R v Roberts **[2019] SASCFC 94 (1 August 2019) – South Australia Supreme Court (Full Court) [Summary prepared by Magistrates' Associates of the Adelaide Magistrates Court]**

'Admissibility' – 'Assault' – 'Evidence' – 'Propensity' – 'Relevancy'

Charges: Causing harm with intent to cause harm

Appeal type: Appeal against conviction

Facts: The defendant was convicted by jury of causing harm with intent to cause harm to the complainant who he was in a sexual relationship with. The defendant, while intoxicated, grabbed her and dragged her out of the house, pushed her on to the footpath and kicked her body causing various injuries. The appellant's brothers Stephen and Joe were present at the house. The complainant said that before living with the defendant, a former partner, Ray, had also been violent to her. The defence put to the complainant in cross-examination that it was Ray not the appellant who assaulted the complainant. Ray was deceased by the time of the trial. The complainant gave:

- General evidence that the appellant was 'rough to [her] nearly everyday [they] were together' and 'slapped' her around; and
- Specific evidence that on 14 February 2017 the appellant was angry at her and twisted and broken her arm for which the injury required surgery. The complainant lied to medical staff that she had fallen off a deck.

A police officer who attended the scene gave evidence of two tranches of the appellant's brother, Stephen's, statements and conduct:

- The first tranche was that Stephen 'loudly told police to leave the property and shut the front door'.
- The second was that when told the appellant was arrested for assaulting the complainant, Stephen stated 'If she's saying those things she needs to be dealt with. She needs to learn the Aboriginal way'.

Grounds of Appeal:

- Ground 1: Did the Trial Judge err in admitting the specific evidence as to the appellant having broken the arm of the complainant on 14 February 2017, and in doing so cause a miscarriage of justice?
- Ground 2: Did the Trial Judge err at law in admitting evidence of words spoken out of Court by a person not called as a witness (Stephen Roberts), and in doing so cause a miscarriage of justice?

Held:

- Ground 1: Peek J and Hughes J allowing the appeal, Kourakis CJ dismissing the appeal.
- Ground 2: Peek J allowing the appeal, Kourakis CJ and Hughes J concurring.

Reasons:

Ground 1 – Kourakis CJ (dismissing)

- 'The admissibility of evidence of a violent relationship…between a perpetrator and a victim involved in a domestic relationship has long been held to be admissible on a charge of a violent criminal offence' citing R v Olasiuki (1973) 6 SASR 255 at 263-264 and R v Hissey at [2] (1973) 6 SASR 280.
- On the admission of the evidence relating to the breaking of the complainant's wrist by the appellant, the jury 'could not reason in the appellant's favour that he was unlikely to be the complainant's assailant because he was in a romantic relationship with her' at [4].
- 'The risk of misuse of discreditable conduct evidence is greatest when it is admitted as propensity evidence. It is more difficult to compartmentalise specific propensity reasoning from bad person reasoning' at [9]
- The probative value of the evidence 'substantially outweighed any prejudicial effect' as 'it showed that the appellant's romantic relationship with the appellant did not inhibit him from bashing and slapping her around and, importantly, causing her serious bodily harm three weeks earlier' and as such was admissible under s 34P(2)(a) at [10].
- The evidence of the broken arm assault 'did not materially add to the prejudicial effect of the evidence that the appellant bashed and slapped around the complainant' at [10].
- 'Prejudice is not necessarily accumulated by the arithmetic addition of the occasions of discreditable conduct. The prejudice lies in the error of reasoning' at [10].

Ground 1 – Peek J (allowing) (Hughes J concurring)

- In relation to s 34P(2)(a) prosecution often contend in domestic violence matters that there is a 'permitted use' under s 34P(2) for the admission of evidence of prior conduct at [74].
- The only 'permitted use' here is said to be that such evidence is relevant to the alleged assault on the basis that 'the assault did not come out of the blue' (the out of the blue argument) at [74].
- The out of the blue argument is often linked to and strengthened by delays in reporting to police due to fears of repercussions and situations where the existence of a violent relationship is established or confirmed by independent evidence at [76].
- 'If only evidence of the specific allegation is led…it is not unlikely that members of a jury may gain the impression that the assault charged involves an incongruous, unprovoked and unexplained occurrence' at [75].
- Tection 34P(2)(a) requires that separate assessments must be made as to both 'any probative value' and 'any prejudicial effect' of the evidence to determine whether the prosecution have 'demonstrated

that the former substantially outweighs the latter' at [77].

