CITATION:	*Morluk v Firth* [2017] NTSC 91
PARTIES:	MORLUK, Ambrose v FIRTH, Justin Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 37 of 2017 (21647382)
DELIVERED ON:	19 December 2017
DELIVERED AT:	Darwin
HEARING DATE:	9 October 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS

Whether findings of guilt unsafe and unsatisfactory – matter turns on the appeal court's own assessment of whether it was open to the tribunal below to be satisfied of the appellant's guilt to the criminal standard – the trial judge's advantage in seeing and hearing the evidence may be capable of resolving a doubt experienced by a court of criminal appeal – not a case in which the victim's evidence inconsistent with objective and contemporaneous documentary evidence or evidence given by an independent third-party witness – reasonable doubt said to arise from inconsistencies in the victim's evidence and the victim's intoxication at the time of the alleged offending – relevant question is whether the inconsistencies went to the essential features of the victim's account of the

offences or were explicable in a manner that did not provide a basis for them to reflect on her credit – inconsistencies explicable by reference to the relationship between the victim and the appellant – victim's account of the assault consistent with the complaint made in the aftermath of the incident – victim's account corroborated in a circumstantial sense by other witnesses – no evidence giving rise to reasonable possibility of consent to the application of force or the defence of defensive conduct – appeal dismissed.

Criminal Code Act (NT) s 188
Local Court (Criminal Procedure) Act (NT) s 166

BCM v The Queen (2013) 303 ALR 387, *Elliot v Harris (No 2)* (1976) 13 SASR 516, *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 47 NTR 8, *GAX v The Queen* (2017) 344 ALR 489, *M v The Queen* (1994) 181 CLR 487, *R v M, WJ* [2004] SASC 345, *Reilly v Baker* (1989) 99 FLR 52, *SKA v The Queen* (2011) 243 CLR 400, *The Queen v Dookheea* (2017) 347 ALR 529, *Warford v Firth* [2017] NTSC 75, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Aust
Respondent:	L Hopkinson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	GRA1715
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Morluk v Firth [2017] NTSC 91
LCA 37 of 2017 (21647382)

BETWEEN:

AMBROSE MORLUK
Appellant

AND:

JUSTIN ANTHONY FIRTH
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 19 December 2017)

[1] On 3 July 2017 the appellant was found guilty and convicted in the Local Court of the following offences:

(a) one count of aggravated assault occasioning harm, contrary to s 188(1) and (2) of the *Criminal Code* (NT); and

(b) one count of breaching a domestic violence order contrary to s 120(1) of the *Domestic and Family Violence Act* (NT).

[2] The charges arose out of a course of conduct which took place on 27 December 2016. The victim was the appellant's wife at the time.

[3] This is an appeal against those convictions brought pursuant to s 163 of the *Local Court (Criminal Procedure) Act* (NT). An appeal may be brought under that provision on a ground which involves an error or mistake on the part of the Local Court on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law.

[4] The notice of appeal in this case contends that the findings of guilt were unsafe and unsatisfactory on all of the evidence, and that the Local Court erred in finding there was no reasonable doubt concerning the question of identification. During the hearing of the appeal counsel for the appellant characterised the second ground as a particular of the first ground, rather than an independent ground of appeal.

Preliminary issue

[5] The charge under the *Criminal Code* was brought on information. The charge under the *Domestic and Family Violence Act* was brought on complaint. The two charges were heard together before the Local Court. A single notice of appeal has been filed. A preliminary issue arises as to whether separate notices of appeal were required to be filed in respect of each conviction. There is conflicting authority on the question whether separate notices are required in these circumstances.[1]

1 See, for example, *Warford v Firth* [2017] NTSC 75; *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 47 NTR 8 at 12; *Reilly v Baker* (1989) 99 FLR 52; *Elliot v Harris (No 2)* (1976) 13 SASR 516.

[6] This is not a case in which it is necessary to address that conflict or to attempt any resolution of the issue. The joinder of the appeals in the one notice causes the respondent no prejudice in the present matter, s 166 of the *Local Court (Criminal Procedure) Act* provides that an appeal is not defeated merely by reason of a defect of substance or form, and if such a defect presents in this case there is no need for amendment to allay prejudice.

