

MEMORANDUM OF ADVICE ON EVIDENCE:

R v FARINA

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FACTUAL THEORY

Salvatore Farina came to an understanding with Antonio Batista, along with Manuel Garcia and Giovanni Rambaudi, that David Baxter-Jones was to be seriously injured. At approximately 7:40pm on 16 December 2004, in the presence of Farina, Batista armed himself with a knife and engaged in a violent altercation with Baxter. During this altercation Batista stabbed Baxter, intending to cause serious injury to him.

REAL ISSUES IN THE CASE

In order for the prosecution to prove that Farina intentionally caused serious injury to Baxter (on the basis of the doctrine of acting in concert), it is necessary to prove the following six elements beyond reasonable doubt:

1. Batista caused serious injury to Baxter;
2. Batista intended to cause serious injury to Baxter;
3. Batista caused serious injury to Baxter without lawful excuse;
4. An understanding or agreement existed between Batista and Farina as to causing serious injury to Baxter;
5. Batista's actions in causing serious injury to Baxter were done in furtherance of and accordance with this understanding and agreement; and
6. Farina was present when Batista caused serious injury to Baxter.

Of these six elements, it is unlikely that the sixth will be in dispute. Additionally, it is unlikely that the third will be seriously in dispute considering the use of a knife on an unarmed opponent. Therefore the key factual propositions to be proven are the first, second, fourth and fifth propositions.

PROOF OF FACTUAL PROPOSITIONS

1. Batista caused serious injury to Baxter

It is contended that a stabbing wound that penetrates the lung and left ventricle is a serious injury. Therefore, a stab to the chest, such as Baxter received, constitutes a serious injury. In order to establish that Batista caused serious injury to Baxter, it is necessary to prove that Baxter was stabbed (1.1) and that Batista stabbed Baxter (1.2).

1.1 Baxter was stabbed

It is unlikely that this point will be disputed. Dimitroff is very clear that Baxter has a stabbing injury on the left side of the chest.¹ Additionally, Baxter states that he has been stabbed.²

1.2 Batista stabbed Baxter

1.2.1 Batista threatened to stab Baxter

Batista threatened Baxter in the phone call made at 19:26 on 16 December 2004.³ The precise content of these threats may be in dispute. The possibilities range from “I’m going to stab you, I’m going to fucking kill you”⁴ to “you’re living dead” and “you’re dead man walking.”⁵ That Batista threatened Baxter by saying he was going to stab him is supported by two witnesses,⁶ and the victim.⁷ However, Farina states that these threats were not made,⁸ and Garcia does not mention the specific threat to stab or kill.⁹

Generally, people do what they say they are going to do. Therefore, as Batista said that he was going to stab Baxter, and Baxter was stabbed, we can draw the inference that Batista stabbed Baxter. This can be rebutted by the generalisation that young men may make empty threats, particularly around groups of their friends. However, this was not an empty threat, as we can see from the next supporting proposition, as Batista also had opportunity to stab Baxter (1.2.2). Another possible rebuttal to this would be that someone else stabbed Baxter, this is responded to at 1.2.4.

1.2.2 Batista had the opportunity to stab Baxter

In order to show that Batista had the opportunity to stab Baxter it is necessary to prove that Batista had a knife (1.2.2.1) and that Batista was in an altercation with Baxter (1.2.2.2).

¹ Dimitroff, 53.

² Baxter, 8; Bond, 12.

³ Baxter, 6; Bond, 10; Rambaudi, 32 and 35; Garcia, 38; Phone records, 43.

⁴ Baxter, 6.

⁵ Rambaudi, 32.

⁶ Rambaudi, 35; Bond, 10.

⁷ Baxter, 6.

⁸ Farina, 79-80.

⁹ Garcia, 38.

1.2.2.1 Batista had a knife

Batista was seen with a knife in his hand both before and after the stabbing, by both Baxter and Rambaudi.¹⁰ Rambaudi's evidence of seeing the knife immediately after the stabbing wrapped in white tissue in the hand of Batista¹¹ is supported by the piece of blood-stained tissue found by Choi on the nature strip.¹² However, Farina states that he never saw the knife before, during or after the stabbing, but he does not state that Batista did not have a knife.¹³ Indeed, no witness or defendant states that there was not a knife present.

1.2.2.2 Batista was in a violent altercation with Baxter

This is very unlikely to be disputed. All witnesses and defendants, except Batista, freely admit that Batista was in a violent altercation with Baxter on the evening of 16 December 2004.

1.2.3 Batista was seen to stab Baxter

The only person who admits to seeing Batista possibly stab Baxter is Bond. He states that Batista strikes Batista with a closed fist in a "shanking motion" two to three times up under the left armpit.¹⁴ However, Bond did not see that Batista had anything in his closed fist. The other witnesses and defendants cannot clearly state that they saw Batista stab Baxter. Indeed, Baxter himself appears to be unable to state with any certainty at which point during the altercation he was stabbed.

Generally, people do not make a shanking motion with a closed fist in a violent altercation unless they are stabbing someone. This shanking motion, when combined with Batista's holding of a knife (1.2.2.1), allows the inference to be drawn that Batista stabbed Baxter with a shanking motion up under the left armpit.

