McDonald v Eaton [2012] NTSC 75

PARTIES:	WARREN JOHN MCDONALD v DONALD JOHN EATON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY AT ALICE SPRINGS
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION AT ALICE SPRINGS
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JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

Magistrates – Appeals from Magistrates – Appellant convicted of aggravated unlawful assault – Alleged victim reluctant to give oral evidence and declared an adverse witness – Oral evidence contrary to statements in declaration originally signed by witness – Refusal by magistrate to agree to dismissal of charge despite concurrence by both counsel in such a course – Finding of guilt based on injuries sustained by alleged victim and content of declaration – Appeal allowed.

REPRESENTATION:

Counsel:

Appellant:	J Tapueluelu
Respondent:	N Kumar

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

McDonald v Eaton [2012] NTSC 75
No. JA 7 of 2012 (21200038)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against the finding of guilt, recording of a conviction and imposition of sentence by the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

WARREN JOHN MCDONALD
Appellant

AND:

DONALD JOHN EATON
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 28 September 2012)

Introduction

[1] The appellant, by notice dated 10 May 2012, appeals against the recording of a conviction and imposition of a sentence imposed on him by a stipendiary magistrate, consequent upon a finding of guilt as to a charge of aggravated unlawful assault, contrary to s188 of the *Criminal Code (NT)*.

[2] The circumstances giving rise to the appeal are somewhat out of the ordinary.

[3] The appellant appeared before the court of summary jurisdiction sitting at Alice Springs on two charges, one by way of information for an indictable offence and the other on complaint. The present appeal relates only to the hearing and disposal of the former.

[4] That charge asserted that, on 1 January 2012 at Alice Springs, the appellant unlawfully assaulted Justyna Sampi, circumstances of aggravation being that she suffered harm, she was a female and the appellant was a male, and that she was threatened with an offensive weapon, namely a knife.

[5] The appellant pleaded not guilty to the charge and appeared before a stipendiary magistrate for a trial on the merits on 3 May 2012. The parties consented to the matter being dealt with in the court of summary jurisdiction pursuant to s131A of the Justices Act.

[6] I will return to a discussion of what occurred at the trial in due course.

[7] Suffice to say that, on the closing of the Crown case, the learned magistrate rejected a submission of no case to answer and, having received oral submissions from counsel for the parties, ultimately found the appellant guilty of the primary charge against him and also of the first two of the three circumstances of aggravation alleged. The learned magistrate gave extempore reasons for his conclusions.

[8] A conviction was thereupon recorded against the appellant and he was sentenced to 3 months imprisonment, backdated to 2 April 2012 to take into account 31 days already served.

The appeal

[9] The present appeal is founded on three asserted grounds, namely:

(1) That the learned magistrate erred in law by preferring a statement of the complainant not adopted by the complainant in her evidence and which was adduced for the limited purpose of credibility, over the viva voce evidence of the complainant, given at the hearing of the matter;

(2) That the learned magistrate erred in law by failing to have regard to the burden and standard of proof; and

(3) That the guilty verdict was unsafe and unsatisfactory and against the weight of the evidence in all of the circumstances.

Relevant narrative facts

[10] When the proceedings were called on and the appellant had pleaded not guilty, the prosecutor informed the learned magistrate that the alleged victim, Justyna Sampi, would be called to give oral evidence by video link from Broome in Western Australia, where she was then currently residing.

[11] After some initial difficulty, a workable video link connection was established with Western Australia and it was noted the witness was initially

sitting with her back to the camera. When asked by the learned magistrate whether she was Justyna Sampi she acknowledged her identity.

[12] Upon being told by the learned magistrate that she was there to give evidence in a case against Warren McDonald she said that she was not going to do so.

[13] Discussion then ensued between the learned magistrate and counsel as to what should be done. At the direction of the learned magistrate, Ms Sampi stood up and was affirmed.

[14] What followed was, to say the least, more than a little frustrating.

[15] The prosecutor proceeded to ask Ms Sampi a series of questions.

[16] The latter initially gave appropriate answers to them. In particular:

(1) She agreed that she had been resident in Alice Springs on 1 January 2012 and had been in a relationship with the appellant for some four years. She agreed that she had a domestic violence order against him in force.