[7] To the extent that a requirement for separate notices operates as a condition precedent to the right of appeal, in appropriate cases the court is able to dispense with compliance pursuant to s 166 of the *Local Court (Criminal Procedure) Act*. This would be such a case.

The conduct of the trial in the Local Court

[8] Counsel for the appellant advised at the commencement of the trial that the identity of the assailant was in dispute, as was the principal allegation that the appellant was involved in the conduct said to constitute the assault.

[9] Three witnesses were called in the prosecution case. They were the victim, an independent witness who saw the victim in the immediate aftermath of the assault, and the police officer who initially attended on the victim. No evidence was called in the defence case.

[10] The victim is an Aboriginal woman from Maningrida who required the assistance of an interpreter in giving her evidence. She gave evidence

that on the day in question she had been drinking at a bush camp near Palmerston in company with the appellant. No one else was present at the time.

[11] In response to a series of questions from the prosecutor the victim gave an initial account of the events said to constitute the offending behaviour. That account was in the following terms:[2]

> MS HOPKINSON: So there's you and Ambrose Morluk. What happened between you two?---We was like fighting.
>
> HIS HONOUR: I understood the witness to say she was stabbed by him.
>
> MS HOPKINSON: I – –
>
> HIS HONOUR: We heard two entirely different things.
>
> MS HOPKINSON: Yes.
>
> HIS HONOUR: Just ask her to repeat it.
>
> Say that one again, please, what happened?---We were drinking, we were both drinking and then it was happening, we start fighting.
>
> I think you heard better than I did.
>
> MS HOPKINSON: Okay.
>
> What happened during the fight?---Hit me with a stick.
>
> Where did he get the stick from?---The bush area.
>
> How big was the stick?---Middle size stick but I couldn't see.
>
> Where did he hit you?---On my back, back of me.
>
> How many times did he hit you?---Only one time.
>
> Did he say anything to you?---He's been swearing at me.
>
> What was he saying?---'Brother fuck her sister, fuck her.'
>
> Did he say that softly or loudly? How did he say that?---Hardly.

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2 Transcript of Proceedings, 3 July 2017, p 12-13.

How did you feel when he said those things?---He was saying that and he hurt me.

….

MS HOPKINSON: Were you standing up or lying down when he hit you on your back with the stick?---I was standing up.

Did you stay standing the whole time or not?---No I was standing up only one time.

Then what happened?---And then he hit me.

What did he hit you with?---A stick.

Where did he hit you?---My back.

Then what did you do?---Then I ran away from him.

Were you paining?---I was paining and - - -

Where were you paining?---My back.

Anywhere else?---My whole body.

Your whole body?---And then I went to the hospital.

What happened at the hospital?---And then I got checked up.

What injuries did you have?---I've got in my face injury.

What happened to you face?---He push me.

Who pushed you?---Like I said, things sometimes are (inaudible) because I was so drunk.

What about on this occasion, do you remember who pushed you?---I just fall down because I was too drunk.

So you fell down, how did you get the injuries on your face? You told us you went to the hospital and had a check up and you had injuries on your face. Can you tell us how you got those injuries on your face?---It was from my partner.

What's the name of your partner?---Ambrose.

His surname?---Morluk.

[12] The victim then gave an account which appeared to contradict that evidence in the following terms:[3]

> MS HOPKINSON: What did he do to cause those injuries on your face?---I never seen the person that he did to me because I was so drunk.
>
> How do you know it was him?---It could be him or somebody else.
>
> This person who hurt your face, what did they do?
>
> MR WOODROFFE: Well, objection, your Honour. Your Honour, that does not flow from the evidence. The witness has indicated she did not see the person who did this to her.
>
> HIS HONOUR: The witness has also already said in answer to the question, 'How did you get injuries to your face?---It was from my partner, Ambrose Morluk.' It can be explored in chief further.
>
> MR WOODROFFE: If your Honour pleases.
>
> MS HOPKINSON: So what did Ambrose Morluk do to cause injury to your face?---Well, we was both drunk and fighting and then we split and I don't know where he was.
>
> You said that he hit you with a stick, did you give him permission to do that?---Pardon?
>
> You told us that Ambrose Morluk hit you with a stick. Did you tell him it was okay to do that?---I don't know.