1.2.4 Batista was covered in blood

The evidence of witnesses that Batista was covered in blood is solid circumstantial evidence from which the inference can be drawn that he stabbed Baxter. Bond,

¹⁰ Baxter, 7 – 8; Rambaudi, 32 – 34.

¹¹ Rambaudi, 33.

¹² Choi, 14.

¹³ Farina, 88 (q 233 and 235), 90 (q 242) and 99 (q 312)

¹⁴ Bond, 12.

Rambaudi and Garcia all witnessed Batista being covered in blood during and immediately after the altercation with Baxter.¹⁵ In particular, Bond states that Batista's hand and the front of his top were covered in blood.¹⁶ Farina is the sole witness who denies seeing blood on Batista. However, given that Bond, Garcia and Rambaudi all give clear evidence that they saw blood on Batista it is unlikely that this fact will be genuinely disputed.

A person gets blood all over their hand by stabbing someone else. Therefore Batista stabbed Baxter. The defence may attempt to bring an alternative theory as to why Batista is covered in blood by pointing to Batista's own injuries. Given Garcia's evidence that Batista's sole major injury was on the top of his left forearm, and was oozing blood, not 'squirting out',¹⁷ it would seem that this alternative theory would be difficult for the defence to sustain.

1.2.5 Baxter was not stabbed by someone else

It is unlikely that it would be contended by the defence that Baxter was stabbed by someone else, as there is no evidence that points to anyone else stabbing Baxter. The sole possibility for creating reasonable doubt in the mind of the jury would be if Batista claims that Farina stabbed Baxter. The discovery of the knife in Farina's bedroom, concealed in a sock creates the possibility that Farina was armed during the altercation.¹⁸ However, there is no evidence that Farina had the knife with him on the evening of 16 December, indeed Farina denied being in possession of a weapon or stabbing Baxter.¹⁹ Further, there is no evidence that Farina stabbed Baxter.

1.2.6 Batista made comments indicating that he stabbed Baxter

Following the altercation Rambaudi hears Batista say "he'll be going to hospital" and "it went in pretty deep".²⁰ Generally, if a person states that someone will be going to hospital it indicates that they are aware that that person is seriously injured. Coupled with the statement that "it went in pretty deep", the inference can be drawn that

¹⁵ Bond, 12; Rambaudi, 33; Garcia, 39.

¹⁶ Bond, 12.

¹⁷ Garcia, 40.

¹⁸ Choi, 21.

¹⁹ Farina, 91 (q 244 and 247).

²⁰ Rambaudi, 33.

something punctured Baxter and “went in pretty deep”. Taken in conjunction with the proposition that Batista had a knife during the altercation (1.2.2.1), the inference to be drawn from these comments is that Batista stabbed Baxter with that knife, and that the stab wound was likely to be deep and serious enough that Baxter would need to seek urgent medical attention at a hospital.

This inference is supported further by Rambaudi’s statement that ‘[Batista, Farina, Garcia and him] were all saying we hoped he is not dead.’²¹ Generally people are not concerned about people being dead unless they are aware that they have been seriously injured. Therefore, Rambaudi’s statement, in conjunction with the above reasoning, would indicate that Batista (and the other defendants) were aware that Baxter had been stabbed so seriously that he could have died.

1.2.7 Batista had consciousness of his guilt

There are many different pieces of evidence which point to Batista having consciousness of guilt over seriously injuring Baxter. Taken together these pieces of evidence make it likely that a tribunal of fact would draw the inference that Batista thought he was guilty.

1.2.7.1 Batista attempted to flee to Italy

This is unlikely to be in dispute. Batista was arrested in Sydney International Airport, having been booked on flights from Sydney to Bangkok then on to Italy.²² These flights were booked on very short notice following the violent altercation.²³ Generally, people who think they are not guilty do not attempt to flee the country following their involvement in an incident. Therefore, the inference to be drawn from Batista’s attempt to flee the country is that he believes he is guilty.

1.2.7.2 Batista expressed concern about Baxter

Batista expressed concern that he has seriously injured Baxter. Garcia states that Batista said “Oh man, I hope Baxter’s alright. What have I done to him?”²⁴ Generally, people do not worry about people who they have just been in violent altercations with

²¹ Rambaudi, 34.

²² Choi, 26.

²³ Phone records, 45.

²⁴ Garcia, 40.

unless they are aware that they have seriously injured them. Therefore, this comment signifies concern about Baxter and implies that Batista has done something to him that would have caused Baxter to not be 'alright'. This is consistent with Batista being conscious of his guilt.

1.2.7.3 Batista told the other defendants not to tell anyone

Batista told Garcia, Farina and Rambaudi not to tell anyone, including the police, what had happened that night.²⁵ Further, Batista told his friends to lie to police and tell them that they weren't at the crime scene.²⁶ Generally people do not warn their friends to lie to or not to talk to the police unless they believe that they are guilty. Therefore, Batista has told his friends not to tell anyone what happened, and to lie to the police as he believes that he is guilty.

