CASE NOTE - HIGH COURT

by Mark Hunter

Roy Bernard Melbourne v The Queen

High Court No. D10/1998

Judgment of McHugh, Gummow, Kirby, Hayne and Callinan JJ - delivered 5 August 1999.

CRIMINAL LAW - CHARACTER EVIDENCE - DIRECTIONS TO JURY

In dismissing this appeal against conviction from the Northern Territory Court of Criminal Appeal, the High Court considered for the first time since *Simic* (1980) the circumstances in which a trial judge is obliged to give the jury a direction as to the way in which they may use evidence of good character.

The appellant was in 1996 convicted of the murder of his next door neighbour. At trial, he did not deny stabbing the deceased three times while moderately intoxicated but raised his prior "good character" (absence of relevant convictions) and the defence of diminished responsibility (s37 Criminal Code). He elected not to give evidence and the jury received *without objection* the history given by the appellant to his expert medical witnesses as contained in the reports and oral evidence of those witnesses. They diagnosed frontal lobe damage and a persecutory delusional disorder in the appellant at the time of the killing. The Crown did not adduce evidence of misconduct in rebuttal on the issue of character.

The appellant gave his experts a history of poly drug abuse and further stated that for some time he had been subject to loud banging noises at night which he believed came from the unit occupied by the deceased and were caused by her. In an interview with Police the day after his arrest, the appellant denied any recollection of the stabbing. The Crown adduced at trial evidence of CT scans which did not reveal any brain damage.

The Crown cross examined the defence medical experts as to the veracity of the history given to them by the appellant. Their diagnoses were based largely upon this history and it was this attack on the credibility of the appellant which loomed large on appeal. The evidence of other crown witnesses tended to discount a delusional disorder, suggesting that the unit occupied by the appellant was subject to 'water hammer' in its pipes and that sprinklers in different areas of the common property were programmed to turn on and off during the night.

Rule 86.08 of the Supreme Court Rules requires that an appellant obtain leave of the Court of Criminal Appeal before there taking a point not the subject of an objection at trial. The Court (Martin CJ, Gallop and Angel JJ) granted the appellant leave but in 1997 dismissed his appeal, holding that no miscarriage of justice had been demonstrated. It doubted that evidence of good character could be used to support the credibility of an accused in respect of out-of- court statements made by him to police and medical experts.

The Court further unanimously found the question of the accuracy of the history given by the appellant to his medical experts to be 'extraneous' to his state of mind at the time of the killing. The failure of senior defence counsel to seek a redirection from the trial judge was highlighted by the Court of Criminal Appeal.

Counsel for the appellant at trial had, in a rather convoluted manner, sought a <u>full</u> character direction (propensity and credibility), received only a partial direction (propensity) and thereafter failed to seek a redirection from the trial judge. His final speech to the jury did not address the credibility aspect of the character direction and in the Court of Criminal Appeal he swore an affidavit stating that he misheard the original direction given by Thomas J.

HELD (per McHugh, Gummow and Hayne JJ)

1. The appeal should be dismissed.
2. The giving of directions as to character is a matter for the discretionary judgment of the trial judge after evaluating its probative significance in relation to both the accused's propensity to commit the crime charged and his credibility.

In separate judgments the majority determined that the appellant was only entitled to the propensity element of the character direction. This appears to have been on the basis that the Court considered the evidence of his character witnesses to have been silent on the question of the appellant's honesty. They had described him as "quiet", "amiable", "gentle" and "well behaved".

The appellant had urged the High Court to adopt the English, Canadian and New Zealand position as developed over the past 20 years whereby a character direction is mandatory whenever the issue is left before the jury.

The Court criticised the historical rationale for the admission of evidence of good character - the assumption that 'character' produces a permanent and unchanging pattern of behaviour, whether for good or bad. All five judges agreed, however, that it was 'too late in the day' to overturn a rule of law base not upon logic but upon what McHugh J described as the 'policy and humanity' of the common law.

Kirby J (dissenting) favoured the adoption of the English position. He acknowledged academic criticism in that country of mandatory character directions but noted that where character is left to the jury a summing up which does not include a direction as to the way the jury may use evidence of good character will ordinarily be incomplete. His Honour concluded that the obligations of best judicial practice "...should not depend unnecessarily on the inclinations of the particular judge who presides at the trial any more than on the skill and experience of the accused's advocate..."

Kirby J and Callinen J (also dissenting) expressly approved the decision of the House of Lords in *Aziz*, extending the application of the credibility component of the character direction to out-of-court statements by the accused admitted into evidence. The majority of the High Court did not disapprove of this part of the decision in *Aziz*.