(2) She also accepted that she and the appellant went to an auntie's place on Lyndavale Drive on New Year's Eve and were drinking there. She conceded that both of them became drunk.

(3) She further testified that they had an argument on what I take to have been the morning of New Year's Day and were fighting. When asked

whether she got hurt she replied "Yeah"… "Just a couple of cuts and bruises".

(4) She was then asked to look at some copies of photographs that were said to have been photographs of the witness taken at the Alice Springs Hospital on 1 January 2012. Counsel for the appellant took objection on the basis that it had not been established that the copy photographs before the witness were the same as those produced in court by the prosecutor.

(5) The prosecutor undertook to call a police witness to identify the photographs and copies of them. Accordingly, they were marked P3 for identification and the matter proceeded.

(6) However, no such police witness was ever called and, so far as I can determine, the status of the photographs did not change.

(7) Ms Sampi said that that the injury shown in photographs 1 and 2 were those to which she had previously referred, but stated that she did not know how the injuries depicted in the other photographs had occurred.

(8) As her evidence proceeded Ms Sampi asserted that she had had the various cuts and bruises all night and that she had been fighting a couple of other girls before she and the appellant had a fight.

(9) She then proceeded to say that she and the appellant were "just arguing and punched" and that he hurt her, "was arms bleeding and everything".

However, she reasserted that she did not know how she had received the various cuts and bruises depicted in the photographs.

(10) The prosecutor thereupon put to the witness a formal statutory declaration that she was said to have made before a police officer on 1 January 2012.

(11) Ms Sampi acknowledged that her initials appeared on each page of the statutory declaration and that she had written them there. However, despite the fact that the statement specifically asserted that Ms Sampi had been assaulted by the appellant in various ways on 1 January 2002, she asserted to the prosecutor that someone else other than the appellant had hurt her face and that she hardly remembered anything.

(12) At that point the learned magistrate declared Ms Sampi an adverse witness. She was thereupon cross-examined by the prosecutor.

(13) In essence Ms Sampi said that certain of the content of the declaration was a lie and that, at most, the appellant had lifted her up under her arms and dragged her a little. She did not accept the accuracy of the statutory declaration as to specific assaults said to have been perpetrated upon her.

(14) Eventually, the prosecutor sought to tender Ms Sampi's statutory declaration. When she did so the following exchanges occurred between the learned magistrate and counsel:

"HIS HONOUR: Mr Tapueluelu?

MR TAPUELUELU: Well, your Honour, she has given her answers as to most of what's on the statement.

HIS HONOUR: Mr Sampey (*sic*), We have gone through the process of 18, 19 and 20 of the Evidence Act quite plainly.

MR TAPUELUELA: No objection."

(15) The learned magistrate then admitted the declaration into evidence as exhibit P4.

(16) The prosecutor asked Ms Sampi some further questions, the detail of which is not relevant for present purposes. Counsel for the appellant thereafter proceeded to cross-examine the witness.

(17) It is unnecessary to review the whole of that cross-examination in detail. The net effect of the responses given by Ms Sampi was to the effect that she had a fight with some girls earlier that night before she was with the appellant and that, in saying that he had hurt her, she meant emotionally rather than physically.

(18) She went on to say that she was pretty drunk when she gave a statement at the hospital and that the words in her declaration were those of the police and not her words.

[17] She accepted that the appellant had punched her, but denied that he had dragged her into the house. She said that, earlier in the night, she had a fight with Claire Rankine, a cousin of the appellant.

[18] It was, she said, possible that she may have received the various injuries to her face and legs in the course of that incident, which took place outside the house. They were rolling around on the ground. She was drunk at the time.

[19] She further stated that she had also had a fight with a person called Russell and just slapped him. It was possible that he could have hurt her too.

[20] Ms Sampi claimed that the police had not written down everything that she told them in the declaration and agreed that, when the appellant was arrested, he and she had been found sleeping together in the house. She concluded her evidence by denying that the appellant had caused her injuries.

[21] At that point the learned magistrate indicated that he would take a break. What next occurred was little short of remarkable.