1.2.7.4 Batsista disposed of evidence

Following the altercation, Batista directed Rambaudi to drive to Rica St to dispose of his bloody shirt and the bloodied knife used in the stabbing in rubbish bins due to be collected the following morning.²⁷ It is difficult to see that any other inference could be drawn from this act other than Batista's desire to cover up his involvement in the stabbing of Baxter. Typically an attempt to cover up involvement in an act is indicative of consciousness of guilt. Therefore Batista's actions in covering up his involvement in the stabbing can be inferred to be indicative of a consciousness of guilt.

1.2.7.5 Batista wanted to leave scene quickly

Immediately after the altercation, Batista screamed some variation on "get the fuck out of here."²⁸ Generally when someone wants to leave a scene quickly following a stabbing it is because they are aware that they have stabbed someone and that they are likely to be apprehended if they remain at the scene, typically a fear of being apprehended indicates a consciousness of guilt. Therefore, Batista's screams to "get the fuck out of here" can be used to demonstrate his consciousness of guilt.

²⁵ Rambaudi, 34; Garcia, 41.

²⁶ Rambaudi, 34.

²⁷ Rambaudi, 34.

²⁸ Baxter, 8; Bond, 12; Rambaudi, 33; Garcia, 40.

The alternative reason for this outburst from Batista that could be put forward by the defence would be that Batista was scared of Baxter and wished to leave the scene in order to escape from him. This is inconsistent with Batista's prior behaviour in throwing a can at Baxter and aggressively approaching him immediately prior to the altercation. Generally a person does not seek out a fight with another person if they are scared of that person and do not wish to engage in violence against that person. Therefore, can be inferred that due to Batista seeking out a fight with Baxter, he was not scared enough of Baxter to wish to leave immediately.

1.2.8 Batista has a tendency to be violent, including violence involving a knife

In order to show that Batista has a tendency to be violent it is necessary to prove that Batista has been involved in previous similar violent altercations. This is provided through the adducing of evidence about Batista's convictions for assault in company and assault with a weapon in the July 2004.²⁹ Here there is strong evidence that Batista has engaged in the prior conduct of assault with a weapon. Whilst we only have evidence of one such crime, considering that the conviction was for assault for a weapon (the weapon was a knife) and was committed within the last six months, it seems that it would be strongly indicative of Batista having a tendency to violence with a knife.

2. Batista intended to seriously injure Baxter

Batista intended to seriously injure Baxter. This argument is supported by two conjunctive propositions: Batista intended to stab Baxter (2.1) and by stabbing Baxter, Batista intended to seriously injure him (2.2).

2.1 Batista intended to stab Baxter

That Batista intended to stab Baxter is proven by three conjunctive propositions: Batista arranged to meet with Baxter (2.1.1); Batista armed himself with a knife (2.1.3); and Batista willingly entered into a violent altercation with Baxter (2.1.4). Generally a person does not arrange to meet with someone, arm themselves with a knife and then enter into a violent altercation with them if they do not intend to stab them.

²⁹ Farina, 96 (q 289 – 290).

2.1.1 Batista arranged to meet with Baxter

Batista told Baxter where he and his friends were and asked Baxter to come and meet them so that they could sort out the disagreement between them relating to the theft from Baxter's car.³⁰ This evidence shows that the altercation was not a chance meeting between Batista and Baxter. Batista had arranged to meet Baxter. This original arrangement is unlikely to be disputed, however, there may be a rebuttal on this point to the effect that Batista directed Rambaudi to leave the arranged meeting place (2.2).

2.1.2 Rebuttal: Batista attempted to avoid meeting Baxter

There is evidence that Batista attempted to avoid meeting Baxter by directing Rambaudi to drive away from the arranged meeting place.³¹ The defence may assert that as Batista wished to leave the meeting place, he intended to avoid meeting Baxter. Whilst this may be accurate at the time Batista left the meeting place, it is unlikely that it will be of particular value to the defence as there is further evidence that Batista willingly entered into the violent altercation with Baxter at the crime scene (2.1.4).

2.1.3 Batista armed himself with a knife

There is evidence that Batista armed himself with a knife (Garcia gave it to him) immediately prior to entering into the altercation with Baxter.³²

2.1.4 Batista willingly engaged in a violent altercation with Baxter

This is the final piece of conjunctive reasoning (together with 2.1.1 and 2.1.3) that is required to draw the inference that Batista intended to stab Baxter. Upon seeing Baxter's car driving past them, Batista requests that Rambaudi turn the car around.³³ Once Baxter pulls over, and Rambaudi pulls in behind, Batista jumps out of the car immediately.³⁴ Rambaudi states that Batista gets out of the car before he brings it to a complete stop.³⁵ These are not the actions of a person wishing to avoid a violent altercation, generally these would can be inferred to be the actions of a person

³⁰ Baxter, 6; Rambaudi, 32; Garcia, 38.

³¹ Rambaudi, 32; Garcia, 38.

³² Rambaudi, 32.

³³ Rambaudi, 32.

³⁴ Rambaudi, 33; Garcia, 39.

³⁵ Rambaudi, 33.

wishing to engage in a violent altercation. Therefore it can be inferred that Batista intended to engage in a violent altercation with Baxter.

2.2 By stabbing Baxter, Batista intended to seriously injure him

Batista stabs Baxter in the chest.³⁶ Generally, stab wounds to the chest result in serious injury. It can be inferred that by stabbing someone in the chest one intends to seriously injure them. Therefore it can be inferred that when Batista stabbed Baxter in the chest, he intended to seriously injure him.