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problem area at a later time and, if possible, from a different direction.

It is important that you listen to the answers given by your witness and that you show interest in what is being said. If you do not do this you will contribute to any discomfort that your witness may be feeling. Put yourself in the position of the witness who is asked a question by a person who seems to have no interest in the answer. What does the witness do? Who does he or she respond to? Further, you may miss a vital answer that is inconsistent with what was to be expected from the proof of evidence you have before you. In the event that your witness does provide you with an answer that is inconsistent with your instructions you should not demonstrate surprise or exasperation or any kind of displeasure. To do so emphasises to all in court the fact that you have received a "wrong answer". It will also contribute to any concern the witness may be feeling. If the matter is sufficiently important you may wish to come back to it in another way at a later time, but you will have to be wary of an objection based upon you endeavouring to cross-examine your witness. If the "wrong answer" is not of overwhelming importance to your case you may be better advised to leave it alone. This will be a matter for the exercise of your judgment at the time.

You can assist your witness in the presentation of evidence by yourself being calm, confident, concise and seeking information in a logical order.
It will help your witnesses if you refer to them by name. It must be off-putting, dehumanising and aggravating for a person in the witness box to be addressed as "witness" rather than by name. Further, you should use any title to which that person is entitled, eg Constable Smith, Doctor Jones, Professor Adams. This is a matter of simple courtesy.

On an earlier occasion I recommended that you endeavour to ensure that each of your witnesses is both familiar and comfortable with the process which they are about to undertake and that they understand what is expected of them. I will not repeat what I said on that occasion.

Whilst it is necessary to avoid asking leading questions in evidence in chief, commonsense requires that you be permitted to do so in some areas and on some occasions. The Court is likely to become frustrated if non-leading questions are asked in relation to peripheral and non-contentious matters. It should be possible for you to agree with your opponent that you will lead the witness in areas that are not controversial but that you will apply the rules when appropriate.

Your strategy in leading your evidence in chief is likely to be to obtain the necessary information from your witness in an orderly fashion, a comprehensible manner and in a way that is most likely to lead to that testimony being accepted. In order to achieve this end careful preparation is required.

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Callinen J noted that the very fact of bizarre out-of-court *assertions* by an accused may constitute bizarre *conduct* for the purpose of a psychiatric or psychological diagnosis and on this basis alone may be admissible as original evidence.

Appearances
Appellant
Counsel - Odgers and Cox
Solicitors - NT Legal Aid Commission
Respondent
Counsel - Grace QC and Fraser
Solicitors - DPP(NT)

Commentary

Character directions have for years been a rich source of appeals from trial judges in Australia. In some jurisdictions the wording of an uncontroversial character direction is now contained in judges' benchbooks, the precise terms of which is known to many prosecution and defence counsel.

The High Court and the Court of Criminal Appeal reached the same result but used quite different reasoning. The High Court, unlike the Court of Criminal Appeal, seems to have had no difficulty *per se* with the proposition that evidence of good character may be used to support the credibility of out-of-court statements placed before the jury and made by an accused who has chosen not to give evidence himself.

The Court of Criminal Appeal had been referred to *Gillard* (unreported NSWCCA 13/7/91 per Gleeson CJ) which some years earlier had approved the application of the character direction to out-of-court statements by an accused. That appeal also concerned an attack on the credibility of an accused, through his medical experts, who claimed diminished responsibility.

The Court of Criminal Appeal considered the question of the accuracy of the history given by the appellant to his medical experts to be 'extraneous' to his state of mind at the time of the killing. None of the High Court judgments expressly agrees with this reasoning.

In this commentator's opinion the regime of discretionary character directions, as reaffirmed by the High Court in *Melbourne*, can lead to curious if not anomalous results, particularly where the good character of the accused is not contested by the Crown.

If an accused gives his version of events to interviewing Police and declares, "...I've never been in trouble with the Police", he will be only entitled to the propensity element of the character direction in the absence of 'more probative' evidence as to his good character.

On the other hand, if in the same context he states "...I'm an honest man", the jury should be directed that they may also consider the accused's good character when deciding if in general they accept him as a truthful interviewee.

The waters may, however, easily muddy. Consider, for example, the scenario in which a suspect, in the course of making an exculpatory statement to Police declares, "...I'm an *honourable* man...". Would defence counsel, on this statement being before the jury, be able to count on a <u>full</u> character direction from the trial judge ? After *Melbourne* it seems that in this example the extent of the character direction required by law from the trial judge will be governed by whether he or she thinks the accused had staked a claim to being moral - or only reputable.