[13] When the prosecutor sought to clarify the matter the victim indicated that she did not want the charges to be pursued against the appellant. That statement, together with a subsequent interaction with the trial judge, was made in the following terms:[4]

> MS HOPKINSON: When what was happening?---Like I said I like to drop his charge and then go back to his family back at their river because I'm not with him anymore and I'm staying with my family, my mum. My

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3 Transcript of Proceedings, 3 July 2017, p 14.

4 Transcript of Proceedings, 3 July 2017, p 14.

mum, she's very sick, very old and I've got kids. So I left her back at Maningrida.

HIS HONOUR: You can do that. You can go back to Maningrida when you finish here today but first we want to hear what you can tell us about this trouble?---Yeah there's trouble. That's between me and him, my partner. I had a lot of smash with the other peoples that I was drinking with them. I was in Darwin.

[14] The prosecutor continued with the examination-in-chief. The victim then appeared to confirm the account she had initially given in evidence to the effect that it was the appellant who had assaulted her on the day in question:[5]

MS HOPKINSON: What do you mean by smash?---When we were drinking but for now I'm not drinking.

So when you say smash do you mean - - -?---Like hitting, like, with a stick.

Who did that?---My partner, Ambrose.

Did he do anything else to you?---With fists.

What did he do with the fists?---Well, he punched me.

Where did he punch you?---My face.

How many times did he do that?---Only just one time.

Did you have any injuries on your face after that?---I was swelling on face, that's it.

Swelling, okay. Was there any bleeding or not?

MR WOODROFFE: Objection, your Honour, leading.

HIS HONOUR: You're leading, MS HOPKINSON.

MS HOPKINSON: Was there anyone around when you were hit?---No ones. Just only between me and him.

Had anyone hit you earlier that day?---Yeah.

What can you tell us about that?---It could be somebody else.

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5 Transcript of Proceedings, 3 July 2017, p 15.

Whereabouts on your face were you swollen?---I was drunk and I just fell down.

You said that when you went to - - -

MR WOODROFFE: Your Honour, the witness was still finishing what she was trying to say.

MS HOPKINSON: Sorry, please continue. I didn't hear that, pardon?---I can't remember because I was so drunk.

[15] The victim went on to give an account in which she ran away from her assailant, she was taken to the hospital in the ambulance, she came into contact with police at the hospital, and she was taken by police to a "women's safe house".[6] The victim then made reference to fighting with other people in the following terms:[7]

MS HOPKINSON: Did you talk to anyone about the trouble you'd had with Ambrose before you went to the hospital?---Excuse me? You mean like going to talk about whole stories but I never - also drunk. Some stories it's not the truth.

HIS HONOUR: Was not the truth?---Because I had sometimes fighting with the other families, like, people.

MS HOPKINSON: Can you tell us about the fighting you were having with those other people? When did those fights start?---Can't remember. Only I know with my partner, Ambrose, that's it.

You remember the fight with your partner, Ambrose?---Yeah.

And that's the one where he hit you with a stick on your back?

HIS HONOUR: The witness nods.

MS HOPKINSON: Pardon?

HIS HONOUR: The witness nods.

MS HOPKINSON: And that's the one where he punched you on the face and you got swelling.

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6 Transcript of Proceedings, 3 July 2017, p 15-16.

7 Transcript of Proceedings, 3 July 2017, p 16.

HIS HONOUR: Again the witness nods.

[16] A short time later in the examination the victim again indicated that she did not wish to proceed. That led to a further interaction with the bench, and further questioning during which the victim appeared to confirm the identity of her assailant:[8]

> THE WITNESS: I don't want no more court.
>
> HIS HONOUR: That's not for you to say. That's for me to say. If you answer the questions we can finish soon but you must answer the questions so that we can finish. Ms Hopkinson asked you how did you get hurt on the head with a stick?---Yeah.
>
> Can you tell her that? How hurt your head with a stick?---My husband.
>
> MS HOPKINSON: And your husband's Ambrose Morluk?---Yep.
>
> Did your husband hit you anywhere else with the stick?---My leg, my arm.
>
> Anywhere else?---No.

