SUPREME COURT OF QUEENSLAND

CITATION:	*R v Patel (No 5)* [2013] QSC 63
PARTIES:	**THE QUEEN** **v** **JAYANT MUKUNDRAY PATEL** **(Defendant)**
FILE NO/S:	Indictment No 387 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2013
JUDGE:	Fryberg J
ORDERS:	**No orders made.** (On 18 February 2013, counsel for the Crown informed the Court that the Crown would call the witness in question.)
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – POWERS AND DUTIES OF PROSECUTION AS TO CALLING OF WITNESS AND PRESENTING EVIDENCE – GENERALLY – Duty to call all relevant evidence – Relevant witness CRIMINAL LAW – PROCEDURE – POWERS AND DUTIES OF PROSECUTION AS TO CALLING OF WITNESS AND PRESENTING EVIDENCE – UNRELIABLE AND HOSTILE WITNESSES – Right of Crown to refuse to call *Coulson v The Queen* [2010] VSCA 146, cited *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38, cited *R v Wilson* [1998] 2 Qd R 599, cited *Velevski v The Queen* (2002) 187 ALR 233; [2002] HCA 4, cited *Whitehorn v The Queen* (1983) 152 CLR 657; [1983] HCA 42, cited
COUNSEL:	P Davis SC with D Meredith for the Crown K Fleming QC with P Smith and K Hillard for the defendant

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown
Raniga Lawyers for the defendant

[1] **FRYBERG J:** The retrial of Dr Patel for the manslaughter of Mervyn Morris began on Wednesday last week, 6 February 2013, when the jury was empanelled. The Crown prosecutor opened, and evidence was called on 8 February. Included in the list of witnesses provided to the court and read to the jurors was a Dr Smalberger. He had given evidence at the first trial. He was a consultant physician at Bundaberg Base Hospital and had examined Mr Morris on the day he died. Notes of the examination were made in the patient record by his assistant, Dr Chikolwa, but the latter did not himself make any observations; he simply acted as a scribe. The notes were unconditionally admitted into evidence.

[2] On 13 February, or perhaps late on 12 February, the Crown prosecutor informed the defence that he had decided not to call Dr Smalberger. The circumstances which gave rise to that decision were that in January, after obtaining the consent of the Director of Public Prosecutions to speak to the doctor, junior counsel for the defence obtained a further statement from him. That statement was forwarded to counsel for the Crown on 31 January. That in turn led to an interview between Dr Smalberger and junior counsel for the Crown on 8 and 9 February. It seems that those interviews were the cause of the Crown's change of mind.

[3] At the first trial Dr Smalberger gave evidence of Mr Morris' condition at the time of his examination. He expanded upon and explained the notes of that examination. He gave a small amount of opinion evidence. For example he opined that the patient's

blood sugar reading was far below normal, most likely due to the fact that he had been malnourished. That evidence supported the Crown case against the accused, who was responsible for oversight of Mr Morris' nourishment. He was cross-examined about it. He was also cross-examined to show that various test results indicated that Mr Morris' liver function was normal. That helped the defence, because the Crown case included the proposition that Mr Morris suffered from liver disease.

[4] In his interview with junior counsel for the accused, Dr Smalberger was asked his opinion about a number of other matters of importance to the Crown case, about which it seems his opinion had never previously been sought. His opinions on these matters, it is common ground, favour the defence. I have not read the transcripts of his interviews with junior counsel for the Crown in full, but I assume that the same is true of them.

[5] This morning the defence applied on notice for an order staying the trial until the Crown should call the witness, or in the alternative, for a direction or indication that the court would call the witness. The stay was opposed by the Crown and it was rightly pointed out that I have no power to direct a prosecutor to call the witness. In fairness to Mr Fleming QC, senior counsel for the defence, this aspect of the application was argued but faintly. To persuade me that I should call the witness Mr Fleming relied upon the decision of the Court of Appeal in *R v Wilson* [1998] 2 Qd R 599. He submitted that Dr Smalberger was a relevant witness in the Crown case, and the defence should not be forced to call him themselves.

