Sylvanna was in some distress and felt the need to speak to her trusted sister. She travelled to Featherston to see Renee, and the two women met in the shed to ensure their privacy. Nothing about the circumstances suggests that Sylvanna would be anything less than entirely truthful once she decided to unburden herself. I accept that Renee asked for and was given an assurance that what Sylvanna related was true. Their discussion took place only a few days after Mr Cottrell's death, and Sylvanna's discussion with Mr Waipuka must have been fresh in her mind. There is nothing about the circumstances of this statement that might adversely affect its reliability. I observe that it is consistent with other accounts of admissions made by Mr Waipuka.

[32] I turn to the probative value of the statements. Mr Paino joined issue at this point, arguing that Renee's statement to the police could not possibly have material probative value when it is hearsay and both she and Sylvanna now deny its contents.

[33] I do not agree. The statement is intrinsically probative. It contains details that could only have come from someone who knew what happened at the scene. If one discounts the possibility that Detective Gibson was the source of the information, as I do, then it has material probative value as an admission by Mr Waipuka is material.

[34] Finally, I do not consider that admission of the statement occasioned any illegitimate prejudice. Both women were cross-examined, giving counsel the ability to explore the reliability of what they had to say. The jury were given a warning about the reliability of the evidence.