[17] There followed a passage of evidence in which the victim confirmed that following the assault she had spoken to police and they had taken a photograph of her injuries. As the prosecutor was questioning the victim about the injuries depicted in the photograph, she again asked to be released from the proceedings "[b]ecause I don't want to talk about it". The trial judge prompted the victim to continue, upon which she made the following statements:[9]

> HIS HONOUR: We will stop it when you have finished telling us. If you answer the prosecutor's questions - if you answer them, it goes quicker. If

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8 Transcript of Proceedings, 3 July 2017, p 17.

9 Transcript of Proceedings, 3 July 2017, p 18-19.

you take a long time, it goes slower?---Yes, I was drunk and you know when you drink alcohol and can't remember the person hit you. We were both right, but the other families, they just came and, you know, they was make us mad. We were both right. Just because he was the alcohol problem. That's why he smash me like from the reason alcohol.

Yes?---Yeah. He was so kind to me and care for me. The reason from the alcohol. That's it.

Ms Hopkinson?

THE WITNESS: Excuse me, Judge, and I like to say one more word and - - -

HIS HONOUR: Yes?---I bail him out and he's not going to stay in prison all the time. He wants to see his kids and the families.

I understand that?---And we both got kids, so it's at Maningrida and is worry.

[18] The prosecutor then embarked upon a course of questioning which sought to ascertain whether the victim was saying anything while her assailant was hitting her. That questioning would appear to have been directed to excluding the possibility that there was some sort of consent to the assault, or some sort of consensual fight.[10] The results of that questioning were in some ways inconclusive, but did not suggest any possibility of consent or a consensual fight.

[19] The victim was then subjected to cross-examination by counsel for the defence. During that examination the following matters were led from the victim.[11] She was "falling down drunk" on the day in question. The injuries on her face were caused by falling down. She was drinking with other families on the day in question. She could not

10 Transcript of Proceedings, 3 July 2017, p 19-20.

11 Transcript of Proceedings, 3 July 2017, p 20-22.

remember what happened at that time. Upon her release from hospital the following day she could not recall and did not know what had happened to her on the previous day. She did not know whether the appellant had punched her in the face or hit her with a stick.

[20] For the purposes of this appeal it is important to consider how that evidence fell out during the course of cross-examination. The relevant passages are as follow:[12]

> MR WOODROFFE: You had three bottles. Isn't that right?---No.
>
> Do you remember saying that you had three 1.5 litres of wine that you drank yourself?---Yeah.
>
> That day you have told us that you were - besides drunk, that you were falling down?---Yes.
>
> And you were falling down drunk from that grog?---Yes.
>
> And you were falling down on your face?---Yes.
>
> You were busted up around your face?---Yes.
>
> That was from falling down?---Yes.
>
> You had that sore lip. Busted lip?---Yes.
>
> Did you have other cuts on your face from falling down?---Yeah.
>
> Besides falling down, you told us that you were drinking with - is it families?---Yeah.
>
> Wilson families?---Families was there, but when - when we were drunk they all just get up and just go somewhere else. I don't know.
>
> ….
>
> What I want to ask you, Ms Campion, is that next day you didn't know what had happened to you?---Yes, I didn't know what's happening.
>
> So when you got out of that hospital you didn't know how you got busted up. Isn't that right?---Yes

12 Transcript of Proceedings, 3 July 2017, p 21-22.

….

Did you try and talk to Ambrose because you wanted to know what had happened, but you didn't know?---Yeah.

So you were asking Ambrose what - - -?---And I - - -

Sorry?---I didn't know what's happening and - yeah, and I asked Ambrose. Ambrose said, 'That could be someone that's - you will fall down by yourself,' when I was drunk.

So isn't it true, Ms Campion, today you don't know whether Ambrose - - -?---Yeah, I don't - - -

- - - hit you - punched you in the face. Is that right?---No, I don't know.

You don't know whether Ambrose hit you with a stick to your back and your body. Isn't that right?---Actually I don't know much. I can't remember.

[21] The re-examination which followed was directed largely to establishing that the victim had provided a signed statement to police on 27 September 2016, which was the day of the alleged offending.[13] The victim was able to confirm that she had provided a statement to police at that time. The clear purpose of that evidence was to establish that in the period immediately following the assault the victim had a recollection of what had happened, and that the content and significance of any purported conversation with the appellant at some later time had to be viewed in that light.