3. Batista did so without lawful excuse

Batista caused serious injury to Baxter without lawful excuse. The most relevant defence that is available to Batista is that of self-defence. However, there is no evidence to support such a defence.

3.1 Batista was not acting in self-defence

Baxter was unarmed, and at no time was Batista in danger of serious injury. Additionally, given the presence of three of Batista's friends, it is unlikely that Batista ever genuinely worried for his safety. Finally, Batista was the aggressor and willingly entered into the altercation. These arguments are supported by the evidence provided in the proving of the other factual propositions.

4. There was an understanding or agreement between Batista and Farina as to causing serious injury to Baxter

That there was an understanding or agreement between Batista and Farina as to causing serious injury to Baxter is proven through the following cumulative arguments: Farina planned the four boys to getting together that evening to discuss Baxter's allegations (4.1); Farina, Batista, Garcia and Rambaudi did get together that evening and discussed Baxter and his allegations (4.2); and through these discussions they came to an understanding that Baxter was to be seriously injured (4.3).

³⁶ Dimitroff, 53.

4.1 Farina planned the four boys getting together that evening to discuss Baxter's allegations

4.1.1 Farina organised the boys getting together

It is unlikely to be in dispute that Farina organised the four boys to get together on the evening of 16 December 2004. The phone records are clear that Farina is the one calling Garcia, Rambaudi and Batista that afternoon.³⁷ Farina freely admits that he pre-arranged the meeting with Rambaudi on his phone.³⁸ Garcia also states that Farina pre-arranged to meet him that evening in a phone call.³⁹

4.1.2 It was pre-arranged that Baxter's allegations would be discussed

It was pre-arranged that Baxter's allegations of theft against them would be discussed when they met up. Rambaudi states that 'before we even met up we had agreed we would talk about Baxter.'⁴⁰ Garcia adds support to this when he states that it is during the phone call with Farina about Baxter's allegations that it is decided that they will meet up that evening.⁴¹

4.2 Farina, Batista, Garcia and Rambaudi got together and discussed Baxter and his allegations

For this argument to be made out, it is necessary to prove that the boys got together (4.2.1) and that they discussed Baxter and the allegations he had made about the four of them (4.2.2).

4.2.1 The boys got together

This proposition is unlikely to be disputed. There is evidence from all parties that the four boys were together that night.

4.2.2 They discussed Baxter and his allegations

Rambaudi implies that once they were in the car they were all talking about Baxter.⁴² In particular, Batista said that Baxter was a 'bit of a reject for what he had done' and

³⁷ Phone records, 42.

³⁸ Farina, 58 (q 25).

³⁹ Garcia, 38.

⁴⁰ Rambaudi, 31.

⁴¹ Garcia, 38.

⁴² Rambaudi, 31.

Farina and Garcia said that ‘Baxter had pretty much “fucked up” and he would get slapped around for it.’⁴³ Garcia also states that when Batista got in the car, they discussed the allegations that Baxter had made against them.⁴⁴

4.3 Farina, Batista, Garcia and Rambaudi came to an agreement that Baxter was to be assaulted

It was through these discussions (4.2.2) that they came to an understanding that Baxter was to be assaulted. This can be inferred through their discussions (4.2.2), and their contacting Baxter, arranging to meet him and their threats of violence towards Baxter (4.3.1). Additionally, for these propositions to support the argument that all four boys (and for the purposes of this prosecution, Farina in particular) came to such an understanding, it is necessary to demonstrate that Farina was involved in both making arrangements to meet Baxter and making threats of violence towards Baxter. So, in effect, the discussions were when the understanding was come to, and the arrangement to meet Baxter and the threats demonstrate the existence of this understanding.

4.3.1 Farina and Batista arranged to meet Baxter and threatened him

That Batista arranged to meet Baxter is unlikely to be disputed (2.1.1). Further, it has been shown that Batista made threats of violence towards Baxter (1.2.1). However, it is necessary for the purposes of this argument to show that Batista was not acting alone. Direct support for this proposition comes from Rambaudi’s statement that ‘we all said that we need to speak to him’.⁴⁵

Additionally, it is Farina’s phone that is used to make the call to Baxter.⁴⁶ Generally, a person provides their mobile phone for the use of another person, given the second person has a mobile phone of their own, only when requested. Therefore Batista must have requested that Farina lend him his phone so that Batista could make the call to Baxter. The conclusion to be drawn from this is that Farina was aware that Batista was calling Baxter to arrange to meet up and was, if not part of the instigation of that

⁴³ Rambaudi, 31.

⁴⁴ Garcia, 38.

⁴⁵ Rambaudi, 31.

⁴⁶ Rambaudi, 32; Garcia, 38; Farina, 63; Phone records, 43.

plan, at the very least supportive of it, given his handing over of the phone for the call to be made.

Finally, there is evidence from Rambaudi that the phone was on speaker.⁴⁷ Whilst both Farina and Garcia do not mention the phone being on speaker, they state that they could hear both sides of the conversation, at least in part, over the phone.⁴⁸ Typically, a group of people do not listen in on a call, whether it be on speaker or not, unless they are actively invested in the making of the call in the first place. Therefore, Farina, Garcia and Rambaudi can be said to be a part of the call, and threats, to Baxter. This further supports the proposition that this was an action taken by all four boys acting in concert, not solely Batista.