- In relation to the probative value: If the 14 February 2017 assault is set aside it may be contended that 'there is an apparent difference in the evidence of the complainant as between the usual degree of violence ('rough' and 'slapping around') and 'the high degree of violence alleged to be involved in the subject assault' at [79].
- The out of the blue argument in this matter is narrow. There was no delay in reporting and there is no independent evidence outside of the complainant's to establish the existence of a violent relationship at [81].
- In relation to the prejudicial effect: although prosecution eschewed any reliance on s 34P(2)(b), the question arises under s 34P(2)(a) and s 34P(3) 'as to the extent of the risk that the jury might adopt a process of propensity reasoning due to the doubling of the number of allegations of a high level of violence in circumstances where the allegations appeared superficially similar' at [82].
- The prosecution did not call medical evidence in relation to the 14 February 2017 assault and in doing so denied the appellant 'the ability to cross-examine as to whether such injuries where more consistent with her original history of falling from a deck than her later version of an assault' at [82].
- Under s 34P(3) the Judge is 'specifically required' to determine whether the permissible use can be kept 'sufficiently separate and distinct from the impermissible use' at [83].
- 'It is quite evident from the transcript that the Judge did not undertake a sufficient analysis of the application of s 34P and did not refer to s 34P(3) at all' at [83].

Ground 2 - Peek J (allowing) (Kourakis CJ and Hughes J concurring)

- The prosecution 'attempted to justify the admission of both tranches of Parkinson's evidence by citing Walton v The Queen (1989) 166 CLR 283 and R v Hendrie (1985) 37 SASR 581 that stand for the proposition that 'in some circumstances a person's state of mind may be proved by contemporaneous acts or statements made by that person' at [27].
- Although the decisions in Walton and Hendrie are 'unexceptionable', '…the danger of proliferation of tendering evidence of statements or actions of persons not called as witnesses must be guarded against' at [36].
- Evidence of this nature should only be received 'if it is of direct and immediate relevance to an issue which arises at trial' (R v Blastland [1986] AC 41, 53 and R v Szach (1980) 23 SASR 504) at [47].
- The trial judge admitted the evidence of Parkinson in this case to rebut the suggestion put to the complainant in cross-examination that she was assaulted by someone else other than the complainant at [52].
- While it was open to the prosecution to call further evidence that it was not Ray that has assaulted the complainant, this evidence had to be admissible at [58].
- In relation to the first tranche: Stephen's 'less than cordial welcome of police arriving at his home was

entirely consistent with personal beliefs or feelings he holds about police which could be referable to any number of reasons or previous experiences' and not necessarily connected to the crime at [60].

- The second tranche of evidence the prosecution's position is that Stephen's statement was' "Consistent" with knowledge that the appellant did consult the complainant'. However, there was in fact no evidence that Stephen knew who assaulted the complainant
- The evidence as to Stephen Roberts' statement and conduct was 'nebulous and highly speculative' as distinct from being directly relevant to trial at [60].
- It 'is simply not the type of clear and unequivocal "state of mind" evidence' referred to in Hendrie and Walton. There was no evidence that Stephen knew who assaulted the complainant at [63].
- The prosecution was 'simply not permitted to tender evidence of an action or statement of a person who they were not prepared to call, on some sort of 'prophylactic' basis that the jury might consider that the words were consistent with a prosecution case theory' at [64].

Appendix 1: 34P–Evidence of discreditable conduct

(1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (discreditable conduct evidence)–
(a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and

(b) is inadmissible for that purpose (impermissible use); and

(c) subject to subsection (2), is inadmissible for any other purpose.

(2) Discreditable conduct evidence may be admitted for a use (the permissible use) other than the impermissible use if, and only if–
(a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and

(b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue–the evidence has strong probative value having regard to the particular issue or issues arising at trial.

(3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the

permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).