

THE QUEEN

v

RONALD RAYMOND HOVELL

Coram: Richardson J  
McMullin J  
Somers J

Hearing: 18 June 1986

Counsel: P J Kaye for Crown  
C B Cato and N F J Thinn for respondent

Judgment: 22 August 1986

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JUDGMENT OF RICHARDSON J

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This is an application under s 379A of the Crimes Act 1961 for leave to appeal against the ruling of Prichard J on a pre-trial application under s 344A of the Act that a statement which the prosecution proposed tendering at the trial of the respondent was not admissible under s 3 of the Evidence Amendment Act (No 2) 1980.

On 1 November 1985 the respondent was charged with 4 offences alleged to have been committed over 19 months earlier on 23 March 1984: the rape and indecent assault of an 81 year

old woman (Mrs B), breaking and entering her flat in Glen Innes, Auckland, and the theft of a blue cardigan from an adjoining flat. On the morning of 23 March 1984 a police officer had taken a statement from Mrs B. Although in the form of a narrative by Mrs B of events, it was prepared by the police officer on a question and answer basis with the police officer converting it into a running account. On completion of the document it was read by Mrs B. She signed at the end and at the foot of each of the preceding 3 pages and the police officer then certified that she, the police officer, had taken and witnessed the statement. The statement recounted in detail that Mrs B had been attacked and raped in her flat and subjected to various indignities which were later the subject of the indecent assault charge. She described her assailant but did not know his identity. Finger prints were found on the door frame of Mrs B's flat and on the window frame of the adjoining flat, and the blue cardigan stolen that night from the adjoining flat was found in Mrs B's flat. It was not until 19 months later, when as a result of checking the respondent's finger prints following his arrest on a minor and unrelated charge it was found that they matched the finger prints on the door frame and window frame, that the police had a suspect. When spoken to by the police the respondent said he had been in that flat on the evening and had seen an old lady there but was drunk and could not remember what had happened.

Now Mrs B had died of natural causes on 1 June 1985. Without the statement the prosecution did not have a case against

the respondent on the rape and indecent assault charges and at depositions the police officer who had taken the statement produced it as an exhibit under objection from the respondent's counsel. Recognising that admissibility of the statement would be an issue at the trial, counsel for the Crown applied for a pre-trial ruling as to its admissibility under s 3 of the 1980 Amendment.

The Evidence Amendment Acts of 1945 and 1966 provided in a limited way for the admission of certain hearsay evidence in civil and criminal proceedings. In July 1967 the Torts and General Law Reform Committee reported to the Minister of Justice on hearsay evidence and appended a draft bill reflecting its detailed recommendations for legislative change. After a long gestation period and in substantially redrafted form the Evidence Amendment Act (No 2) 1980 repealed the earlier legislation and set out detailed rules allowing for and governing the admissibility of certain documentary hearsay evidence. Section 3, the primary provision, reads as follows:

**" 3. Admissibility of documentay hearsay evidence -**

(1) Subject to subsection (2) of the section, and to sections 4 and 5 of this Act, in any proceeding where direct oral evidence of a fact or an opinion would be admissible, any statement made by a person in a document and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion if -

- (a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; or

(b) The document is a business record, and the person who supplied the information for the composition of the record -

(i) Cannot with reasonable diligence be identified; or

(ii) Is unavailable to give evidence; or

(iii) Cannot reasonably be expected (having regard to the time that has elapsed since he supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he supplied; or

(c) In civil proceedings only, -

(i) The maker of the statement had personal knowledge of the matters dealt with in the statement; and

(ii) Undue delay or expense would be caused by obtaining his evidence.

(2) Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that -

(a) Records the oral statement of any person made when the criminal proceeding was, or should reasonably have been, known by him to be contemplated; and

(b) Is otherwise inadmissible in the proceeding.