4.4 There was an understanding between Farina and Batista that Baxter would be seriously injured

There is an agreement between the boys that Baxter would be assaulted as a result of his allegations to police (4.3). From this agreement in conjunction with the threats and the arrangement to meet, it can be inferred that it was understood that Batista would fight Baxter. Further, Farina is aware that Batista has a tendency to be armed with a knife (1.2.8), and taking this line of reasoning step further, it can be inferred that Farina knew that Batista was armed with a knife, as he was present in the car when the knife was handed to Batista (2.1.3). The inference to be drawn from these propositions is that Farina was aware that Batista intended to use the knife in the altercation with Baxter. Generally, when a knife is used in a violent altercation it leads to serious injury. Therefore it can be inferred that Farina and Batista came to an understanding that Baxter would be seriously injured by Batista.

5. Batista's actions in causing serious injury to Baxter were done in accordance with and furtherance of this understanding or agreement

This element of the crime is supported by the following, previously-argued, propositions taken together: there was an understanding between Batista and Farina that Baxter was to be seriously injured (4.4) and Batista seriously injured Baxter by stabbing him (1.2). Generally if there is an understanding between people that an

⁴⁷ Rambaudi, 32.

⁴⁸ Garcia, 38; Farina, 61 – 62.

event is to happen, and then that event happens at the hand of one of those people, then that person's actions can be said to have been done in accordance with and furtherance of that understanding. Therefore Batista's stabbing of Baxter was done in accordance with and furtherance of the understanding between Batista and the other boys that Baxter was to be seriously injured.

Further support for this proposition can be found in the evidence that Farina participated in the assault on Baxter (5.1) and exhibited consciousness of his guilt (5.1).

5.1 Farina participated in the assault

Farina's fingerprints are on the can that was thrown at Baxter.⁴⁹ A person's fingerprints are on an item if they have made contact with that item with their hand. Therefore, Farina has handled the can that was thrown at Baxter. The inference to be drawn from this evidence is that Farina handed the can to Batista to throw at Baxter. This indicates that Farina was involved in the execution of the assault against Baxter.

5.2 Farina exhibited consciousness of guilt

Farina exhibits consciousness of guilt by trying to cover up evidence of his involvement in the stabbing (5.2.1). From this evidence it is open to a tribunal of fact to draw the inference that Farina believes he is guilty.

5.2.1 Farina attempted to cover up the evidence of the stabbing

Farina admits that he attempted to wash the blood off his clothing.⁵⁰ In general attempting to wash blood off clothes after a violent altercation an attempt to remove evidence that one was involved in the altercation. Therefore by attempting to wash blood off his clothing, Farina attempted to cover up evidence that he was involved in the altercation.

6. Farina was present when Batista caused serious injury to Baxter

This is very unlikely to be disputed given the evidence of all parties, including Farina. Additionally, the fingerprint expert's evidence places Farina at the scene of the crime, both in the car and touching the projectile that was thrown at Baxter in the course of

⁴⁹ Dexter, 48 – 49.

⁵⁰ Farina, 92 (q 255 – 256).

the altercation.⁵¹ Generally, a person's fingerprints are not at the scene of a crime if they were not in attendance. Therefore we can infer that Farina was present when Batista caused serious injury to Baxter.

Admissibility

Under s 56(1) of the *Evidence Act 2008* (Vic) ('*Evidence Act*'), all evidence that is relevant in a proceeding is prima facie admissible in a proceeding. The use of the evidence in Part III to prove the key factual propositions shows that the evidence discussed in this Part is relevant. Therefore, the evidence discussed in this part is admissible unless it is caught by one of the exclusionary exceptions contained within the *Evidence Act*.

1. Testimony

The vast majority of evidence that supports the prosecution case against Farina will be testimony. Whilst some of the evidence relied upon to prove the prosecution case against Farina (Part 3) comes from the statement of Garcia and record of interview of Farina, it is not possible to know if their testimony will be available at trial until the close of the prosecution case, as defendants are not competent to give evidence as prosecution witnesses.⁵² Therefore, where possible, evidence is adduced from the testimony of Baxter, Bond, Choi and Rambaudi (who has pleaded guilty and agreed to give evidence for the prosecution).

Where a piece of evidence is likely to be repeated in the testimony of a number of witnesses (eg., Batista's threats) the admissibility of that statement is only analysed once to avoid repetition.

a) Baxter

i. Credibility

The tribunal of fact's acceptance of Baxter's testimony relies on Baxter's credibility as a witness. Given that there are minimal inconsistencies between his statement and the statements of Bond and Rambaudi, he should be considered a fairly credible witness.

⁵¹ Dexter, 48 – 49.