[22] When the learned magistrate resumed sitting after the break, Miss Finnin the prosecutor was nowhere to be seen. Instead Mr McGrath from the DPP office stood up and informed the learned magistrate that he now appeared in the matter of Warren McDonald.

[23] The following exchanges occurred:

"MR MCGRATH: Your Honour, I now appear in the matter of Warren McDonald.

HIS HONOUR: What's happened, Mr McGrath?

MR MCGRATH: I was requested to appear this afternoon, Your Honour, and agreed to do so.

HIS HONOUR: The matter is part heard before me.

MR MCGRATH: My understanding, Your Honour, yes that certainly is the position at the moment. My instructions may alter that slightly, Your Honour, in that my instructions are…..

HIS HONOUR: I don't understand why Ms Finnin isn't here, Mr McGrath.

MR MCGRATH: Nor do I, Your Honour. I can……

HIS HONOUR: Is there some emergency or something?

MR MCGRATH: I can't actually tell you, Your Honour, because I simply don't know. I was requested to appear and received instructions and that is the limit of my knowledge. I do apologise, Your Honour. I have no other information on the matter.

HIS HONOUR: And did this request come from your senior officer in the DPP?

MR MCGRATH: I don't – it came directly from Ms Finnin, Your Honour.

HIS HONOUR: Well she should have been in a position to explain why she was unable to attend to resume the conduct of the matter.

MR MCGRATH: If I'd asked that question, Your Honour, I certainly would have. It didn't cross my mind.

HIS HONOUR: Mr McGrath, it seems to be extremely unlikely that you'd be asked by a fellow officer of the DPP to take over a hearing part heard without asking for some explanation.

MR MCGRATH: That's exactly what happened, Your Honour. I was given instructions and if I can just address that very briefly, Your Honour.

HIS HONOUR: Yes.

MR MCGRATH: That the matter on Count 1 was to be discontinued and that….

HIS HONOUR: How do you do that? If it is part heard? This isn't a civil action to be discontinued, Mr McGrath.

MR MCGRATH: No, Your Honour. Or to have Count 1 dismissed.

HIS HONOUR: Well that's a matter entirely within my discretion.

MR MCGRATH: Yes, Your Honour.

HIS HONOUR: Yes.

MR MCGRATH: And I understand that the intention of the parties, by agreement, was to…..

HIS HONOUR: This is not a civil proceeding. The parties do not reach agreements part way through a hearing, at least they can reach all the agreements they like, but there is utterly no relevance to the court.

MR TAPUELUELU: Your Honour, if I could just assist Mr McGrath. I did speak to Ms Finnin and she did indicate that she was… She used the term "discontinue", but I understood that to mean that she was withdrawing……

HIS HONOUR: She can't do that, Mr Tapueluelu. Not once the charge has been laid and the matter has proceeded.

MR TAPUELUELU: Well, my understanding, Your Honour, the prosecution can withdraw the charge before they close their case.

HIS HONOUR: No, they cannot withdraw the charges once they have proceeded. It'll be a matter – the sole disposition of the matter in these circumstances would be a dismissal by me.

MR TAPUELUELU: Yes, Your Honour.

HIS HONOUR: But I'd have to be satisfied that that's where we stood.

……

HIS HONOUR: There is no withdrawal. Before a matter commences, it is very common for leave to be sought to withdraw a charge. It's always a

matter of leave. This is sometimes overlooked. Once the charge has been put to the defendant and the defendant has entered a plea of not guilty, and we've commenced to hear evidence, then there is no question of the prosecution withdrawing the charge."

[24] Mr McGrath then intimated that he did not propose to call any further evidence and closed the Crown case.

[25] On that intimation, counsel for the appellant argued that there was no case to answer and, at the request of the learned magistrate, made detailed submissions in that regard.

[26] He initially based those submissions solely on the positive oral evidence that had been given by Ms Sampi. The learned magistrate then said to him "What do you say to me about her statement that is in evidence before me?"

[27] Counsel responded to the effect that Ms Sampi had largely resiled from the statement, saying that it was not a true story. He summed up his position by saying "She's changed her evidence from her statement and she is distancing herself from her statement and her answers in cross-examination, she has definitely said, 'He didn't harm me at all on that night. He hurt my feelings. We had an argument.' But she doesn't take it any further than that."