Where the requirements of the section are met the statement "shall be admissible as evidence of that fact or opinion". However, where the proceeding is with a jury, the Court may, in its discretion, reject any statement that would be admissible in the proceeding under the section, if the prejudicial effect of the admission of the statement would outweigh its probative value, or if for any other reason the

Court is satisfied that it is not necessary or expedient in the interests of justice to admit the statement (s 18). If the statement is admitted its weight will be assessed by the jury, or by the trial Judge in Judge alone cases, having regard to all the circumstances including the obvious consideration that the person concerned cannot be cross-examined.

Two questions of construction of s 3 arise for consideration. The first concerns the application of subs (1) to the present case. If otherwise within that subsection then the second question is whether admission of the statement is barred by subs (2). It is logical and convenient to follow that sequence.

As to subs (1), Mr Kaye for the prosecution relied on para (a) and alternatively (b). If Mrs B is "the maker" within para (a), there can be no doubt that that paragraph is satisfied. However I think the better view is that the police officer was the maker of the statement for the purposes of para (a) and because she did not have personal knowledge of the matters dealt with in the statement that essential ingredient of the paragraph is not met.

The subsection is directed to the admissibility of "any statement made by a person in a document". The term "document" is itself defined in s 2 as meaning a document in any form whether signed or intialled or otherwise authenticated by its maker or not and "statement" means any representation of fact or opinion. Clearly the police officer was the maker of the document in question. She prepared it. She did so converting

into narrative form the answers she received to the questions she asked.

That is not the end of the inquiry. Subs (1) does not refer to the maker of the document as such. The reference is to "any statement made by a person in a document" and (in para (a)) "the maker of the statement". However I do not see any rational basis for distinguishing between the 2 formulations under this statutory scheme. The first phrase is directed to a statement which is made in a document, not to its earlier status as an oral statement. It is as if the phrase contained the added words "... document made by that person". This construction may be tested by comparing the language of para (b) and subs (2). Both proceed on the premise that the person making the statement in the document is recording information given to him rather than matters within his personal knowledge. That is explicit in para (b) in its reference to "the person who supplied the information for the composition of the record". It is implicit in subs (2) in its reference to "records". An apt direction to paras (a) and (c) of subs (1) would have simply read: "Is made when the criminal proceeding was, or should reasonably have been, known by the maker to be contemplated". As the common reference to recording itself suggests, subs (2) is in my view directed to cases coming within subs (1)(b).

On this analysis the inquiry under para (a) is who made the document containing the statement in question. It is I think implicit in the subsection that where one person provides

information which another then converts into documentary form each cannot be described as the maker of the document. In that situation the person who prepares the statement in documentary form is the maker, and because she or he does not have personal knowledge of the matter dealt with that ingredient of para (a) is not met; but para (b) which is directed to the situation where the supplier of the information is not available may then apply. Each paragraph has its own function under the legislative scheme and, particularly given the role of para (b), it is understandable that para (a) should be confined to those cases where it can truly be said that the person who actually prepared the document had personal knowledge of the matters with which she or he was dealing. If so, then the signing by Mrs B of the document prepared by the police officer does not change its character and convert it into one made by Mrs B.

The next question is whether the document is a business record within para (b). If it is, then the other requirements of the subsection are met and in particular it is clear that the person who supplied the information for the composition of the record, that is Mrs B, is unavailable to give evidence. The composite expression "business record" is defined in s 2 as meaning:

" A document made -

(a) Pursuant to a duty; or

(b) In the course of, and as a record or part of a record relating to, any business, -

from information supplied directly or indirectly by any person who had, or may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information he supplied. "

"Business" too is given an expansive definition in section 2. It means any business, profession, trade, manufacture, occupation, or calling of any kind; and includes the activities of any Department of State, local authority, public body, body corporate, organisation, or society.