⁵² *Evidence Act 2008* (Vic), s 17(2).

ii. Batista's threats

Batista's threat 'I'm going to come and stab you, I'm going to fucking kill you' is being relied upon to prove that Batista intended to stab Baxter, and that in doing so, he intended to kill or seriously injure him. This is a hearsay use under s 59 of the Evidence Act. It is therefore necessary to consider whether any of the exceptions to the blanket exclusionary rule of hearsay apply. In the event that Batista is called to give evidence (this seems unlikely given his no-comment interview with police) then the threat will be admissible, whether given in evidence by Baxter or Batista,⁵³ given that the representation was made by Batista when the fact that he was going to stab Baxter was fresh in his mind.⁵⁴ In the more likely event that Batista is not called to give evidence, the threat will also be admissible given that it was made at a time when Batista did want to stab Baxter and it is unlikely that he would fabricate such a threat.⁵⁵ It is necessary to provide notice to the defence that the prosecution intends to adduce this evidence.⁵⁶

There is the possibility that the court may refuse to admit the evidence of the threats if it decides that there is a danger of unfair prejudice to Batista or Farina that outweighs the probative value of the evidence.⁵⁷ However, considering the extremely high probative value of the evidence of the threats, it is unlikely that the court would exercise this discretion.

iii. Batista tells Baxter to come to the car park in East Boundary

Batista's statement 'come to the car park in East Boundary' is being used for a hearsay purpose. However, it is likely to be admitted under the same analysis that was used for the evidence of the threats.

iv. Batista: 'Get the fuck out of here, get the fuck out of here'

⁵³ *Evidence Act*, s 66(2).

⁵⁴ *Evidence Act*, s 66(2A).

⁵⁵ *Evidence Act*, s 65(2)(b).

⁵⁶ *Evidence Act*, s 67.

⁵⁷ *Evidence Act*, s 137.

Again, Batista's statement 'get the fuck out of here, get the fuck out of here' is being used for a hearsay purpose. It is also likely to be admitted under the same analysis as was used for the above two statements.

b) Bond

i. Credibility

The main utility of Bond's testimony is his assertion that he saw Batista striking Baxter with a shanking motion. Bond is the sole witness who saw this occur, therefore the defence will be very keen to shake Bond's credibility. This could take the form of questioning Bond's ability to see the altercation, particularly as Bond was, by his own admission, still in the car and pretending to be on his phone during this period.

ii. Baxter: 'I've been stabbed'

Baxter's statement 'I've been stabbed' is prima facie inadmissible as hearsay evidence.⁵⁸ However, the exception under s 66(2) of the Evidence Act should apply in this situation, as Baxter is available to give evidence about the asserted fact that he was stabbed. Additionally, the exception under s 66A would apply as the statement by Baxter that he was stabbed was a contemporaneous representation about his health. Therefore, the evidence would be admissible.

iii. Batista: 'you're a dead man walking' and 'I'm going to stab you'

Considering Bond heard these threats through the phone as Batista said them to Baxter, the same analysis as was applied to Baxter giving evidence as to the threats would apply to Bond giving evidence as to the threats. Therefore, the evidence is admissible.

iv. Batista: 'Get the fuck out of here, get the fuck out of here'

See 1(a)(iv).

v. 'I was really worried about catching up with these guys because they don't use fists, they use weapons'

⁵⁸ *Evidence Act*, s 59.

This is clearly opinion evidence and as such is prima facie inadmissible.⁵⁹ It does not fall within the relevant exceptions for expert opinion evidence⁶⁰ or the lay opinion exception.⁶¹ Additionally, its prejudicial nature is so high that a court may well exercise its discretion and declare that the prejudicial nature outweighs the probative value of the evidence.⁶² This evidence would not be admissible.

c) Rambaudi

i. Credibility

The credibility of Rambaudi is likely to be attacked strongly by the defence as he has pleaded guilty and agreed to appear as a prosecution witness. The key inconsistencies between his testimony and the testimony of Baxter, Bond, Garcia and Farina are: the smoking of marijuana, Batista's phone call to Baxter was on speaker, Garcia handed the knife to Batista, the can is a Pepsi can, and Batista's admissions.

The defence may also request that the judge issue a warning that the evidence is unreliable.⁶³

ii. Batista's threats

See 1(a)(ii).

iii. Batista: "he'll be going to hospital"

The use of this statement is not for a hearsay purpose. It is not being used to assert that Baxter was going to hospital, it is being used to assert that Batista seriously injured Baxter. Therefore there it should be admissible as it is not excluded as hearsay evidence.

iv. Batista: "it went in pretty deep"

This statement is used for a hearsay purpose. It is being used to show that Batista stabbed Baxter and that the knife went in 'pretty deep'. It is prima facie inadmissible. However, the statement is also an admission that Batista stabbed Baxter (it meets the

⁵⁹ *Evidence Act*, s 76.

⁶⁰ *Evidence Act*, s 79.

⁶¹ *Evidence Act*, s 78.

⁶² *Evidence Act*, s 137.

