Yunupingu v The Queen [2002] NTCCA 5

PARTIES:	YUNUPINGU, GAVIN MAKUMA
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	RESERVED QUESTION OF LAW PURSUANT TO S 408 *CRIMINAL CODE NT*
FILE NO:	20013733
DELIVERED:	5 JUNE 2002
HEARING DATES:	22 MAY 2002
JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

CRIMINAL LAW

Procedure – Case Stated – Failure of case stated to set out facts relating specifically to issues raised by question of law reserved

Criminal Code NT s 408

REPRESENTATION:

Counsel:

Appellant:	D Ross QC and J Lawrence
Respondent:	M Carey

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yunupingu v The Queen [2002] NTCCA 5
No. AP7 of 2002 (20013733)

IN THE MATTER of the *Criminal Code NT*

AND IN THE MATTER of a question of law reserved in a trial for the consideration of the Court under s 408 of the *Criminal Code NT*

BETWEEN:

GAVIN MAKUMA YUNUPINGU

AND:

THE QUEEN

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 5 June 2002)

ANGEL J*:*

[1] This is a reserved question of law pursuant to s 408 *Criminal Code NT* which provides:

> "408 **Reservation of points of law**
>
> (1) When any person is indicted for any offence the court of trial must, on the application of counsel for the accused person made before verdict and may, in its discretion, either before or after judgment, without such application, reserve any question of law that arises on the trial for the consideration of the Court.
>
> (2) If the accused person is found guilty and a question of law has been so reserved before judgment, the court of trial may either

pronounce judgment on the finding of guilt and respite execution of the judgment or postpone the judgment until the question has been considered and decided and may either commit the person found guilty to prison or admit him to bail on recognizance, with or without sureties, and in such sum as the court of trial thinks fit, conditioned to appear at such time and place as the court of trial may direct to receive judgment.

(3) The judge of the court of trial is thereupon required to state, in a case signed by him, the question of law so reserved with the special circumstances upon which it arose and the case is to be transmitted to the Court.

(4) The judge of the court of trial may state, in a case signed by him, the question of law so reserved before the trial has concluded.

(5) Any question so reserved is to be heard and determined as an appeal by the Court and, in the discretion of the Court, may be heard and determined before the trial has concluded.

(6) The Court may send the case back to be amended or restated if it thinks it necessary so to do."

[2] As I have reached the conclusion we can not or ought not answer the question I deem it desirable to set forth the case stated in full:

"**Facts relevant to raise the question of law reserved**

[1] On 8 April 2002 the accused Gavin Makuma Yunupingu was arraigned on the following charge:

> 'That on or about 9 August 2000 in Nhulunbuy in the Northern Territory of Australia you murdered Betsy Murrupu Yunupingu contrary to s 162 of the Criminal Code.'

[2] He pleaded not guilty to that charge. He stood his trial.

[3] Cause of death was an issue.

[4] On 11 August 2000 the autopsy was carried out by Dr Zillman, Forensic Pathologist, Royal Darwin Hospital, a copy of his post mortem report is attached.

[5] Dr Zillman, through ill health, was unavailable to give evidence. The Crown proposed to call Professor Green who was Acting Forensic Pathologist for the Northern Territory Department of Health. Prior to Professor Green giving his evidence counsel for the accused objected to the tender of that part of Dr Zillman's report under the heading "Comments".

[6] The Crown argued the whole report was admissible under the Evidence (Business Records) Interim Arrangements Act.

[7] I made the following ruling:

> 'By reason of the Evidence (Business Records) Interim Arrangements Act his report (Zillman's) which was tendered at committal upon which he was cross examined there and which it is proposed would be tendered in these proceedings through Professor Green, is admissible.
>
> I was asked to rule that under the Act the opinion is not admissible, that is what Dr Zillman in his report calls his 'Comments' which include opinion as to cause of death and its relationship to observed trauma, injury on the body of the deceased. It was admissible, in my view and I have already ruled under s 5 of that Act, expressions of opinion are expressly made admissible and I have not been pointed to anything in s 7 which places restrictions on admissibility under s 5 in criminal proceedings which can be applied in circumstances of this case.'

And further:

> 'I am not satisfied any ground has been made out to exclude any part of Dr Zillman's report or anything that's known Professor Green will be saying about it.'

[8] Dr Zillman's report was admitted into evidence through Professor Green. It became exhibit P2. The professor gave opinion evidence on cause of death and his opinion regarding its mechanism based on his reading of Dr Zillman's report, autopsy photographs and his experience.

