1) 'Fresh in the memory' in the context of s66 of the *Evidence Act* meant 'fresh' or 'immediate' and is a term likely to be measured in hours or days, not years. This was decided for a number of reasons:
   a) Section 66 applies only where a person making a representation has been, or is to be, called to give evidence;
   b) The memory of events does change as time passes;
   c) The exception to the hearsay rule created by s66 should be applied only in cases where the tendering of an earlier statement is likely to add to the useful material before the court.
2) The trial judge failed to properly direct the jury, to consider the complainant's failure to make the complaint, as relevant to her credibility. This may not have been a point of appeal open to the appellant, as counsel failed to take any point with the trial judge on this point. This was irrelevant, as the appeal was allowed on other points.
3) The record of interview of the appellant should not have been admitted in full, if at all.

The appeal was allowed. The verdicts of guilty were quashed and a new trial was ordered.

In response to the unanimous decision of the High Court of Australia in *Graham v R* [1998] HCA 61, s66 of the Commonwealth *Evidence Act* was amended to include a new clause, s66(2A):

'2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
   a) the nature of the event concerned; and
   b) the age and health of the person; and
   c) the period of time between the occurrence of the asserted fact and the making of the representation.' ■

Note: 1 *Graham v R* [1998] HCA 61 at para 29.

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Propensity evidence

Jones v The Queen [2009] HCA 17 (29 April 2009)

By Gaetana Marjas

On 29 April 2009, the High Court dismissed an appeal brought by a co-accused convicted of murder.

THE FACTS

On 1 April 2005 the body of Morgan Jay Shepherd ('the deceased') was found decapitated and buried in a shallow grave near Dayboro, a township north of Brisbane.

The deceased was last seen alive, drinking with James Patrick Roughan ('Roughan') and the appellant at Roughan's home in Sandgate.

Both the appellant and Roughan were charged with the murder of the deceased. Both pleaded not guilty to the charge of murder, but guilty to 'being an accessory after the fact to the unlawful killing of the deceased by the other and to interfering with a corpse'.[1]

The prosecution submitted that either Roughan and the appellant murdered the deceased together, or that one of them murdered the deceased with the assistance of the other in the attack, with the intent of causing death or grievous bodily harm.

Both Roughan and the appellant made out-of-court statements that the other had assaulted and then stabbed the deceased in the neck with a knife.

The appellant said in his out-of-court statement that Roughan had been charged with stabbing a friend of his on a previous occasion. At the date of the offence against the deceased, Roughan was facing a charge of attempted murder of someone named McKenna and was on bail.

The appellant admitted to being present at the time of the killing of the deceased.

At first instance, Roughan and the appellant were both convicted of murder.

Both Roughan and the appellant appealed their convictions in the Court of Appeal. The appellant's appeal was dismissed.

The High Court considered the appellant's further appeal by special leave from the orders made by the Court of Appeal. The grounds for appeal cited by the appellant were that there was a miscarriage of justice arising as a result of two errors made during the course of the trial; namely, that:

a) The trial judge, Atkinson J, did not allow the appellant's counsel to fully adduce the evidence that Roughan had attempted to murder a friend (McKenna) on another occasion; and

b) His appeal had been dismissed despite the fact that the Court of Appeal had found that the trial judge had misdirected the jury. The claimed misdirection was that the jury could use the evidence of the appellant's bad character to reason that Roughan was, by comparison, less violent and dishonest than the appellant.

THE FIRST GROUND OF THE CHALLENGE

Counsel for the appellant sought to cross-examine Detective Sergeant Williams, the arresting police officer who charged Roughan with the murder of his friend, McKenna. This was on the grounds that this evidence was relevant to the credibility of the appellant's assertion that he was in fear of Roughan. The trial judge allowed the evidence of DS Williams, inasmuch as it revealed that Roughan was on bail charged with an offence that involved the stabbing of a friend. The appellant challenged the decision of the trial judge not to allow DS Williams to be cross-examined about his knowledge of the circumstances of the McKenna assault. The Court of Appeal held that the decision of the trial judge was correct because 'cross-examination on these lines could only have elicited hearsay'.[2]

The appellant accepted that the ruling confining the cross-examination of DS Williams was correct, but was concerned that the effect of this ruling was to limit any opportunity for his counsel to adduce admissible evidence of the circumstances of the McKenna assault.

The trial judge refused to allow questions regarding whether Roughan committed the offence against McKenna, save for the evidence from DS Williams that Roughan had been charged with the offence and was on bail. The trial judge made the distinction that it 'would be different ... if [Roughan] had been convicted of it [the offence against McKenna] but the problem with his being charged with it is that he is entitled to the presumption of innocence and the dangers of the prejudicial effect of it'.[3]

The further evidence that counsel for the appellant sought to lead in the trial included hearsay evidence; namely, that Roughan had admitted assaulting McKenna. Counsel for the appellant sought to include Roughan's 'confession' as part of the admissible evidence, on the basis that it was an out-of-court third-party confession. The appellant did not seek at trial to adduce similar fact evidence to prove Roughan's guilt 'by a process of improbability reasoning',[4] but rather to show that Roughan had a particular propensity that made it more likely that it was Roughan who killed the deceased.

The High Court found that the initial ruling of the trial judge and subsequent rulings of the Court of Appeal did not prevent the appellant from seeking to adduce direct evidence of the circumstances of the assault on McKenna.

In a separate judgment, Hayne J indicated that the type of evidence sought to be adduced by counsel for the appellant was hearsay and therefore inadmissible.

THE SECOND GROUND OF THE CHALLENGE

At trial, evidence adduced by counsel for Roughan about the nature of the appellant's bad character included his use of cannabis and speed and his supply of these drugs to others, that he smoked cannabis in the presence of his infant daughter, that he had assaulted a person and that he had a criminal history of assault and offences relating to property.

The trial judge directed the jury that this evidence was relevant only in the prosecution case against Roughan to endeavour to show that Roughan was of a less violent and dishonest nature than the appellant. The trial judge specifically told the jury that they should not infer from the evidence that because the appellant had committed other offences, he was therefore more likely to have committed the offence which was the subject of the trial.

The High Court did not consider that the direction given by the trial judge disadvantaged the appellant. Essentially, the direction made by the trial judge would not have had any significance in determining the verdict.[5]

The High Court found that the Court of Appeal did not err in finding that no substantial miscarriage of justice occurred in the trial of the appellant.

By comparison, Roughan was successful in his appeal, because the admission of evidence that he was charged with stabbing a friend was 'irretrievably prejudicial', and this prejudice was exacerbated by a direction by the trial judge to the jury that this evidence could be used to confirm that appellant was of a less violent nature than Roughan.[6]

Hayne J indicated at page 9 of the judgment that:

> 'the adducing of evidence by one co-accused about the propensities of another co-accused presents real difficulties for the conduct of a trial, especially a joint trial. There may be a question about whether the admissibility of evidence of this kind depends on the accused against whom the evidence is led having first put his or her character in issue.'

Hayne J was also concerned that, if one co-accused in a situation such as this can adduce evidence about the criminal propensities of the other, there is the risk that these issues could create a distraction from the central issues that are the subject of the trial.

The appeal was dismissed. ■

Notes: **1** *Jones v The Queen* [2009] HCA 17 at para 2. **2** R v *Roughan and Jones* [2007] QCA 443; (2007) 179 A Crim R 389 at 404 [73] per Keane JA, 406 [88] per Muir JA, 410 [101] per McMurdo J. **3** At p5. **4** At p6. **5** Citing *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81. **6** At 8.

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