Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 38) [2022] FCA 597

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| File numbers: | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: | 23 May 2022 |
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| Catchwords: | **EVIDENCE** — Ruling on admissibility of document applicant seeks to tender — document recording WhatsApp message from a Mr Sharif Khoram to solicitors for respondents dated 1 December 2020 — where witness called by respondents, Mohammed Hanifa Fatih, cross-examined by applicant on whether he had spoken to Afghan Independent Human Rights Commission (AIHRC) about events at village of Darwan on 11 September 2012 and whether he had applied for compensation from AIHRC — where counsel for applicant put to Mohammed Hanifa and Mohammed Hanifa denied that he had had telephone conversation with AIHRC official in presence of Mr Khoram during which he was informed of certain matters, including possibility of compensation by AIHRC — where WhatsApp message from Mr Khoram sets out matters Mohammed Hanifa was told by “the HRC director”, including possibility of compensation by AIHRC — whether document contains prior statement, inconsistent or otherwise, made by Mohammed Hanifa — inference that WhatsApp message records statement made by Mohammed Hanifa to Mr Khoram on or shortly before 1 December 2020 — whether applicant put to Mohammed Hanifa substance of evidence and enough of circumstances of making of statement to enable witness to identify statement in accordance with ss 43 and 106(1)(a) of *Evidence Act 1995* (Cth) — tender refused |
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| Legislation: | *Evidence Act 1995* (Cth) ss 43, 101A, 102, 106 |
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| Cases cited: | *Roberts-Smith v Fairfax Media Publications Pty Limited (No 10)* [2021] FCA 317 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 17 |
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| Date of hearing: | 2 August 2021 |
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| Date of last submissions: | 6 August 2021 (Applicant)  4 August 2021 (Respondents) |
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| Counsel for the Applicant: | Mr A Moses SC with Mr P Sharp |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Mr N Owens SC with Ms L Barnett and Mr C Mitchell |
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| Solicitor for the Respondents: | MinterEllison |
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| Counsel for the Commonwealth of Australia: | Ms C Ernst |
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| Solicitor for the Commonwealth of Australia: | Australian Government Solicitor |

ORDERS

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|  | | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LIMITED (ACN 003 357 720) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1486 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE AGE COMPANY PTY LIMITED (ACN 004 262 702) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1487 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED (ACN 008 394 063) (and others named in the Schedule)  First Respondent | |

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| order made by: | besanko J |
| DATE OF ORDER: | 23 MAY 2022 |

THE COURT ORDERS THAT:

1. The tender of MFI D (WhatsApp message dated 1 December 2020) be rejected.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO J:

1. This is a ruling on the admissibility of a document which the applicant seeks to tender. The document is a WhatsApp message from Mr Sharif Khoram to solicitors for the respondents and dated 1 December 2020. Mr Khoram was described by the respondents as an intermediary who was responsible for making contact with persons in Afghanistan, including, but not limited to, Mohammed Hanifa Fatih. The tender relates to evidence given from Afghanistan by one of the Afghan witnesses, Mohammed Hanifa. I have previously summarised the significance of the Afghan witnesses and the evidence it was anticipated they would give (see *Roberts-Smith v Fairfax Media Publications Pty Limited (No 10)* [2021] FCA 317).
2. In the course of the cross-examination of Mohammed Hanifa, counsel for the applicant asked Mohammed Hanifa whether he had spoken to the Afghan Independent Human Rights Commission (the AIHRC) about the events at the village of Darwan on 11 September 2012. Mohammed Hanifa said that he had not done that. He was then asked whether he had made an application for compensation to the AIHRC. He said that he had not presented any application.
3. The following day, Mohammed Hanifa was cross-examined about these topics in greater detail. He denied that he had had discussions with the AIHRC in late 2020, early 2021. He denied that he had had a telephone conversation with an official of the AIHRC in the presence of Mr Khoram, during which he was told the following: (1) if Ali Jan was his father or brother, he could file a complaint; (2) some compensation would be provided for the affected families by Australians through the AIHRC in Tarin Kowt; and (3) only the AIHRC could do that i.e., arrange or provide compensation and no one else. Furthermore, it was put to Mohammed Hanifa in cross-examination that he had a motive, that is, obtaining compensation for falsely claiming Ali Jan was not “Talib”. He denied this proposition.
4. The applicant seeks to tender the WhatsApp message to rebut Mohammed Hanifa’s denial that he did not speak to anyone from the AIHRC. The key passage in the WhatsApp message is as follows:

In first telephone conversation with Hanifa: the HRC director mentions to Hanifa in way that if Alijan is your brother or father file your complain. But he knew who he was he knows the whole story. The HRC director tells Hanifa that some compensation will be provided to the affected families by Australians through HRC here in Tirinkot. Only HRC can do that nobody else. He told that there are two group against each other and one group is facing justice.