[6] For the Crown Mr Davis SC did not oppose my calling the witness provided the Crown had the right to cross-examine him. Indeed, he submitted that I should call him after the Crown case had closed and before the accused was called upon. He rejected an offer to cross-examine the witness on the voir dire and then make an application for a declaration of hostility and stated frankly that the Crown did not consider the witness dishonest. He told me that the Crown's position was that the evidence suggested the witness's evidence severely lacked objectivity; that it was at odds with more qualified experts; and that his opinion was not reliable. He expressly denied that the Crown sought to gain a tactical advantage by denying the accused the right to cross-examine. He invited me to consider these matters and, if I thought fit, to invite the Crown to reconsider its position, and to do so at this stage of the trial rather than at the close of the Crown case. Among the numerous decisions to which counsel specifically drew my attention were *Velevski v The Queen* (2002) 76 ALJR 402, *Whitehorn v The Queen* (1983) 152 CLR 657, *R v Apostilides* (1984) 154 CLR 563 *and Coulson v The Queen* [2010] VSCA 146.

[7] I need not determine whether it is the law that if prosecutors form the view that the interests of justice require a relevant witness to be cross examined by the Crown, at least in the case of opinion evidence, they have discretion not to call that witness. I am firmly of the view that the interests of justice do not require the prosecutors here to have the right which they seek.

[8] Criminal trials are adversarial proceedings. The obligations which lie on a prosecutor are well known. The procedural rules are often deliberately weighted against the Crown. I make no comment about this. In

assessing what is in the interests of justice one must take into account that it is justice in accordance with the law, including the existing procedural rules, which is the relevant measure.

[9] I turn to the specific matters relied upon by the Crown. First it was submitted that in the lead up to the first trial, Dr Smalberger indicated to prosecutors that he thought the prosecution of the accused was a witchhunt, and he repeated that comment to the police after he had given his evidence at that trial. It may be that he has that view. A lot of people in the community, particularly medical practitioners, might well hold the same view. It is a view which could reasonably be held by honest and unbiased people. The transcript of Dr Smalberger's evidence at the first trial does not suggest that his testimony was in any way affected by such a view.

[10] Next, it is submitted that it was extraordinary that these opinions would be offered for the first time six and a half years after Dr Smalberger's initial statement. In the present context that does not seem extraordinary. What is extraordinary is that he was not asked about the matters now in contention when he gave evidence at the first trial. It is pointless to speculate why that happened. It is not without irony that one of the main Crown witnesses at the second trial, who has already given evidence, Dr Igras, was in a similar position. As it happens, her opinions are favourable to the Crown. The defence objected to evidence of those opinions being given. I overruled those objections. Fairness requires a consistency of approach in relation to Dr Smalberger.

[11] The Crown further submitted that Dr Smalberger's lack of objectivity could be demonstrated from his interview. I was referred to pages 13 and 14 of that interview, which is exhibited to the affidavit of Mr Raniga. In my judgment the passage does not demonstrate anything which would indicate a lack of objectivity on the part of the witness or any "political" identification by the witness with the accused.

[12] The Crown also pointed out that the defence has made it plain to the jury that it intends to call the accused and probably others to give evidence in the defence case; that Dr Smalberger is available, cooperative with the defence and able to be called by them if they wish. It submitted that there was nothing to suggest they needed to cross-examine in order to adduce the evidence which they wished to lead.

[13] All that is no doubt true; but if the prosecution persists in its stance, no doubt that will be taken into account by the Court of Appeal. I do not think it provides a reason to depart from the usual procedure adopted in criminal trials. It must be remembered that Dr Smalberger is a witness of fact. Even if his evidence on facts is not highly controversial and his evidence on that aspect is not particularly lengthy, it is capable of affecting the outcome to the extent that it explains and expands on the notes. It is not to the point that the factual evidence is to a considerable degree established by the notes already admitted into evidence by consent at a time when Dr Smalberger was still named as a witness.

[14] Finally, it is in my view irrelevant to the obligation on the prosecutor that the evidence is at odds with that of more qualified experts and the opinion is not in the

prosecutor's view reliable. Those are jury questions. If the prosecutor thinks the opinion is unreliable, he is under no obligation to lead it.

[15] Accepting the Crown's invitation, I indicate that in my view it should reconsider its decision not to call Dr Smalberger. I shall reserve my decision on the application to allow that process to take place.