[9] The jury returned the following verdicts:

Murder:	Not guilty
Manslaughter by Provocation:	Not guilty
Manslaughter:	Not guilty
Dangerous Act	Guilty
Thereby causing the death:	Guilty
At the time of doing that dangerous act the accused was under the influence of alcohol:	Not guilty

Question of Law Reserved:

[10] Did I err in law in admitting that part of Dr Zillman's report to which objection was made?"

[3] It is to be noticed the question is not whether the relevant part of Dr Zillman's report was admissible at law but whether the Chief Justice erred "in law in admitting" the relevant part of Dr Zillman's report. The question thus posed raises two issues namely whether the relevant part of the report is admissible as a question of law, and if so, whether it was admitted into evidence contrary to law.

[4] On a reserved question of law this court is necessarily confined to the facts that are stated in the reserved case and to the question that is reserved; see Assange [1997] 2 VR 247 at 253, and cases cited therein. On a case stated this court has no function of finding facts – including in that the drawing of

inferences: *Boese v Farleigh Estate Sugar Co Ltd* (1919) 26 CLR 477 at 483, per Isaacs, Gavan Duffy and Rich JJ.

[5] The admissibility of the contentious evidence depends on the terms of s 5 and s 7 of the Evidence (Business Records) Interim Arrangements Act. If that evidence is admissible, whether it is admitted is a matter of judicial discretion. A judicial exercise of discretion is not a matter that can be referred to this Court as a reserved question of law: *Hall* (1890) 16 VLR 650 at 654.

[6] The admissibility of the contentious evidence pursuant to s 5 depends, inter alia, on s 7(3) which provides:

> "(3) A statement made in connection with a criminal legal proceeding or with an investigation relating or leading to a criminal legal proceedings is not admissible under section 5."

[7] The facts in the stated case do not address any issue under s 7(3). The Chief Justice's ruling quoted in the stated case mentions s 7 generally but does not specifically address the issues raised by s 7(3). It was submitted the Chief Justice overlooked s 7(3) in admitting the material into evidence, but, having referred to s 7 generally, he must, I think, be taken to have considered s 7(3), at least inferentially.

[8] The prisoner also complained that the Chief Justice had overlooked the discretion under s 19 Evidence (Business Records) Interim Arrangements Act. That Section provides:

> "16. REJECTION OF EVIDENCE IN CRIMINAL PROCEEDINGS
>
> This Act does not affect the power of a Court in a criminal legal proceedings to reject evidence which, if admitted, would operate unfairly against the defendant."

We were referred to portions of the transcript at the trial in support of this submission. Given the restrictions upon us on this referred case it is unnecessary to deal further with that submission. If it be the case that no discretion was exercised that is an error of law; alternatively, if the discretion was exercised, but without reasons being given therefor (in particular no justification or reason for admitting against the prisoner, evidence which could not be tested or cross–examined upon) that also would constitute an error of law. However this may be the stated facts are wanting in this regard and we can not cure the defect by reference to the trial evidence. Compare *Alexander v Menary* (1921) 29 CLR 371 at 375.

[9] I have said enough to show that the question referred to us involves legal issues which can not be answered on the inadequate factual material in the case. There is no factual basis sufficient to answer the question whether the contentious material was legally admissible and if admissible whether it was properly admitted according to law. This case is not stated in a form which enables us to answer the question posed. We should not therefore answer the question that has been referred to us.

[10] As we have not been asked to send the case back to be amended or restated and that course does not appear necessary, I propose that this Court make no order.

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MILDREN J:

[11] I agree with Angel J and with Riley J that this Court should not answer the question of law reserved for its consideration for the reasons which they both give.

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RILEY J:

[12] Gavin Makuma Yunupingu (the prisoner) was charged with the murder of Betsy Murrupu Yunupingu. He pleaded not guilty to that charge and, following a trial, was found not guilty of murder but guilty of committing a dangerous act and thereby causing death.

[13] In the course of his trial a report prepared by Dr Zillman, a forensic pathologist, was received into evidence. Dr Zillman was not available to give evidence through ill health. Counsel for the prisoner objected to part of the report being received but the whole report was admitted over that objection. The whole of Dr Zillman's report was admitted into evidence through Professor Green who was the acting forensic pathologist for the

Northern Territory Department of Health at the time of trial and was called to give evidence. The professor gave evidence in relation to the cause of death and expressed his opinion regarding its mechanism based upon his reading of Dr Zillman's report, viewing the autopsy photographs and upon his own experience.

[14] The matter comes before this Court by way of a reserved question of law pursuant to s 408 of the *Criminal Code*. The question posed is whether the Chief Justice erred "in law in admitting that part of Dr Zillman's report to which objection was made."