[22] The prosecution then called Daniel William Frederick Brant. His evidence was that on the afternoon of 27 September 2016 he was walking his dogs at the back of Archer Oval in Palmerston. He saw the

13 Transcript of Proceedings, 3 July 2017, p 22-26.

victim run from bushland with "a lot of facial injuries and blood all over her" saying that she had been "bashed".[14] The victim said to him, "Just leave. Leave. He's gonna kill you. He'll get you too, so just leave."[15]

[23] The witness then saw an Aboriginal male come out of the bushland approximately 100 metres away. The Aboriginal male addressed the witness in abusive terms, telling him to mind his own business and leave the area. The Aboriginal male then saw the witness's dogs and stopped approximately 50 metres away from the witness and the victim.[16] The witness offered to take the victim to get help, but she refused. The witness then reported matter to police by telephone.[17]

[24] In cross-examination, the witness agreed that police had not subsequently sought to have him identify the Aboriginal male using a photo board or physical line-up.[18]

[25] The prosecution then called Senior Constable Gavin Ascoli. His evidence-in-chief was that at approximately 6:30 on the evening of 27 September 2016 he was called to attend a disturbance at a bush camp near the Archer Oval.[19] The police vehicle in which he was travelling

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14 Transcript of Proceedings, 3 July 2017, p 28.

15 Transcript of Proceedings, 3 July 2017, p 28.

16 Transcript of Proceedings, 3 July 2017, p 29.

17 Transcript of Proceedings, 3 July 2017, p 30.

18 Transcript of Proceedings, 3 July 2017, p 31.

19 Transcript of Proceedings, 3 July 2017, p 31.

was waved down by the victim. She stated that she had been assaulted by her partner. She had swelling to her face and other unspecified injuries. The victim identified her partner as an Aboriginal male approximately 150 metres away from where she was talking with police. The Aboriginal male ran into the bush. The victim was taken to the Palmerston Police Station where she made a statement. She was then taken to the Royal Darwin Hospital.[20]

[26] Senior Constable Ascoli went back to the bush camp on 11 October 2016 in an attempt to locate the appellant. He found the appellant with the victim in a tent. He advised the appellant that he was under arrest for the breach of a domestic violence order and for aggravated assault. At that time, the victim stated that she wanted to withdraw her complaint. She had in fact attended at the Palmerston police station on 10 October 2016 and sought to recant her story. Police advised her at that time that it would be a matter for the courts to determine.[21]

[27] In cross-examination, Senior Constable Ascoli confirmed that there was no photo board or line-up conducted with Mr Brant. He said further that when the victim sought to recant her earlier story she "said she made a mistake, it wasn't him".[22]

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20 Transcript of Proceedings, 3 July 2017, p 32.

21 That advice was presumably given in accordance with some form of "no drop" practice or policy in relation to cases involving domestic violence.

22 Transcript of Proceedings, 3 July 2017, p 32-35.

[28] After hearing submissions the trial judge found the offences proved beyond reasonable doubt notwithstanding his assessment that the victim was a reluctant witness, and a reluctant participant in the bringing of the charges generally.[23] The trial judge reconciled the victim's conflicting evidence on the basis that although she was prepared to concur in the version of events put to her by defence counsel in order to exculpate the appellant, the evidence she gave when not being led in that fashion clearly and credibly described an assault on her by the appellant.

[29] The trial judge accepted that the victim was highly intoxicated at the time the assault was alleged to have taken place. That intoxication notwithstanding, the trial judge formed the view that the victim had a reliable recollection of the events relevant to the charges. That recollection involved an argument between her and the appellant, the appellant swearing and yelling at her, the appellant punching her, and the appellant striking her to the back, leg and arm using a stick.

[30] In the trial judge's assessment, the victim's subsequent attempt to withdraw her complaint was referable to her spousal relationship with the appellant, and her view that the events on the night in question were a matter between husband and wife rather than one to be

23 Transcript of Proceedings, 3 July 2017, p 42-43.

addressed in the context of the criminal justice system. The inconsistency was not the product of either dishonesty or unreliability.

[31] The trial judge was of the view that although the evidence from Mr Brant was weak in terms of corroborating the victim's account that she had been assaulted by the appellant in particular, it was not inconsistent with the victim's account in examination-in-chief. Similarly, the victim's account was consistent with the statement she made to police shortly after the events in question.