⁶³ *Evidence Act 2008 (Vic)* s 165.

definition in the dictionary of the Evidence Act, as it is both made by a party to the proceeding (Batista, and all accused are being tried jointly) and is adverse to Batista's interests in the proceeding), therefore the prohibition is lifted as this is first-hand hearsay and is being used against Batista, the maker of the admission.⁶⁴ The court has the discretion to rule the admission inadmissible if it comes to the conclusion that, having regard to the circumstances in which the admission was made, to admit it would be unfair to the defendant.⁶⁵ It is unlikely that a court would find that the admission of the admission would be unfair to Batista considering it was not made in coercive or other extraordinary circumstances. Therefore the admission is likely to be admitted into evidence.

v. Batista told the boys not to tell anyone and to lie to police

This evidence is being used for a hearsay purpose. Here the representation is Batista's statement, and the asserted fact is that Batista does not want Garcia, Farina or Rambaudi to tell anyone about the altercation, and if questioned about it by police to deny involvement. In the event that Batista testifies, the statement was made when the asserted fact was fresh in the memory of Batista, therefore under s 66, this evidence would be admissible. In the event that Batista does not testify, the statement was made when the asserted fact occurred, and the circumstances make it unlikely that the statement is a fabrication, therefore under s 65(2)(b), this evidence would be admissible.

vi. Batista: 'get the fuck out of here'

See 1(a)(iv).

vii. Batista arranged to meet w/ Baxter

See 1(a)(iii).

viii. Batista told Rambaudi to drive away from meeting place and to do a U-turn

This evidence is being used for a hearsay purpose, however it would be admissible for the same reasons as given in 1(a)(v).

⁶⁴ *Evidence Act 2008 (Vic)*, ss 81 – 83.

⁶⁵ *Evidence Act 2008 (Vic)* s 90.

ix. Batista: Baxter is a bit of a reject for what he did

This evidence is not being used for a hearsay purpose. In making this representation Batista was intending to assert that Baxter was a bit of a reject. However, the prosecution wishes to adduce this evidence for the purpose of demonstrating that Batista, Farina, Garcia and Rambaudi discussed Baxter and his allegations. Therefore this statement is not covered by the hearsay exclusionary rule, and is admissible.

x. Farina and Garcia: Baxter has “fucked up” and will get slapped around

This evidence is being used to demonstrate both that Farina, Batista, Garcia and Rambaudi discussed Baxter and his allegations, and the existence of an agreement between them to assault Baxter. Under s 60, the exclusionary hearsay rule does not apply to evidence that is admitted for a purpose other than proof of an asserted fact. Therefore, because of the dual relevance of the evidence, the evidence will not be deemed inadmissible because of its hearsay purpose and should be admitted.

d) Garcia

It is unclear if Garcia will testify.

i. Credibility

Given the gaps in Garcia’s statement, including the lack of evidence regarding the stabbing itself and the disposal of the knife, it is possible that Garcia may claim not to remember seeing the knife at any point. If this is the case, it would be necessary to lead evidence to attack his credibility as a witness. This would be done by adducing evidence from Rambaudi and highlighting the inconsistencies between the testimony of Rambaudi and Garcia. This would demonstrate that Garcia was mistaken or deliberately omitted information regarding the knife. Given that Rambaudi’s evidence is relevant and admissible for another purpose, as shown above, there are no restrictions on using this as credibility evidence as well.⁶⁶

ii. Batista made threats

See 1(a)(ii).

⁶⁶ *Evidence Act 2008* (Vic), ss 101A and 102.

iii. Batista: ‘Oh man, I hope Baxter’s alright. What have I done to him?’

This evidence is being used for a hearsay purpose. Batista intended to assert that he was concerned about Baxter, and we wish to adduce this evidence to assert the fact that Batista was worried about Baxter. Again, this evidence is likely to be admitted either under analysis of the s 65 or s 66 exceptions (dependent on whether Batista testifies) similar to that undertaken above.

iv. Batista: ‘Just don’t mention a word to anyone about this’

See 1(c)(v).

v. Batista: get the fuck out of here

See 1(a)(iv).

vi. Batista arranged to meet w/ Baxter

See 1(a)(iii).

e) Farina

It is unclear whether Farina will testify. In the event that Farina does not testify, it is assumed that Weaver or Oduwo will be available to testify as to Farina’s responses to questioning.

i. Credibility

In the event that Farina does testify, the prosecution should lead evidence to attack his credibility. There are significant inconsistencies between Farina’s evidence, as presented in the record of interview and the evidence given by other witnesses. Primary among these is Farina’s claims that there was no knife. As with Garcia, given that the evidence required to question Farina’s credibility has been admitted for other purposes (ie., Rambaudi’s evidence), there are no restrictions on using this evidence for credibility purposes as well.

ii. Denied right to communicate with a friend

The defence are likely to raise an objection to any evidence being admitted from the police interview, as Farina was denied the right to communicate with a friend, after he expressed his desire to exercise this right. Under s 138 of the Evidence Act, evidence

that is improperly or illegally obtained is not to be admitted. The defence would be likely to argue that as Farina has the right to communicate with a friend to inform them of their whereabouts,⁶⁷ and that Farina was denied that right. Therefore, the evidence was obtained in consequence of the denial of that right refusing this legal right and should be excluded under s 138. However, if the investigating officer believes on reasonable grounds that the communication with a friend would result in the fabrication or destruction of evidence,⁶⁸ then they may continue with the questioning without allowing the person in custody to exercise that right. In this situation, Weaver makes it clear that Farina is not being allowed to contact a friend due to the belief that evidence could be lost. Considering that at the time of the interview Batista is yet to be apprehended, it appears that Weaver's belief is based on reasonable grounds. Therefore, there has been no illegality in the obtaining of the evidence, and s 138 cannot apply. Thus, evidence from the police interview is admissible.