[15] It is clear that the question does not relate to the admissibility of the whole report but only to the part which deals with the opinions of Dr Zillman ("the opinion material"). This is made clear in the facts set out in the material included in the case stated and by the statement of counsel who appeared on behalf of the prisoner in the Court below when he said:

> "[W]e have no objection to the report of Dr Zillman being tendered as to the observations by Dr Zillman. However we do object to Dr Zillman's opinion which is contained in the latter part of the said report."

[16] The argument on behalf of the prisoner on the occasion the matter was before this Court was, at times, addressed to the admissibility of the whole of the report. That was not the issue before us.

[17] The Crown says that the relevant material was admissible on two bases:

(a) pursuant to s 152 of the *Justices Act* and

(b) pursuant to s 5 of the *Evidence (Business Records) Interim Arrangements Act* (the "*Business Records Act*").

[18] It was acknowledged in the statement of relevant facts and agreed between the parties before the trial Judge and again before this Court that Dr Zillman suffered ill health and was not available to give evidence.

[19] The Crown says that it pressed for the admission of the evidence under the *Business Records Act* to suit the convenience of the defence. It was submitted that admission of the material under the provisions of the *Justices Act* would have meant that the evidence of Dr Zillman at the committal proceedings would "automatically go in" and there would be no discretion on the part of the trial judge to exclude any part of it.

[20] Whatever may have been the reason for the admissibility of the evidence being dealt with under the *Business Records Act*, the prisoner submits that the issue of whether or not the material was admissible under the *Justices Act* was not explored and has not been determined. It was not a matter raised in the question posed for the consideration of this Court. The prisoner says that in these proceedings it is now too late to address the admissibility of the material under the *Justices Act*. That must be so.

[21] The prisoner submits that the whole report could not be admitted because of s 7(3) of the *Business Records Act*. That section provides:

> "A statement made in connection with a criminal legal proceeding or with an investigation relating or leading to a criminal legal proceeding is not admissible under section 5."

[22] The prisoner acknowledges that the application of s 7(3) of the Act was not raised before his Honour, but says that the basis for such a submission was to be found in the evidence that was then before his Honour and it fell to the Judge to determine the admissibility of the document. It was submitted that:

> "It fell to the Judge to decide the simple matter of whether the report was admissible as a business record, or whether it should be admitted. Concessions or assertions of counsel cannot make the law. The law is the responsibility of the Judge. A Judge has no power to allow inadmissible evidence to be given."

[23] It was submitted that the report of Dr Zillman amounted to a statement of the kind caught by s 7(3) and the whole report should have been excluded. That submission goes beyond the question that was before us. It was not a matter raised with his Honour at any time and was not a matter either party asked his Honour to refer to this Court. There was no argument before his Honour that the report was not admissible under the *Business Records Act*. Indeed the question posed for the Court assumes the balance of the report was correctly admitted into evidence. Further, in order for us to now consider that question would involve this Court considering the transcript of the proceedings before his Honour and the jury.

[24] In *Secretary v The Queen* (1996) 5 NTLR 96 Mildren J said at 101:

> "… [T]he authorities show that this Court may have regard only to the special facts stated by the trial judge, and the transcript should not be considered by this Court or put into the appeal books: *Thomas v The King* (1937) 59 CLR 279 at 286, 299; *R v Clarke* [1956] QSR 93 at 98. This is consistent with r 86.16(4)(b). We must therefore confine ourselves to the special facts. Lest it may be thought that this procedure may give rise to injustice, the practice is for the trial

> judge to settle the special facts and the question of law with counsel for the accused and for the Crown, which we were told was done in this case. However, where the trial Judge has given reasons for his ruling, as was done in this case, there is no rule that precludes us from considering those reasons, just as we may consider any other legal materials helpful to the resolution of the question reserved."

[25] The Court to which a case is stated must confine itself to the facts that are stated and to the questions that are reserved. Generally the Court is not at liberty even to draw inferences from the facts that are stated, they are to be taken as the ultimate facts for whatever purpose the case is stated: *R v Assange* [1997] 2 VR 247 at 253 per Hayne JA. The Court is not entitled to go outside the stated case and read the transcript. The obligation is upon those seeking an order that a court state a case to ensure that all relevant material is set forth in the case: *Question Of Law Reserved (No.1 of 2000)* (2000) 77 SASR 344 at 351-352 per Debelle J.

