Determining probative value: considerations of reliability and credibility

Justin Simpkins reports on *R v XY* [2013] NSWCA 12

The Court of Criminal Appeal recently handed down a judgment of a five judge bench (Basten JA, Hoeben CJ at CL, Simpson, Blanch and Price JJ) dismissing the appeal (Basten JA and Simpson J dissenting) in a case that considered a challenge to the interpretation in New South Wales of s 137 of the *Evidence Act 1995* (NSW).

The facts

In November 2012, the respondent was arraigned in the District Court on an indictment containing six counts. Five were of indecent assault and the sixth was of aggravated sexual intercourse without consent. All offences were alleged to have been committed against the same complainant in 2002. Throughout that time the complainant was eight years of age.

The prosecution sought to adduce evidence of two recorded telephone conversations between the respondent and the complainant that took place on 25 August 2011 and were recorded pursuant to a warrant issued under the *Surveillance Devices Act 2007*. The telephone calls were initiated by the complainant, under the supervision of police investigating the complaints she had previously made, for the express purpose of engaging the respondent in conversation about her allegations, in the expectation or hope that he would incriminate himself.[1] The evidence of the telephone conversations was the subject of a *voir dire*.[2] The trial judge rejected the evidence pursuant to powers conferred by ss 90 and 137 of the Evidence Act. In rejecting the evidence, the trial judge took into account the reliability of an alleged admission made during the telephone conversations in her consideration of the objection based on s 137. The Crown appealed the trial judge's decision to reject evidence of the telephone conversations.

One of the issues raised on appeal was whether the court should depart from its judgment in *R v Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228, particularly the principle that in applying s 137 of the Evidence Act the court is to assess the capacity of the evidence to support a particular finding, but not its credibility and reliability, those being matters to be left to the jury if the evidence be admitted.[3]

Section 137 of the Evidence Act

Section 137 provides that the court must refuse to admit evidence adduced by the prosecutor in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The telephone calls were initiated by the complainant, under the supervision of police ... for the express purpose of engaging the respondent in conversation about her allegations, in the expectation or hope that he would incriminate himself.

It has been the position in New South Wales that in determining the probative value of the tendered evidence sought to be excluded under s 137, the evidence is to be considered on the assumption that it will be accepted so that the credibility or reliability of the tendered evidence will rarely be relevant.[4]

In *R v Shamouil*[5] Spigelman CJ (with whom Simpson and Adams JJ agreed) said[6]:

> The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility.

The approach taken in *R v Shamouil* was recently held by the Victorian Court of Appeal in *Dupas v The Queen* [2012] VSCA 328 to be 'manifestly wrong and should not be followed'.[7] In that case it was held that a trial judge should consider the quality and weight of the evidence when assessing probative value.[8]

In *R v XY*, the Criminal Court of Appeal declined to follow *Dupas v The Queen* and instead held that New South Wales courts should continue to follow *R v Shamouil* when applying s 137 of the *Evidence Act 1995*.[9]

Reasoning

Three of the five judges held that the court should not depart from the general approach accepted in *R v Shamouil*.[10]

Justice Simpson held that questions of credibility, reliability and weight play no part in the assessment of probative value with respect to s 137.[11] Her Honour noted, *obiter*, that none of the sections in the *Evidence Act 1995* (NSW) that call for assessment of the probative value as a precondition to admissibility[12] give any indication that some exploration of credibility, reliability or weight ought to be conducted, or, if so, what limits are imposed on the extent of that exploration.[13] As a result, the principle that questions of credibility, reliability and weight play no part in the assessment of probative value must apply in all cases where admissibility depends on an assessment of probative value.[14] Central to her Honour's reasoning was that actual probative value to be assigned to any individual item of evidence lies in the province of the tribunal of fact which, in most criminal cases, is the jury.[15] Her Honour, in allowing the appeal, held that as the trial judge had taken into account the reliability of the evidence, she had fallen into error.[16]