Those related definitions breathe comprehensiveness. When read together they apply fairly to the statement taken by the police officer in this case. The document was made by the police officer from information supplied directly by Mrs B. She had or at the lowest may reasonably be supposed to have had personal knowledge of what she saw and experienced that night and of what was said to her by the intruder. In short, of the matters dealt with in the information she supplied to the police officer. The next question is whether the document was made pursuant to a duty or in the course of or as a record or part of a record relating to any business. Clearly it was made in the regular course of police work. "Duty" is not defined in this context but the performance of a responsibility imposed or resting on the holder of an office would seem clearly enough to be within its scope. In terms of the oath of office taken by every member of the police this officer was bound to "see and cause Her Majesty's peace to be kept and preserved; [to] prevent to the best of my power all offences against the peace; [and to] discharge all the duties [of the office] faithfully according to the law" (Police Act 1958 s 37(1)). Considered in terms of the role and responsibilities of the police officer I am satisfied that it was within the duty of this police officer investigating



the complaint by Mrs B to record the information Mrs B supplied to her and that the record was made in appropriate form in the performance of that duty (see Simpson v Lever [1963] 1 QB 517, 522).

Turning to the alternative definition (b) it might fairly be said that the document was made in the course of and as part of a record relating to the activities of the police (the statute not requiring that it be part of a continuous record). However, the document in question falls naturally and squarely within the first limb of "business record" and in that circumstance it is not necessary to explore the difficulties of application of the second limb canvassed in argument by Mr Cato.

Subject then to subs (2) the document meets the test of admissibility under s 3(1)(b). The further question is whether admission is barred by subs (2). The requirements of (a) and (b) are cumulative. As to (a), for the reasons given earlier and accepting for this purpose the evidence of the police officer as to the manner in which the information was elicited and recorded and the accuracy of the record, I am satisfied that the statements in the document, that is the representations of fact or opinion in the document, record the oral statement made by Mrs B.

The remaining question under (a) is whether the oral statement of Mrs B was made at a time when the criminal proceeding was or should reasonably have been known by her to be contemplated. The expression "the criminal proceeding" refers here

to the criminal proceeding instituted against the respondent on 1 November 1985 and Mr Kaye argued that no such proceeding could have been contemplated within the meaning of the subsection until then when, for the first time, there was a known suspect. Prichard J rejected that submission and so would I. "The criminal proceeding" is the criminal proceeding in which the written statement is tendered in evidence. But the expression is obviously not used in the technical sense of the institution of a particular proceeding for that would exclude the application of para (a) and in that way preclude any challenge to admission under the subsection if the statement in question had been made after the initiation of the proceedings. The paragraph is directed more broadly to the hearing at which the document would be tendered in evidence. And it does not follow that the person providing the information incorporated in the statement must have known every particular of every charge ultimately brought to hearing. She or he must be taken when making a complaint to the police to have known that charges appropriate to the conduct complained of would be contemplated by the police. That after all is a reason for complaining to the police. It can make no difference that the complainant understood that charges could not be brought unless and until evidence of the identity of the person referred to in her (or his) statement became available. There is a real risk of injustice if without the opportunity of cross-examination damaging evidence is tendered in documentary form and the obvious purpose of subs (2) is to guard against the admission of documentary evidence of that kind which may be

unreliable because prepared with a criminal trial in mind. That legislative purpose is likely to be thwarted if the words "the criminal proceeding" are read narrowly and artificially as requiring the contemplation of the precise charge against the particular defendant. The concern is whether the person concerned has an axe to grind through the criminal processes. In my view the requirement of the subsection under discussion is met if the person who made the written statement (within s 3(1)(a)) or supplied the information recorded in the statement (within s 3(1)(b)) did so when that person knew or should reasonably have known that there could be a hearing of criminal proceedings in which that information would be material evidence.

The content of this statement and the manner in which it was recorded by the police officer and authenticated by Mrs B must have led Mrs B to believe that charges appropriate to the conduct complained of were being contemplated, and would lead to further inquiries which might result in whoever was in her flat that night facing charges.