[26] Section 408 of the *Criminal Code*, in common with similar provisions in some other jurisdictions, contains a provision that requires any question reserved to be "heard and determined as an appeal by the Court". This provision does not widen the scope of the question that comes before the Court or the material that is to be considered. Rather it requires that "any question" be heard and determined as an appeal. One consequence of that provision is that once the question is determined the Court may dispose of the matter exercising its powers under s 411 of the *Criminal Code*: *Secretary v The Queen* (supra at 108); *R v Demicoli* (1971) Qd R 358 at 370-371.

[27] In my view this Court should not now embark upon a consideration of the wider question addressed by the prisoner.

[28] The issue before his Honour, and that which is embodied in the question referred to this Court, is whether the opinion material should have been excluded in the exercise of a discretion by his Honour. Counsel for the prisoner in the Court below pressed for its exclusion "in the application of your Honour's discretion in the trial". He pointed out that the opinion evidence of Dr Zillman would be untested. It would be an opinion in relation to which counsel did not have the opportunity to cross-examine Dr Zillman.

[29] Counsel before the learned trial Judge did not identify the source of the discretion upon which he relied and it is not referred to in the statement of relevant facts. Although the source of the discretion was not identified or addressed before his Honour the *Business Records Act* contains a discretion in s 19. That section is in the following terms:

> "This Act does not affect the power of a Court in a criminal legal proceeding to reject evidence which, if admitted, would operate unfairly against the defendant."

[30] Any consideration of s 19 of the Act necessarily involves an examination of whether the learned trial Judge should have exercised his discretion to exclude the opinion material. Whether the discretionary power of a trial Judge should have been exercised, there being no doubt that the question is one of discretion, is not a question of law capable of being reserved under

s 408 of the Code. What may be reserved pursuant to s 408 is "any question of law" that arises during the trial. As was observed in *R v Hall* (1890) 16 VLR 650 at 654:

> "A question of discretion the judge has no power to reserve, and if he did reserve it we should have no jurisdiction to entertain it. We should be wholly indisposed to exercise it if it existed. Where discretion is given to a judge, the Court will always be exceedingly slow to review it, unless it be shown very clearly and unmistakably beyond all doubt that wrong has resulted to the party through the exercise of that discretion."

[31] In this case it was argued that the issue reserved was not as to the exercise of the discretion but, rather, as to whether, given that a discretion existed, the learned trial Judge proceeded in ignorance of that discretion.

[32] There is nothing in the statement of relevant facts that would permit us to reach any conclusion as to whether there is merit in the arguments of counsel. Reference to the material that was placed before us during the hearing suggests that his Honour was aware of the discretion. Indeed it was upon that basis that counsel for the Crown advised his Honour that he proposed to introduce the evidence pursuant to the *Business Records Act*. It was to be introduced under that Act because, it was submitted, there was no discretion to exclude the opinion material if the report was introduced into evidence under the *Justices Act*. Whether that assumption is correct was not the subject of debate. Both counsel made reference to a discretion to exclude the evidence existing in the learned trial Judge and counsel for the

prisoner called upon his Honour to exercise that discretion to exclude the material.

[33] In giving short reasons for permitting the evidence to be called his Honour did not specifically mention the exercise of a discretion. He ruled that the expressions of opinion were admissible under the Act and said he had not "been pointed to anything in s 7 which places restrictions on admissibility under s 5 in criminal proceedings which can be applied in circumstances of this case". He went on to say:

> "Counsel for the accused then asked me to reject the evidence of Professor Green or Dr Zillman because there is some – said to be some conflict between them as to the mechanism causing the death but I've not had put to me any legal basis upon which such an exclusion could be made.
>
> It is, as Mr Carey puts, the two experts are in agreement that there was the subarachnoid haemorrhage which caused the death. The difference between them seems to lie as to the cause or how that haemorrhage was brought about. That's an opinion, both of which can go to the jury in my view, the jury can consider it and if they find it necessary to do so make their own findings.
>
> I'm not satisfied any ground has been made out to exclude any part of Dr Zillman's report or anything that's known Professor Green will be saying about it."

[34] In my opinion, in that passage, his Honour must have been considering the exercise of his discretion to exclude the opinion material. There was no basis under the statute to exclude the materials and it could only have been by the exercise of a discretion that he could do so. His Honour was asked to exercise that discretion immediately before providing his ruling. The

submission that his Honour proceeded in ignorance of the discretion or failed to consider the exercise of his discretion cannot be made out on the material before this Court. It is not appropriate for this Court in these proceedings to entertain a question relating to the exercise of a discretion.

[35] In my opinion this Court should not answer the question of law reserved.

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