I don’t know what is going on. There might be any intention for diverting part of the compensation if any in a collective manner from several families. if it is really the matter. The HRC should know that distributing money should not be just like that but if there is any that must be after many processes.

However, this was just a new information which confirms Hanifa’s honesty in reporting issues.

Another question involving Hanifa in such dirty game will not affect the quality of witnessing in your courts?

However, we don’t know what is really behind.

Sorry for broken sentences as I have strength to review it.

You might share your thought with me if there is any.

Thanks.

1. The applicant claims that the WhatsApp message is admissible as credibility evidence. He claims that the WhatsApp message contains a prior inconsistent statement made by Mohammed Hanifa to Mr Khoram, the making of which (as opposed to the truth or otherwise of the statement) is relevant to the credibility of Mohammed Hanifa. It constitutes, so it is said by the applicant, a representation of what Mohammed Hanifa said to Mr Khoram about his (Mohammed Hanifa’s) conversations and dealings with the AIHRC.
2. Section 102 of the *Evidence Act 1995* (Cth) establishes the credibility rule which is that credibility evidence about a witness is not admissible. The concept of credibility evidence is defined in s 101A. There are specific exceptions to the credibility rule and they are set out in the sections which follow s 102. Only one exception has been identified by the applicant as relevant and that is the exception in s 106. That section is in the following terms:

**106 Exception: rebutting denials by other evidence**

(1) The credibility rule does not apply to evidence that is relevant to a witness’s credibility and that is adduced otherwise than from the witness if:

(a) in cross-examination of the witness:

(i) the substance of the evidence was put to the witness; and

(ii) the witness denied, or did not admit or agree to, the substance of the evidence; and

(b) the court gives leave to adduce the evidence.

(2) Leave under paragraph (1)(b) is not required if the evidence tends to prove that the witness:

(a) is biased or has a motive for being untruthful; or

(b) has been convicted of an offence, including an offence against the law of a foreign country; or

(c) has made a prior inconsistent statement; or

(d) is, or was, unable to be aware of matters to which his or her evidence relates; or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

1. The applicant claims that the evidence in the WhatsApp message is relevant to Mohammed Hanifa’s credibility because it shows that his evidence that he never spoke with anyone from the AIHRC is false.
2. It is uncontentious that the evidence is to be adduced otherwise than from Mohammed Hanifa. For admission of the evidence under s 106, the applicant must satisfy the Court that the substance of the evidence was put to Mohammed Hanifa and Mohammed Hanifa denied, or did not admit or agree to, the substance of the evidence (s 106(1)(a)). The applicant asserted that he did not need leave under s 106(1)(b) because the evidence in the WhatsApp message tends to prove that Mohammed Hanifa has made a prior inconsistent statement. The term *prior inconsistent statement* is defined in the Dictionary in the Evidence Act as follows:

***prior inconsistent statement*** of a witness means a previous representation that is inconsistent with evidence given by the witness.

1. The term *representation* is defined in the Dictionary as follows:

***representation*** includes:

(a) an express or implied representation (whether oral or in writing); or

(b) a representation to be inferred from conduct; or

(c) a representation not intended by its maker to be communicated to or seen by another person; or

(d) a representation that for any reason is not communicated.

1. Section 43 defines the circumstances in which a cross-examiner may adduce evidence of a prior inconsistent statement of a witness. The section provides as follows:

**43 Prior inconsistent statements of witnesses**

(1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:

(a) complete particulars of the statement have been given to the witness; or

(b) a document containing a record of the statement has been shown to the witness.

(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:

(a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and

(b) drew the witness’s attention to so much of the statement as is inconsistent with the witness’s evidence.

(3) For the purpose of adducing evidence of the statement, a party may re-open the party’s case.