The additional requirement to be met before the protection provided by subs (2) attaches is that the statement is inadmissible but for the provisions of s 3(1). Such a statement would be inadmissible in various situations. One is where, though relevant, it is inadmissible as oral hearsay - for example, if the police officer here wished to give oral evidence of what Mrs B told her. Another is where because the statement is contained in a document it is not admissible as coming within

any of the rules of evidence at common law or statute allowing the admission of documentary evidence. Included as admissible at common law are statements against interest made by an accused to a police officer and recorded by the latter, and dying declarations. Included by statute are depositions admissible under s 184 of the Summary Proceedings Act 1957 and certificates of the Government Analyst under the Transport Act 1962 and the Misuse of Drugs Act 1975.

This case is not of that latter kind. The statement is inadmissible because it is contained in a document which is not admissible as such at common law or by statute (otherwise than in accordance with the provisions of s 3(1) itself).

The other members of the Court have reached a different conclusion and in accordance with the views of the majority leave to appeal is granted, the appeal is allowed, the order made in the High Court is quashed, in lieu it is ordered that the statement taken from Mrs B on 23 March 1984 is admissible under s 3 of the Evidence Amendment Act (No 2) 1980 and the matter is remitted to the High Court. If the statement is tendered in evidence at a trial of the respondent it will be for the trial Judge to determine whether or not it should be rejected under s 18.

*W. B. L. - 12 - 1*

Solicitors:

Crown Solicitor, Auckland  
N F J Thinn, Auckland, for respondent

THE QUEEN

V

RONALD RAYMOND HOVELL

Coram           Richardson J (presiding)  
                  McMullin J  
                  Somers J

Hearing        18 June 1986

Counsel       P.J. Kaye for Crown  
                  C.B. Cato and N.F.J. Thinn for respondent

Judgment      22 August 1986

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JUDGMENT OF McMULLIN J

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This appeal raises questions as to the meaning and scope of s.3 of the Evidence Amendment Act (No. 2) 1980. The factual background to the document which the Crown seeks to have admitted under that provision is not in dispute and can be briefly stated. Ronald Raymond Hovell has been indicted for the rape of a Mrs B, indecent assault upon her and the breaking and entering of her flat with intent to commit a crime therein. There is a fourth count relating to the theft of an article by Hovell from the dwelling of one of Mrs B's neighbours.

At 11.10 a.m. on the morning of 23 March 1984, some hours after the commission of the alleged offences, Mrs B was interviewed by the police and, as a result of that interview, a statement was prepared outlining at length and in detail the circumstances in which an intruder entered Mrs B's flat shortly before midnight on the previous day and what he did to her there. What is recorded in that statement if given in oral evidence, would establish a case against the intruder on the first three counts in the indictment. (We are not presently concerned with the fourth count). The information set out in the statement was obtained in answer to questions addressed to Mrs B by an interviewing detective who typed the statement setting out the information in narrative form. Mrs B's signature appears at the end of the statement and at the bottom of each page. The first two paragraphs of the statement contain information as to her name, address, age and income. The third paragraph reads:

I am making this statement to the police about what happened to me at my unit early this morning.

Mrs B died on 1 June 1985 some five months before Hovell was apprehended by the police late in October 1985. When interviewed by the police on 1 November 1985 Hovell told the police "... I can remember leaving the flat but I cannot remember going there....". When asked "Did you rape the old lady?" he said "I don't know, I can't remember, I was too drunk". He went on to say "I heard it on the radio and was going to go down to the police station but I thought it was

me they were looking for." He later made a statement acknowledging his presence at the unit and seeing the complainant there. Fingerprints found by the police on the doorframe of Mrs B's flat soon after the alleged rape can be shown to be those of the respondent.

Therefore the Crown has material establishing Hovell's presence in the flat about the time the crimes were committed. But, without Mrs B's statement, there is no proof that the intruder raped or indecently assaulted her.

At Hovell's trial, and pursuant to s.3 of the Evidence Amendment Act (No. 2) 1980, the Crown wishes to adduce as evidence the statement signed by Mrs B. In a judgment delivered on 3 June 1986 Prichard J ruled, contrary to the Crown's submission, that the document was not admissible because it came within paras (a) and (b) of s.3(2); that is to say it was a statement made when a criminal proceeding arising from the incidents described by Mrs B was, or should reasonably have been, known by her to be contemplated (para (a)); and that it was "otherwise inadmissible" (para (b)).