[28] The following exchanges then occurred between the learned magistrate and Mr McGrath**:**

"MR MCGRATH**:** Yes, Your Honour. The no case submission in relation to Count 1 is conceded.

HIS HONOUR: Is not a question of concession. For goodness sakes Mr McGrath.

MR MCGRATH: Sorry, Your Honour. It is accepted that the evidence doesn't……..

HIS HONOUR: If you want to run dead, sit down and run dead, otherwise make some proper submissions.

MR MCGRATH: I will sit down, Your Honour."

[29] And he did. The learned magistrate then found, essentially on the basis of the content of the declaration exhibit P4, that there was a case to answer.

[30] Counsel for the appellant thereupon elected to call no evidence and closed the defence case.

[31] Counsel for the appellant addressed the learned magistrate, pointed to the unsatisfactory state of the evidence and, in effect, submitted that the charge against the appellant had not been proved beyond reasonable doubt.

[32] Mr McGrath’s submissions ran to 3 lines of transcript. He said "The prosecution relies on the statement of Justina Sampi. In particular I refer Your Honour to, in relation to Count 1, to paragraph 6, 7, 8 and 10".

[33] The learned magistrate then expressed extempore reasons for the conclusions to which he had come and proceeded to find the appellant guilty of Count 1, with circumstances of aggravation 1 and 2.

[34] It is impractical and unnecessary to recapitulate the extempore reasons in detail. The essential thrust of them was to the effect that:

(1) The material before the learned magistrate established that Ms Sampi had been admitted to the Alice Springs Hospital on 1 January 2012 exhibiting multiple injuries, which he described.

(2) Having referred to Ms Sampi's presentation on the video link the learned magistrate referred to the photographs that had been produced by Ms Finnin and noted that, because of her failure to prove that the photographs in front of Ms Sampi were the same as those in court they had never been admitted in evidence.

(3) The learned magistrate reviewed the oral evidence given by Ms Sampi and contrasted it with the content of her original statutory declaration, admitted as exhibit P4.

(4) He noted that Ms Sampi had merely acceded to a whole series of propositions put to her by counsel for the appellant and commented that those propositions were "simply acceded to by the witness, who was clearly adverse and who was clearly not wishing to have the defendant in further trouble".

[35] The learned magistrate accepted that there was no satisfactory evidence to establish that the appellant had been threatened with a knife.

[36] Having referred to what he regarded as the unsatisfactory witness evidence given by Ms Sampi, he concluded his reasons in these terms:

"At the end of the day, notwithstanding that I have totally conflicting evidence from that witness before the court today, I am satisfied beyond reasonable doubt that the witness lied in her evidence today in most of what she told the court as to her recollection and as to the existence of other circumstances which might have led to any of the injuries observed in the exhibit P4 (*sic?P1*). On the basis of the witness's statutory declaration made the morning after the offences were alleged to have taken place, on 1 January 2012, to police officers and her signing that statutory declaration, ***I am satisfied that I cannot rely at all on anything, in essence, which the witness had to tell the court today.***

However, I am satisfied, on the evidence before me, beyond reasonable doubt, and by that I mean the evidence in the statutory declaration, exhibit P4 and the medical record exhibit P1, that the defendant, Warren John McDonald, unlawfully assaulted Justina Sampi by striking blows to her head and upper body, well - head at least, by dragging her, even though I cannot be satisfied it was necessarily by her hair, but by dragging her, ***because that was confirmed by the witness today, and by stabbing her with an unknown object to the legs.***

Accordingly, I find the defendant guilty of Count 1 with circumstances of aggravation 1 and 2."

[The emphasis has been added by me]

[37] I take those sentencing remarks to indicate that the content of exhibit P4 was before the court for all purposes and that, accordingly, he was entitled to accept any of such content as proof of the accuracy of the facts referred to in it.

Consideration of the appeal

Ground 1

[38] It is the appellant's contention that the learned magistrate erred in law by preferring a statement of the complainant which she did not adopt when she gave her "viva voce" evidence on the contested hearing of the matter.

[39] The appellant submits that the statement was not admissible as to the truth of its contents, unless the complainant adopted those contents during her viva voce evidence, which she did not.