[32] On the basis of those matters, the trial judge was satisfied to the relevant standard that the appellant had assaulted the victim in the manner charged, including the four circumstances of aggravation, and that the appellant had breached the terms of the domestic violence order by intimidating, harassing and verbally abusing the victim.

Unsafe and unsatisfactory

[33] As already described, the appellant's contention in this appeal is that the findings of guilt were "unsafe and unsatisfactory". The function to be performed by an appellate court in determining an appeal on that ground was described in *M v The Queen* in the following terms:[24]

> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of

24 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.

> the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[34] That question also governs the determination of an appeal on that ground from a summary trial by judge alone. The determination of that matter turns on the appeal court's own assessment of whether it was open to the tribunal below to be satisfied of the appellant's guilt to the criminal standard.[25] This is not to say that the appellate court must disregard the advantages in fact-finding which the trial judge enjoys by reason of hearing the evidence in its entirety and in its context, and having opportunity to assess the demeanour of the various witnesses while they are giving evidence. However, the approach properly taken in the event that the appeal court has some doubt on its own assessment of the evidence was described in *M v The Queen* in the following terms:[26]

> It is only where a jury's [or trial judge's] advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

[35] The matters which an appeal court may take into account in determining whether it was open on the evidence to be satisfied of guilt beyond reasonable doubt cannot be exhaustively catalogued. Sometimes the question may resolve to whether the particular dealing

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25 *GAX v The Queen* [2017] HCA 25; 344 ALR 489 at [25]; *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14] (405-6) per French CJ, Gummow and Kiefel JJ.

26 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.

described in the evidence was capable in law of constituting the offence charged. In other cases, the question will be whether a lengthy delay in making complaint requires particular caution; whether there are material inconsistencies between the initial complaint and the evidence given at trial; whether the surrounding circumstances suggest some ulterior purpose for a victim's account; whether a victim might be considered unreliable due to some impairment of memory or suggestibility; whether there is a real possibility that the victim's account was a reconstruction; whether collusion between a victim and some other interested party cannot be excluded beyond reasonable doubt; or, as in this case, whether there are internal inconsistencies in the victim's evidence which necessarily give rise to a reasonable doubt.

[36] This is not a case in which the victim's evidence is inconsistent with some objective and contemporaneous documentary evidence, or inconsistent with plausible evidence given by an independent third-party witness. This is a case in which the peril in letting the convictions stand is said to arise from direct inconsistencies between the various accounts given by the victim during the course of the trial, and from the victim's level of intoxication at the time of the alleged offending. Counsel for the appellant also contended by way of corollary, rather than independent ground, that those inconsistencies and that intoxication were such that the question of consent or a consensual fight arose as a possible defence, and that the trial judge

did not direct his mind to that matter in the process of determining guilt.

[37] The central questions in these circumstances are whether the inconsistencies went to the essential features of the victim's account of the offences;[27] and whether those inconsistencies "were explicable in a manner that did not provide a basis for them to reflect on [the victim's] credit".[28]

Discussion

[38] It is a not uncommon occurrence for a victim in proceedings, particularly those involving an alleged assault in the domestic violence context, to recant her or his complaint to police or evidence given in court which would inculpate the alleged offender. It does not follow in such circumstances that a reasonable doubt will necessarily arise, although that may be the finding. The determination of whether a reasonable doubt arises in cases such as this is not to be resolved by conducting a mechanical comparison of the two accounts given by the victim, identifying inconsistency between those accounts, and concluding that reasonable doubt must arise by reason of the inconsistency. Inconsistency of that type will not necessarily yield reasonable doubt even where, as in the present case, the accounts are diametrically opposed.

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27 *BCM v The Queen* [2013] HCA 48; 303 ALR 387.

28 *R v M, WJ* [2004] SASC 345.

[39] The law has long rejected the notion that facts or guilt may be established with absolute certainty in the criminal justice context,[29] and the standard of beyond reasonable doubt does not require absolute certainty. There is a substantive difference between no doubt, fanciful doubt and reasonable doubt.[30] Against that background, a number of observations may be made in relation to the assessment of the evidence and the fact-finding process in this case.