Section 3 of the Evidence Amendment Act (No. 2) 1980 provides:

- (1) Subject to subsection (2) of this section, and to sections 4 and 5 of this Act, in any proceeding where direct oral evidence of a fact or an opinion would be admissible, any statement made by a person in a document tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion if -

- (a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; or
- (b) The document is a business record, and the person who supplied the information for the composition of the record -
  - (i) Cannot with reasonable diligence be identified; or
  - (ii) Is unavailable to give evidence; or
  - (iii) Cannot reasonably be expected (having regard to the time that has elapsed since he supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he supplied; or
- (c) In civil proceedings only, -
  - (i) The maker of the statement had personal knowledge of the matters dealt with in the statement; and
  - (ii) Undue delay or expense would be caused by obtaining this evidence.
- (2) Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that -
  - (a) Records the oral statement of any person made when the criminal proceeding was, or should reasonably have been, known by him to be contemplated; and
  - (b) Is otherwise inadmissible in the proceeding.

Section 3 relates to the admissibility of documentary hearsay evidence in both civil and criminal proceedings. It replaced s.3 of the Evidence Amendment Act 1945 which applied to civil proceedings only. And it incorporated the provisions of s.25A of the Evidence Act 1908 which was inserted in the principal Act by s.2 of the Evidence Amendment Act 1966. The 1966 amendment was enacted to



abrogate the decision of the House of Lords in Myers v. DPP [1965] AC 1001, as was the Criminal Evidence Act 1965 (UK) which the 1966 amendment followed, with some minor modifications. Section 3 of the Evidence Amendment Act (No. 2) 1980 was enacted following the report of the Torts and General Law Reform Committee of New Zealand on Hearsay Evidence (July 1967). The Committee considered the hearsay rule at length but its report does not throw any light upon the particular questions raised on this appeal except that it records that the Committee was unanimously opposed to the admission of oral hearsay evidence in criminal proceedings.

The first question is whether the statement signed by Mrs B is a statement in a document qualifying for admission under s.3(1)(a). "Document" is widely defined in s.2 of the amendment. It is sufficient for present purposes to set out only a limited part of the definition:

"Document" means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes -

(a) Any writing on any material ....

"Statement" is defined as meaning:

Any representation of fact or opinion, whether made in words or otherwise; and includes a statement made by a witness in any proceeding.

On its face the typewritten document signed by Mrs B is a document within s.2(1) and the representations of fact within it amount to a statement within the definition given

to that word in the same subsection. Therefore it is a statement within s.3(1)(a). But whose statement is it? In a sense the statement is that of the detective. Barkway v. South Wales Transport Co. Ltd [1949] 1 KB 54; Brinkley v. Brinkley [1963] 2 WLR 822; [1963] 1 All ER 493; Re Hennessey's Self Service Stores Pty Ltd [1965] Qd R 576. Cf. Edmonds v. Edmonds [1947] P 67 - all cases of statements made in evidence. But, even if that can be said to be the case, it is much more the statement of Mrs B. The detective had no personal knowledge of the matters referred to in the statement and she was little more than an amanuensis. She did no more than elicit and record in narrative form the factual material which she obtained from Mrs B by question and answer. The statement in this case commences "E... L... B... states" and records that Mrs B is making a statement to the police as to what happened to her at her unit. Although the document does not necessarily take its character from the description which Mrs B and the detective have both given it, it is noteworthy that Mrs B said: "I am making this statement to the Police ...". This is an indication that both the detective who typed the statement and Mrs B who adopted it, by signing it, treated the statement as Mrs B's.

Statements may be made in a number of ways. The maker of a statement may initiate the making of the statement himself; he may be asked to write it out; or, as is more common in police investigations, the statement may be recorded in narrative form as a result of answers elicited

by a trained interviewer. But, although in this last instance, the trained person may prepare the statement, decide on its form and the order in which events are recorded, in those cases where he has no personal knowledge of the matters in the statement he is no more than the chronicler by whom the factual material is recorded.