iii. Previous conviction for assault

The evidence that Farina and Batista have previous convictions for assault is used to make the argument that Batista has a tendency to knife violence, and that Farina has previously been engaged in a violent altercation in which Batista used a knife. This tendency evidence can only be adduced if reasonable notice is given to the other side, and if the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.⁶⁹ Taking into account that the previous conviction related to both Batista and Farina, it was a violent altercation involving a knife, and that it was less than 12 months ago, there would appear to be significant probative value to the evidence. By the same token, the prejudicial effect on Farina would also be enormous, particularly taking into account the paucity of other evidence to demonstrate and agreement or understanding with Batista. In light of the prejudicial effect that the evidence would have on Farina, there is a strong possibility the evidence would not be admitted.

iv. Farina admits to washing the blood off the clothes

⁶⁷ *Crimes Act 1958* (Vic) ('*Crimes Act*'), s 464C(1).

⁶⁸ *Crimes Act*, s 464C(1)(c).

⁶⁹ *Evidence Act 2008* (Vic), ss 97 and 101.

This is admission evidence. Farina admits that he washed the blood off his clothes when he arrived home after Baxter was stabbed. In the event that Farina does not testify, Weaver or Oduwo are able to give evidence as the hearsay rule is lifted for admissions (see analysis at 1(b)(iv)). Therefore, even if Farina does not testify, this evidence is likely to be admitted.

f) Choi

The prosecution wishes to use Choi's testimony to establish the location of certain items of real evidence at the crime scene and at Farina's house (the knife found in the sock, the spray can, the blood at the crime scene, the piece of blood-stained tissue and Farina's wet clothes). There should not be an admissibility issue as all search warrants were properly obtained and executed.

Additionally, the prosecution wishes to use Choi's testimony to establish that Batista attempted to flee to Italy on 17 December 2004. This is a hearsay use of the information he has received from the AFP. However, it is anticipated that a member of the AFP who took Batista into custody in Sydney would be available to give evidence. Therefore, the evidence would be admissible under the s 66(2) exception.

g) Dexter

i. Credibility

Dexter is a highly qualified expert in fingerprint identification. It is unlikely that his credibility will be seriously attacked by the defence, and should be reasonably high based on his qualifications.

ii. Fingerprints at scene

This evidence is being used to place Farina at the crime scene, and implicate him in the assault upon Baxter. Dexter's evidence that the fingerprints found on the spray can and the area around the front seat of Rambaudi's car match Farina's fingerprints is opinion evidence, and is therefore prima facie excluded.⁷⁰ However, the evidence of Dexter is that of an expert, and is thus admissible under the exception for expert

⁷⁰ *Evidence Act*, s 76.

opinion evidence.⁷¹ In order to satisfy the requirements of the expert opinion evidence exception it is necessary to show that the person has specialised knowledge and that the opinion is wholly or substantially based on that knowledge. These requirements are met by Dexter's opinion, which is solely concerned with the matching of the fingerprints, an area in which he undoubtedly has specialised knowledge.

h) Dimitroff

i. Credibility

There is the possibility that the defence may attack the credibility of Dimitroff given that he did not himself perform the surgery upon Baxter following his stabbing. However, Dimitroff is a qualified medical practitioner with a Masters in General Surgery which should suitably qualify him to give an opinion based on specialised knowledge.

ii. Location of stab wound

Dimitroff's evidence that his findings were consistent with a stabbing to the left side chest is used to prove the location of the stab wound. This is opinion evidence, and the analysis and outcome are the same as those for Dexter's evidence.

2. Real Evidence

Given that Choi can testify as to the authenticity and accuracy of the items found at the crime scene and in Farina's bedroom, the foundational facts are seen to be satisfied with regard to Farina's clothes, the knife in the sock, the blood from the crime scene and the spray can.

3. Documentary Evidence

The documentary evidence that the prosecution seeks to have admitted are the telephone records. The best way to have these admitted is through testimony from the relevant officer from the telephone network. That way the foundational facts of authenticity and accuracy could be satisfied.

The telephone records are to be used in evidence to primarily to support the proposition that there was an understanding between Farina and Batista as to the

⁷¹ *Evidence Act, s 79.*

serious injury of Baxter. This is done through evidence that Farina arranged for the boys to get together and discuss Baxter and his allegations. Given that the records are generated by a computer, they do fall under the hearsay rule and should be admissible.

LIKELIHOOD OF CONVICTION

Considering the evidence available, it is unlikely that the prosecution will satisfy a tribunal of fact beyond reasonable doubt that the required elements of the crime are present. Therefore, a conviction against Farina for seriously injuring Baxter is unlikely. Whilst the case against Batista is compelling, there is a paucity of evidence available to prove that Farina and Batista came to an agreement or understanding as to causing serious injury to Baxter, and that the actions of Batista were in furtherance of this agreement or understanding. Further evidence should be sought from Garcia and Rambaudi as to the discussions that took place in the car prior to the altercation. However, the limited evidence that is available to support this allegation is, on the whole, likely to be admitted.