1. It seemed to be common ground that the requirements of both s 106(1)(a) and s 43 must be met in a case where a prior inconsistent statement is the issue.
2. The applicant submitted that the relevant prior inconsistent statement was a statement of Mohammed Hanifa to Mr Khoram which contained details of things said to Mohammed Hanifa and that by putting to Mohammed Hanifa the fact of contact with the AIHRC and the things said to Mohammed Hanifa, he had put the substance of the evidence and the circumstances of the making of the statement and the extent of inconsistency to Mohammed Hanifa. The probative value of the evidence outweighed any prejudice to the respondents. In response to one of the key submissions made by the respondents and addressed below, the applicant submitted that there was no requirement that he put to Mohammed Hanifa that he had told Mr Khoram that he had spoken with the AIHRC in circumstances where Mohammed Hanifa’s denials were “categorical and vigorous”.
3. The respondents advanced two alternative reasons why the WhatsApp message is not admissible under s 106(1)(a) and (2)(c) of the Evidence Act. The first reason is that the applicant has not established that the WhatsApp message records any prior statement of Mohammed Hanifa, inconsistent or otherwise. The second reason is that, in the alternative, the applicant has failed to satisfy “the predicate requirements” of ss 43 and 106(1)(a) of the Evidence Act in that the “substance of the evidence” was not put to Mohammed Hanifa. The “substance of the evidence”, the respondents assert, includes the circumstances of the making of the alleged prior inconsistent statement.
4. With respect to the first reason, the respondents submit that whilst the WhatsApp message contains hearsay statements purportedly made by “the HRC director” to Mohammed Hanifa during a telephone call on an unknown date and a hearsay statement by Mr Khoram on 1 December 2020 in which Mr Khoram repeats the hearsay statements purportedly made by “the HRC Director” to Mohammed Hanifa, the WhatsApp message does not record or refer to any prior statement by Mohammed Hanifa to “the HRC Director” or to Mr Khoram. The respondents point out that the proposition put to Mohammed Hanifa in cross-examination by counsel for the applicant was that he had a conversation with an official of the AIHRC in which Mr Khoram participated (transcript page 1041, lines 44–46). If that was right, then any statement is a statement of Mr Khoram and not of Mohammed Hanifa. The respondents submit that furthermore, that is a different proposition from the proposition now put by the applicant, that is, that it should be inferred that Mohammed Hanifa told Mr Khoram on or about 1 December 2020 that he (Mohammed Hanifa) had spoken to a person purporting to be a director of the AIHRC and was told about the matters recorded in the WhatsApp message. The respondents submit that the inference now advanced is no more likely than the alternative and, in those circumstances, it should not be drawn and that, in any event, the inference now advanced was not put to Mohammed Hanifa. This latter proposition is also an aspect of the second and alternative argument.
5. I reject the respondents’ first reason. I refer to the passage in the WhatsApp message set out above. It seems to me that reading the passage as a whole, it is appropriate to infer that, in addition to the two statements identified by the respondents (see [14]), the WhatsApp message contains a statement by Mohammed Hanifa, not necessarily on 1 December 2020 but, I infer, on or shortly before 1 December 2020, that a “HRC director” had told him certain things.
6. The premise of the second reason advanced by the respondents is that the WhatsApp message contains a prior inconsistent statement by Mohammed Hanifa to Mr Khoram made on or shortly before 1 December 2020, that he (Mohammed Hanifa) had spoken to a person purporting to be a director of the AIHRC who told him about the matters recorded in the WhatsApp message. The respondents submit that both s 106(1)(a) and s 43 of the Evidence Act contain a requirement that the out of Court evidence, in this case a prior inconsistent statement, be put to the witness before the evidence can be adduced. In the case of s 106(1)(a), the requirement is that the substance of the evidence be put to the witness and in the case of s 43, the requirement is that enough of the circumstances of the making of the statement to enable the witness to identify the statement be put to the witness and the witness’s attention be drawn to so much of the statement as is inconsistent with the witness’s evidence. The respondents contend that neither of these requirements were met in this case.
7. In my opinion, the substance of the evidence and “enough of the circumstances of the *making* of the statement to enable the witness to identify the statement” includes the date or period during which the statement was made and the person to whom it was made. Neither of those matters was put to Mohammed Hanifa. These are important requirements of the Evidence Act which were not complied with in this case. In a case where a witness may be held to have made a prior inconsistent statement, I do not think there is scope for an approach which does not insist on strict compliance with the statutory provisions. In the circumstances, the tender of the WhatsApp message dated 1 December 2020 must be rejected.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 23 May 2022

SCHEDULE OF PARTIES

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|  | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
| Respondents |  |
| Second Respondent: | NICK MCKENZIE |
| Third Respondent: | CHRIS MASTERS |
| Fourth Respondent: | DAVID WROE |