A statement becomes the statement of the person interviewed when he or she signifies its adoption as an authentic record, either by signing or initialling it or signifying its adoption in some other manner. It has been held to be sufficient for the maker of the statement to sign it; that it is not necessary to prove he read and understood it. See Vocisano v. Vocisano (1974) 130 CLR 267, where the High Court of Australia, under legislation similar to s.3, held that it was not necessary to the admission of a statement written out by a police officer to record what the respondent had said to him to establish that the respondent could read and understood the writing. It was sufficient that he had signed the writing. Palpably, Mrs B was the maker of the statement in the document and she had personal knowledge of the matters dealt with in it.

The next question is whether there is anything in s.3(2) which affects that construction of s.3(1). Section 3(1) is subject to s.3(2). Section 3(1) expressly says so. And the opening words of s.3(2) reinforce this: "Nothing in subsection (1) of this section shall render admissible ...".

The subsection is not well expressed and may lead to differences of opinion as to its construction, as the arguments of counsel in this case have demonstrated. But, after considering their further submissions, I incline to the view which I expressed during the course of the hearing, namely that the oral statement to which s.3(2)(a) refers is not the statement of its maker who has personal knowledge of the matters dealt with in it, but the oral statement of a person which is recorded in a document containing the statement of another. In this way the Legislature has placed a limitation on the admission of oral hearsay. In short, s.3(1) is intended to admit what may be called first-hand hearsay; s.3(2) is intended to exclude what may be called second-hand hearsay, if it is caught by s.3(2)(a) and (b). This construction follows once it is accepted that it is the statement which records the oral statement to which s.3(2) refers, not the document which records it. Mrs B's statement did not record "the oral statement" of any person; it was her own statement. Therefore, s.3(2) has no application to it.

Statements in documents do sometimes record the oral statements of others, e.g. in police job sheets or notebooks, police officers record oral complaints or allegations made to them by persons whom they have interviewed. Complaints or allegations recorded in that way may be part of a "business record" which includes a document made "pursuant to a duty" (s.2(1)). The effect of s.3(2) is to bar the

admission of a complaint or allegation, so recorded, if it falls within s.3(2) (a) and (b).

As s.3(2) has no application to this case I need not consider whether, if it had, Mrs B's statement would be excluded as one made when "the criminal proceeding" in which it was sought to be tendered was, or should have been, known by her to be contemplated. I desire to leave open the question of whether a criminal proceeding can be said to have been known, or should reasonably have been known by the maker of an oral statement to be contemplated when, at the time the statement was made, the identity of the offender was quite unknown and, therefore, no criminal proceeding was then possible.

One final point remains. Where, as here, the proceeding is with a jury, s.18 gives the Court a discretion to reject any statement that would be admissible under ss.3 to 8 of the Act, if the prejudicial effect of the admission of the statement would outweigh its probative value, or if, for any other reason the Court is satisfied that it is not necessary or expedient in the interests of justice to admit the statement. That is not a discretion this Court is called upon to exercise.

I would grant the application for leave to appeal, allow the appeal, hold the statement admissible under s.3, and direct that the matter be remitted to the High Court for the Judge to consider in the light of s.18.

*Walter B. Harding*

THE QUEEN

v.

RONALD RAYMOND HOVELL

Coram: Richardson J.  
McMullin J.  
Somers J.

Hearing: 18 June 1986

Counsel: P.J. Kaye for Crown  
C.B. Cato and N.F.J. Thinn for Respondent

Judgment: 22 August 1986

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JUDGMENT OF SOMERS J.