[40] I here pause to note that a perusal of exhibit P4 indicates that the relevant statutory declaration had been read to Ms Sampi before she signed it because, as was apparently written on the declaration by the police officer – "I can only read a little bit".

[41] Counsel for the appellant points out that, as appears from the transcript of proceedings before the learned magistrate, exhibit P4 was expressly admitted into evidence for the purposes of activating sections 18 to 20 inclusive of the Evidence Act. This occurred following the intimation by the learned magistrate that he considered Ms Sampi an adverse witness[1].

[42] The tender of the exhibit was permissible and necessary, at that point, both to prove contradictory statements and also as a proper basis for cross-examination pursuant to s20 of the Act.

[43] In large measure the witness actually repudiated the content of the declaration and, in effect, said that the police had put words into her mouth.

[44] In the circumstances, there was simply no basis upon which the statement could have been admitted in direct proof of the truth of the factual matters referred to in it[2]. As was said in the case of *Urbano*[3] –

"Furthermore, I think that the direction was defective in that it did not identify the two questions which arise when a witness has made an out of court statement which is inconsistent with the evidence given at the trial. In such a case they should be told that they cannot act upon the out-of-court statement, not because it is unreliable but simply because it is not sworn to and it is not evidence of the truth of what it contains. It gets into evidence

[1] See Transcript of proceeding on 3 May 2012 page 16
[2] Driscoll v The Queen (1977) 137 CLR 517 at 536
[3] (1983) 9 A Crim R 170 at 173 – 174. See also Bull v The Queen (2000) 201 CLR 443 at 466, Warford v The Queen [2009} NTCCA 9 at [36]

on the issue of the witness's credit and for no other reason and no other or further use can be made of it."

[45] It is only when a witness has expressly adopted a prior, out-of-court, statement as the truth that this can be acted upon as positive evidence in the case.[4]

[46] The authorities to which I have referred make it plain that, in situations in which a witness has been declared adverse and there have been prior out-of-court inconsistent statements, it is essential that the evidence of that witness be treated with great caution.

[47] It must be emphasised that this is not a situation akin to that considered by Kelly J in *Karui v Malgorski*[5], in which the victim eventually adopted important parts of the statement in question.

[48] In the course of her reasons she made the point… "The magistrate did not misuse the statement. He used it for its proper purpose – namely to judge the consistency of the witness's conduct. He believed that part of her evidence which was consistent with both the physical evidence of the assault and with her prior statement – "because of consistency". He was perfectly entitled to do this."

[49] In the instant case, Ms Sampi essentially repudiated the statutory declaration, save, perhaps, for a few relatively minor details. She gave other

[4] See discussion in Reg v Jacquier (1979) 20 SASR 543 at 554 – 555
[5] [2011] NTSC 17

possible explanations for the injuries that she had exhibited. She agreed with a series of propositions put to her by counsel for the appellant that were, in her view, quite inconsistent with her declaration. It is to be remembered that, in cross-examination, Ms Sampi concluded her evidence by specifically denying that the appellant had caused her injuries.

[50] In my opinion, the learned magistrate was not entitled to use the content of the statutory declaration in the positive manner in which he did. Circumstances did not arise in which he was entitled to treat its contents as admissible evidence of narrative fact, as he undoubtedly did. At best its status did not rise above that of evidence of a previous statement made by the witness, said to be inconsistent with evidence that she gave before the court.

[51] In so saying I by no means ignore the submission by the respondent that references to the contents of the statutory declaration were made as part of an overall assessment of the witness's credibility and that the learned magistrate accepted that part of the witness's evidence which was consistent with both the physical evidence of the assault, the prior declaration and the medical evidence.

[52] It seems to me that such a contention ignores what the learned magistrate himself said. Not only did he comment that he could not rely on anything which the witness had told the court that day[6] and also by reference to the

[6] Transcript dated 3 May 2012 at page 45

statutory declaration and the medical record and because the witness had confirmed that she had been dragged and stabbed with an unknown object.

[53] It is to be borne in mind that, in the statutory declaration, Ms Sampi had originally said that the appellant "grabbed me by the hair and dragged me into the house" – a description from which she specifically resiled in her oral evidence.