[40] First, it was not necessary for the trial judge to accept all of the evidence given by the victim. It was open to the trial judge to reject those parts of the victim's evidence in which she sought to disavow her earlier evidence concerning the essential features of the offending. As juries are invariably reminded, in relation to some matters a witness may be obviously untruthful while in other matters they may be accepted as being entirely truthful and accurate. The assessment of reliability in those circumstances will depend upon whether there is some logical reason for the rejection of certain evidence which does not bear upon the reliability of the witness's other evidence.

[41] Secondly, the fact that a witness was intoxicated at the material time does not mean that the tribunal of fact must necessarily reject that witness's evidence or find reasonable doubt. As juries are commonly

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29 *The Queen v Dookheea* [2017] HCA 36; 347 ALR 529 at [32].

30 *The Queen v Dookheea* (2017) 347 ALR 529 at [34]-[36].

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directed, it is a matter for the tribunal of fact to determine the extent to which the witness was affected by the alcohol, the extent to which the witness's intoxication bore on his or her memories and perception, and the bearing those matters have on the witness's reliability concerning the essential matters for determination.

[42] Thirdly, there is a clear basis arising from the victim's evidence and the surrounding circumstances on which to explain the internal inconsistencies in that evidence in a manner which does not reflect adversely on her reliability concerning the essential elements of the offending. She was in a spousal relationship with the appellant. Once the victim had been removed from immediate danger, had received medical treatment, and had resumed her relationship with the appellant, the assault was a matter that she considered should be dealt with in the context of that relationship, rather than by the criminal justice system. At the time the victim gave her evidence the appellant was incarcerated, and she anticipated that on his return to Maningrida he would not be living in close proximity to her. The appellant had children in Maningrida, and in the victim's estimation it was important that he be reunited with those children. As is apparent from the passages of transcript extracted above, on a number of occasions during the course of her evidence the victim sought to withdraw herself from the proceedings. That was clearly for the reasons just described.

[43] In the more general sense, experience shows that it is not unusual for the victims of domestic violence to seek to withdraw complaints. As Southwood J observed in *Warford v Firth*:[31]

> The complainant was an honest witness who gave truthful evidence. The inconsistencies in her evidence and the number of statements that she made is perfectly consistent with the conflicting emotions a person who is subject to domestic violence experiences. Those emotions include the attachment to the domestic partner which still persists, the desire not to harm the domestic partner, fear of the domestic partner and a feeling of blame or fault for what has occurred. The emotions are demonstrated in the complainant's evidence in the Local Court and in her statements. She never recanted in any way in relation to the assault that occurred on the morning of 3 October 2015. At work on the morning of 3 October 2015 she behaved exactly how you would expect a person, who had suffered domestic violence, to behave. The evidence of the police officers and Ms Keogh about the complainant's state of distress and the complaints she made on that morning has the ring of truth and reality.

[44] On an appraisal of the victim's evidence as a whole and in context, it is clear that similar influences were at work in the present case. Those influences provided a logical reason for the acceptance of that part of the victim's evidence where she clearly recalled her partner hitting her with a stick and punching her in the face, and the rejection of those parts of the victim's evidence where she sought either to retract that evidence or to give an apparently contradictory account.

[45] The victim was certain in her initial account in evidence at pages 12 and 13 of the Transcript that it was the appellant who hit her with the stick. She was less explicit in that initial account as to the cause of her

31 *Warford v Firth* [2017] NTSC 75 at [61].

facial injuries. She first said that the appellant had pushed her, and then that she had fallen down because she was too drunk. The victim then gave a different account at page 14 of the Transcript, still in the course of examination-in-chief, to the effect that she never saw the person who caused the injuries to her face because she was so drunk. The initial attempts by the prosecutor to have the victim explain the precise mechanism by which she received the injuries to her face were inconclusive. The victim said by way of response that "we was both drunk and fighting and then we split". Then, at page 15 of the Transcript, the victim confirmed that the appellant had both hit her with a stick and punched her once in the face.