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The conditions of admissibility of documentary hearsay evidence are contained in s.3 of the Evidence Amendment Act (No.2) 1980 which provides as follows -

(1) Subject to subsection (2) of this section, and to sections 4 and 5 of this Act, in any proceeding where direct oral evidence of a fact or an opinion would be admissible, any statement made by a person in a document and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion if -

- (a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; or
- (b) The document is a business record, and the person who supplied the information for the composition of the record -
  - (i) Cannot with reasonable diligence be identified; or
  - (ii) Is unavailable to give evidence; or

- (iii) Cannot reasonably be expected (having regard to the time that has elapsed since he supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he supplied; or
- (c) In civil proceedings only,-
  - (i) The maker of the statement had personal knowledge of the matters dealt with in the statement; and
  - (ii) Undue delay or expense would be caused by obtaining his evidence.
- (2) Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that-
  - (a) Records the oral statement of any person made when the criminal proceeding was, or should reasonably have been, known by him to be contemplated; and
  - (b) Is otherwise inadmissible in the proceeding.

The origin of the document with which this case is concerned emerges from the evidence given at the preliminary hearing by Detective Gulliver. She said - 'I then obtained a full written statement from Mrs. B ... I had had an initial discussion with Mrs. B at the scene and once I had returned to central with her I told her I required a full written statement with quite a bit of detail. We went through and committed the statement to paper. I asked question and she gave answers. I typed the statement myself, but it was in her words. I typed the statement in the form of narrative. Having finished typing the statement I handed the statement to Mrs. B for her to read, and once she had read it, and confirmed that it was correct she signed the bottom of each page, and I witnessed her signatures.'

The first question is whether Mrs. B was the maker of the statements contained in the document. I am of opinion, in agreement with Prichard J., that she was.

The words 'any statement made by a person in a document' contained in the opening words of s.3(1) and the words 'The maker of the statement' contained in para.(a), and also in para.(c) provide the starting point. Shorn of words not material to the present issue s.3(1) refers to 'any statement made by a person in a document...shall be admissible...if (a) The maker of the statement had personal knowledge...' In these provisions I think Parliament was intending to deal with the case of a statement made by a person in a document itself made by that person. The maker of the statement is one having personal knowledge of the matters dealt with and makes that statement in a document. The case of the recorder of the statements of another is covered by para.(c).

According to the evidence so far given the statement was in Mrs. B's own words. But I do not consider this is critical. The evidence shows that she unequivocally adopted, that is to say, she made her own, that which was typed out. If it was not originally her statement when it left the typewriter it became hers by her deliberate act. That the words used are those of another or others will not prevent a statement being made by a person if that person adopts them in the sense of vouching or assuming responsibility for their accuracy. That at least occurred here and accordingly I am of opinion that Mrs. B was relevantly the maker of the statement which she signed. (There is no need to consider whether the statement might not also have been made by the police officer who took it down; such a conclusion would not necessarily be inconsistent with its being



made by Mrs. B). And as Mrs. B plainly had personal knowledge of the matters dealt with in the statement it is admissible as evidence of the facts stated unless excluded by s.3(2) of the Act.

There is support for this simple approach to the words 'maker of the statement' in the antecedents of s.3 of the 1980 Act. The Evidence Amendment Act 1945 which followed the 1938 English Act in allowing documentary hearsay in civil proceedings, and which supplied the general format of the 1980 enactment, expressly provided in s.3(4) that 'a statement made in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made, or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible'. Under the 1945 Act a statement prepared by a policeman and signed by the person giving the information was, under s.3(4), made by the latter: see e.g. Bullock v. Borrett [1939] 3 All.E.R. 505; cf. In the Estate of Powe [1956] P.110; and, in Australia, Vocisano v. Vocisano [1974] 130 C.L.R. 267 mentioned by McMullin J. Section 3 of the 1945 Act was repealed by the 1980 Act and s.3(4) was not repeated. On the contrary the definition of 'document' in s.2(1) does not require signing or initialling or any other authentication by its maker - 'Document means a document in any form whether signed or initialled or otherwise authenticated by its maker or not...' Not only then is there no a priori reason to think the present

provision should be construed more narrowly than its predecessor but the changes made indicate that a wider approach may be appropriate. I think that whether a person is the maker of a statement is a question of fact depending on the circumstances.