[54] I consider that the appellant has made Ground 1 good. All that the learned magistrate had before him were a series of conflicting answers given in the course of oral evidence and which were also inconsistent with the content of the statutory declaration that was never verified by the police officer as being what the witness had said to him.

Ground 2

[55] This ground asserts that the learned magistrate failed to have regard to the burden and standard of proof to be satisfied by the respondent.

[56] It was stressed on behalf of the appellant that no witness was ever called to verify the making of the declaration and the accuracy of its contents, given the background that Ms Sampi denied having read it and also denied the accuracy of its content.

[57] The appellant contends that, in accepting and relying upon the content of the declaration in those circumstances, the learned magistrate manifestly failed to apply the appropriate standard of proof.

[58] The respondent's riposte to that contention is that not only did the learned magistrate say that he was very aware that he must be satisfied beyond reasonable doubt on all the evidence but also, had a police officer been called to verify the making of the declaration, he could not have vouched the accuracy of what was said.

[59] This submission seems to me, in part at least, to misconceive the point being made by the appellant. There was simply no evidence to verify that the declaration, as written out, accurately recorded what Ms Sampi had said to the police, in circumstances in which, on the face of the document, it is recorded, in effect, that she could not read it.

[60] I am not satisfied that the criticism advanced does establish that the learned magistrate failed to have regard to the appropriate standard of proof. The factual basis of the criticism is, however, pertinent to Ground 3.

[61] I do not find Ground 2 to have been made good.

Ground 3

[62] This ground asserts that the verdict of the learned magistrate was, in all the circumstances, unsafe and unsatisfactory and against the weight of the evidence.

[63] The law concerning the approach to such a ground is well settled.

[64] An appellant court must, itself, consider the evidence in order to determine whether it was open to the learned magistrate to convict on the basis of it .[7]

[65] If the evidence contains discrepancies, displays inadequacies or is tainted or otherwise lacks probative force in such a way as to lead an appellate court to conclude that, even making full allowance for the advantages enjoyed by the learned magistrate, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and set aside a verdict based on that evidence.

[66] In the instant case the learned magistrate himself unequivocally indicated that he did not regard Ms Sampi as a witness of truth and was satisfied that he could not rely at all on anything that she had told the court that day[8]. It is unsurprising that he made such a comment.

[67] A perusal of the transcript indicates that not only was she an unwilling and adverse witness, but also she vacillated from time to time in what she said, effectively denied the accuracy of the substance of the statutory declaration, said that her injuries had not been received at the hands of the appellant and proceeded to give alternative explanations as to how she might have received them.

[7] Carr v The Queen (1988) 165 CLR 314 at 331, M v The Queen (1994) 181 CLR 487 at 493, 494
[8] Transcript dated 3 May 2012 at page 45

[68] The admissible evidence as a whole was contradictory to the point that little by way of positive conclusion could confidently be extracted from it.

[69] It is small wonder that the prosecution sought the dismissal of the charge following the conclusion of Ms Sampi's evidence.

[70] That was a realistic recognition of the totally unsatisfactory state in which the evidence then stood. It is somewhat surprising that the learned magistrate declined to entertain such an application and insisted upon proceeding to his own determination of the matter against the obvious desire of the prosecution to withdraw the proceedings. It is a truly rare situation in which a judicial officer would be justified in adopting such a stance.

[71] At the end of the day I am convinced that, with all due respect to the learned magistrate, it was not open to him on the state of the evidence with which he was confronted to be satisfied beyond reasonable doubt of the guilt of the appellant.

[72] The prosecution was well justified in seeking a dismissal of the charge, pursuant to s69 of the *Justices Act*, as it did.

[73] Because of the lack of acceptable, admissible evidence this was not a situation in which the court at first instance was left in a position in which it could fairly arrive at a positive conclusion as to where the truth lay, beyond reasonable doubt.

[74] The evidence before the learned magistrate grossly lacked probative force. There was necessarily a significant possibility that the appellant was innocent and inappropriately convicted.

Conclusion

[75] The appeal must therefore be allowed and the conviction and sentence set aside. There will be orders accordingly.

[76] I do not think that, given the circumstances, this is a matter in which the proceedings should be remitted for retrial.