Basten JA allowed the appeal on the basis that, *inter alia*, no real risk of unfair prejudice arose and for that reason, s 137 had not been engaged.[17] His Honour raised doubt about the extent to which *Dupas v The Queen* departed from the principles stated in *Shamouil*, read in context. His Honour held that because the current matter raised slightly different issues from either case (not being concerned with identification evidence) there was no compelling reason to depart from the general approach accepted in *R v Shamouil*.[18] His Honour held that in this case there was no choice to be made between the principles derived from *Shamouil* and those

articulated in *Dupas v The Queen*, although he noted that the approach in *R v Shamouil* demonstrates how s 137 operates.[19]

Hoeben CJ at CL expressed his agreement with Basten JA and Simpson J that when assessing the probative value of the prosecution evidence that the accused is seeking to exclude under s 137, the court should not consider its creditability, reliability or weight.[20] His Honour held that to embark on a partial assessment of weight could be potentially productive of real injustice.[21] However, in applying s 137 to the facts of the case, Hoeben CJ at CL came to a different result to Basten JA and Simpson J in concluding that the probative value of the evidence was outweighed by its prejudicial effect.[22] As a consequence, his Honour dismissed the appeal.

Justice Blanch agreed that, in applying s 137, the prejudice of the evidence outweighed its probative value and the trial judge was correct in rejecting the evidence on that basis. His Honour held that the evidence of the telephone conversations did not give rise to any question of credibility or reliability because the evidence was known and could be evaluated.[23] As such, it was not necessary for his Honour to address the apparent conflict between *R v Shamouil* and *Dupas v The Queen*.

Justice Price agreed with Hoeben CJ at CL and Blanch J that the appeal should be dismissed. His Honour held that the evidence of the telephone conversations, viewed at its highest, was weak and was substantially outweighed by the danger of unfair prejudice to the accused, which could not be corrected by jury directions.[24] His Honour found that the Crown had not established that the trial judge's ruling on inadmissibility substantially weakened the prosecution case.[25] As such, the Crown had not satisfied s 5F(3A) of the *Criminal Appeal Act 1912* (NSW). Given that finding, it was not necessary for His Honour consider the conflict in the approaches to be taken to s 137.[26] However, his Honour noted (*obiter*) that 'it seems to me that enabling the trial judge to consider questions of credibility, reliability or weight when s 137 is invoked, is likely to enhance the fundamental principle that an accused is to receive a fair trial'.

Conclusion

Following the Criminal Court of Appeal's decision in *R v XY*, it remains the position in New South Wales that where a court is considering an objection to evidence invoking s 137, questions of credibility, reliability or the weight to be attributed to the evidence in question has no part to play. By contrast, the position in Victoria, since the Court of Appeal's judgment in *Dupas v The Queen*, is that the court should consider the quality and weight of the evidence when assessing its probative value. It is likely that this division between states will remain until the issue is dealt with by the High Court.

Endnotes

1. At [103].
2. The content of the conversations are set out in the judgment of Blanch J at [184].
3. At [2].
4. *R v Shamouil* (2006) 66 NSWLR 228.
5. Ibid.
6. At [60].
7. At [63].
8. At [199].
9. Per Basten JA at [66]–[67], Hoeben CJ at CL at [87], Simpson J at [162] and [175], Blanch J not deciding at [198] and Price J dissenting at [224]–[225].
10. Ibid.
11. At [175].
12. Ss 97, 98, 101, 103, 135, 138(3).
13. At [171].
14. At [175].
15. At [167].
16. At [176].
17. At [73].
18. At [65].
19. At [73].
20. At [86].
21. Ibid.
22. At [90].
23. At [198].
24. At [223].
25. At [222]. Section 5F(3A) of the *Criminal Appeal Act 1912* provides that 'The attorney general or the director of public prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case'.
26. At [224].