It is now necessary to refer to s.3(2). I am of opinion that the better view of this difficult subsection is that it does not apply to a statement in a document which qualifies for admission under s.3(1)(a), that is to say, where the maker has personal knowledge of the matters dealt with in the statement. What is excluded from admissibility by s.3(2) is any statement in a document being a statement that answers the description in both para(a) and para(b). The noun that is qualified by the two paragraphs is not document but 'statement', - the words 'in a document' are themselves descriptive of the statement. To correspond with s.3(1) the words 'any statement in a document' used in s.3(2) would read 'any statement made by any person in a document'. In relation to para.(a) of s.3(2) it is a 'statement...that records the oral statement of any person made when the criminal proceeding' was contemplated. This is a reference to a statement in a document made by A which records the oral statement of another person B made when the criminal proceeding was or should have been contemplated by B. Here B is the person with actual or supposed knowledge of the facts. Para. (a) does not, in my judgment, cover the content of a statement of which the maker had personal knowledge, that is to say one falling under s.3(1)(a). I note that Cook J. was also of this

opinion in Atkinson v. N.Z. Forest Service (unreported Christchurch M.561/85; judgment 19 March 1985).

If s.3(2) were to apply to the case of the maker of a statement having personal knowledge of the matters dealt with in it, a statement which, apart altogether from s.3, would not have been admissible had the maker actually given evidence - i.e. one which did not pass the test in s.3(2)(b) - would become admissible if there were no contemplated proceedings because the requirements of s.3(2)(a) and (b) are cumulative. Section 3(2) could in my view only sensibly apply to cases under s.3(1)(a), that is to say cases in which the maker of the statement had personal knowledge of the matters dealt with in the statement, if the two paras.(a) and (b) were read as alternatives.

Section 3(2) naturally applies to statements admissible under s.3(1)(b), that is to say, where the document is a business record. That para, along with the definition of business record in s.2(1), captures most of the 1966 Evidence Amendment Act which was passed to overcome the effect of Myers v. Director of Public Prosecution [1965] A.C. 1009. It refers to a statement made in a document by a person who records information supplied by another. An example is the policeman who in the course of his duty writes down in his notebook what he is told by a complainant about an offence. The document so constituted is a business record as that term is defined in s.2(1) for it is made pursuant to a duty from information supplied directly by a person who had or may reasonably be supposed to have had personal knowledge of the

matters dealt with in the information he supplied. (It may also be a business record as being a record made in the course of, and as a record or part of a record relating to, a business). If the complainant dies and the policeman's record is sought to be introduced in criminal proceedings it is exposed to the tests in s.3(2). Like Prichard J. in this case but contrary to the views expressed in the District Court in Police v. White (1981) 1 D.C.R. 234 and Peters v. Police (1984) 2 D.C.R. 369 I consider a person complaining to the Police of an offence committed against him ought reasonably to know criminal proceedings are contemplated. He would or ought to know that such proceedings will be brought if the offender is identified and the evidence sufficient.

The reason for s.3(2) is to provide a safeguard against the bias or self interest of the person whose oral statement is recorded in cases where, apart from s.3(1), the statement would be inadmissible. A complainant may not know the identity of the offender or the precise nature of his particular offence but there is the risk that he may entertain against the person complained of the animosity or other prejudice which is the reason for s.3(2)(a). As in such a case the statement would, apart from s.3(1), be inadmissible, the cumulative conditions in s.3(2) would be met, and the statement excluded.

It is right to record that Mr. Kaye said that it was no part of the Crown case that policemen can give evidence as to what a complainant told them.

Accordingly I am of opinion that the statement made by Mrs. B in the document signed by her is admissible in the criminal proceedings against the respondent pursuant to s.3(1) of the Evidence Amendment Act (No.2) 1980 and would allow the appeal.

A handwritten signature in dark ink, appearing to be 'G. Brown' or similar, followed by a period.