

Ewen v R [2015] NSWCCA 117- Analysis and Effect on Murray

Introduction

Three things:

- i) *Ewen v R*
- ii) Effect on *Murray*
- iii) Arguments to get a *Murray* direction

1. Ewen v R

a) Crown Case at First Instance

- Complainant goes to house in Bathurst with friend to look at puppies
- Complainant drinks bourbon and takes amphetamines
- Ewen arrives later with friend
- Complainant moderately affected by alcohol
- Ewen invites complainant into bathroom, pushes head down and forces her to perform fellatio
- Complainant loses consciousness, recovers to find lying face down with Ewen behind having penile/vaginal intercourse

b) Defence Case

- Complainant asked for amphetamines, appellant provided some. Complainant became flirtatious in bathroom, and accepted invitation to fellate appellant and thereafter to have sex.

c) Trial by Judge Alone

- Issue at trial is consent
- Ewen gives evidence in trial says Complainant came onto him and wanted sex
- Complainant's version of what happened in bathroom not corroborated
- Complainant makes immediate complaint
- Judge accepted complainant as "a compelling, honest and reliable witness".
- Rejected appellant: "He has taken some facts that were truth and has woven a web of lies around them." (pp 17)

- Judge did **not** give himself a *Murray* Direction

d) The Appeal

- Seven grounds of appeal in CCA
- Ground 2 – That the trial judge erred in failing to give himself a Robinson/Murray type of warning and/or failing to take heed and apply such warning.
- Ratio – Murray previously understood to mean a direction that, in any case in which the sole evidence of the commission of a crime is uncorroborated, that evidence must be scrutinised with great care. The appellant argued that, as the complainant's evidence as to the sexual intercourse without consent was uncorroborated, the Judge ought to have directed himself accordingly.
- After a detailed review of jurisprudence and legislative history regarding Murray directions, the Court found that such a direction is not “required” by law.
- Further s 294AA Criminal Procedure Act prohibits *Murray* direction based solely on absence of corroboration. (see Judgment Summary NSWCCA 27/5/15)

2. Effect on Murray

- Careful analysis of the common law authorities by Simpson J.
- “Murray Direction” from *R v Murray* (1987) 11 NSWLR 12 at pp 19.
- Murray was also a case about sex. However important comment from Lee J:

“In all cases of serious crime it is **customary** for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that a witness’ evidence is unreliable”
- Murray also dealt with a former version of s 294 CPA (s 405C(2)).
- Simpson J opined that the use of the word “customary” by Lee J in Murray meant that such a direction is not necessarily “required” and therefore its absence is not fatal to a conviction (*Ewen v R* [2015] NSWCCA 117 Simpson J at [111]).
- Moreover Simpson J reviewed the six High Court Cases that dealt with *Murray* and found that “in every case where it was held by the High Court that the verdict of guilty

(whether verdict of a jury or judge alone) was flawed by reason of the failure to give a warning to the effect that the complainant's evidence must be scrutinised with great care, there were circumstances other than the absence of corroboration of the complainant's evidence to give a warning to the effect that the absence of corroboration alone calls for a direction in accordance with Murray." (Simpson J at [132]).

- Therefore no case in the High Court that holds that absence of corroboration alone calls for *Murray* direction.
- Also dealt with s 294AA(2) CPA (applicable in prescribed sexual offence cases) that prohibits a warning about the danger of convicting on the uncorroborated evidence of "any complainant". Simpson J held that a "Murray direction", based only on the absence of corroboration, is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant. Held that whether words used are "dangerous to convict" or "scrutinize the evidence with great care" the substance of the direction is the same – that merely because the evidence is uncorroborated, it would be unsafe for the jury to act upon it. Which therefore transgresses s 294AA(2) CPA. (Simpson J, at [141]).

3. Arguments for Murray

- "If the evidence in any case is such as to call for a warning, or a specific direction, as to weaknesses or deficiencies in the evidence, particularly if they are weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury, then the judge is entitled, and may be obliged, to draw that to the jury's attention." (*Ewen v R* [2015] NSWCCA 117, Simpson J at [143]).
- Examples (many of which are indicated in review of decisions in Ewen):
 - i) Delay in bringing proceedings (likelihood of error in recall with long delay); Nature of the allegations; Age of the complainant at the time of the events alleged; Alleged awakening of a sleeping child by indecent acts; and Absence of complaint (*Longman*);
 - ii) Age, emotional instability and infatuation with the accused (*Fleming*);
 - iii) Age, long period elapsed before complaint (impossible to test with medical evidence), inconsistency in complainant's evidence, absence of any conversation on evening in question or later between

- complainant and appellant, absence of any threat or warning not to reveal, maintenance of a harmonious relationship, absence of any earlier or later misconduct (*Robinson*);
- iv) Effluxion of time and affect on memory (even if immediate complaint);
 - v) Demeanor in the witness box (evasiveness, delay in responding to questions, expression/tone/affect etc);
 - vi) Counterintuitive behavior (eg staying with someone after an alleged assault, or not disclosing the matter to someone when asked);
 - vii) Physical or psychological/mental limitations or disability;
 - viii) Where others were present and were or may have been in a position to observe what took place, and were not called to give evidence (absence of corroboration where corroborative witnesses might have been available); and
 - ix) Absence of physical injury when expect to be something.

4. Conclusion

- Murray still there, just have to construct persuasive arguments to get it.
- Judge is “entitled” to give direction – not “required” to give it.
- Still good law to remind HH that “customary” in criminal cases to give the direction where Crown case relies on uncorroborated evidence of one witness.
- Still available for all offences, including prescribed sexual offences, but be mindful of s 294AA CPA.
- Is a powerful tool in supporting grounds for reasonable doubt.
- Look to circumstances giving rise to a potential unreliability that supports the giving of the Direction.
- *“If you can’t answer a man’s arguments, **all is not lost**; you can still call him vile names”* (Elbert Hubbard).

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