[46] Throughout the course of the victim's evidence there were also references to altercations with other people, possibly that day or possibly during the period in which she was in Darwin on that occasion. When the prosecutor sought to clarify that temporal issue at page 16 of the Transcript, the victim was unable to remember when and with whom those altercations had taken place, but did have a recollection of the altercation with the appellant. There were also references by the victim to her inability to remember certain things that were asked of or put to her because of her state of intoxication. While there can be no doubt that the victim's recollection of her dealings with other people on that day was patchy and impaired, she then spoke of a clear recollection of the appellant punching her and hitting her with a

stick, of running away from her assailant, and being taken to hospital. Having recounted that recollection, it is plain from the evidence subsequently given at pages 18 and 19 of the Transcript that the victim considered the appellant to be a kind and caring man when sober, and that he had only assaulted her because he was intoxicated.

[47] While it is correct to say that the evidence from the other two witnesses called by the prosecution was incapable of directly implicating or identifying the appellant as the assailant, that evidence did provide some important corroboration of the victim's initial complaint and the account she gave in evidence to the effect that the appellant had punched her and hit her with a stick. So far as Mr Brant is concerned, the clear inference arising from his evidence is that shortly before Mr Brant first saw the victim she had been assaulted by an Aboriginal male. So far as Senior Constable Ascoli is concerned, it is plain from his evidence that the victim made a complaint very shortly after the assault to the effect that the assailant was her partner, and that the victim identified her partner as an Aboriginal male standing approximately 150 metres away from where she was talking with police.

[48] There was no suggestion put to Senior Constable Ascoli during the course of cross-examination that the victim was incapable of giving a reliable account to police by reason of her intoxication, or that her perceptions were otherwise materially impaired at the time. There was

certainly no suggestion at any stage of proceedings at either first instance or on appeal that the victim's partner at the time was anybody other than the appellant. It was also not suggested that the substance of the victim's complaint to Senior Constable Ascoli was in any way inconsistent with the signed statement she had made to police on 27 September 2016.

[49] The passages of Transcript extracted above demonstrate that the matters in cross-examination upon which the appellant relies were largely led from the victim. It is well accepted that some Aboriginal people will have a heightened tendency to provide an affirmative answer to a leading question even if they do not agree with the proposition being put to them in the question. This communication pattern in Aboriginal English speakers is so well recognised juries are directed accordingly, and counsel are often well-advised to structure their questions appropriately, even in cross-examination, lest the weight accorded to the answers is affected by concerns of gratuitous concurrence and suggestibility.

[50] That tendency will, of course, be exacerbated in circumstances where the witness is already disposed for some reason to provide an account in cross-examination which is inconsistent with accounts previously given. It may also be noted from the victim's answers in cross-examination that she was in most answers relatively non-specific in relation to the point at which she was drinking with other people and

who those other people were. It was also the case that many of those answers did not specify whether her difficulty in remembering what happened at the material times was directed to the questions concerning drinking with other families or the specific interaction with the appellant on the day in question. That lack of specificity might be attributed in part to the understandably careful manner in which the questions in cross-examination were framed.

[51] Having regard to these matters, while the material led from the victim during the course of cross-examination is in some respects inconsistent with her initial complaint and the account given in the examination-in-chief, it does not necessarily follow that there is a reasonable doubt about the victim's evidence concerning the essential features of the offending. There was a clear basis on which the trial judge could find the inconsistencies were explicable in a manner that did not provide a basis for them to reflect adversely on the victim's credit. To the extent this court may have any doubt arising from the fact that it did not have opportunity to assess the victim's demeanour and presentation while she was giving her evidence, that is resolved by deference to the trial judge's advantage in seeing and hearing the evidence.

[52] Finally, so far as the question of consent is concerned, the victim's evidence that "we was like fighting" and that "we start fighting"[32] does

32 Transcript of Proceedings, 3 July 2017, p 12.

not of itself provide any basis for the apprehension of a reasonable possibility that she consented to the application of force of the nature and degree she subsequently described. At one point during the examination-in-chief the following exchange took place:

> You told us that Ambrose Morluk hit you with a stick. Did you tell him it was okay to do that?---I don't know.

[53] That answer is of little or no probative value. Even if taken on its face, the answer does not suggest a reasonable possibility that the force described was applied with the victim's consent, whether express or implied. The answer provided no basis on which to entertain the possibility that this was a situation in which the victim and her assailant had agreed to a fight involving sticks and other implements in order to resolve a disagreement, or a situation which involved some sort of consent to the infliction of the type of force that was applied by the appellant.

[54] The victim's answers to questions by the prosecutor directed to exploring what was said between the victim and the appellant at the relevant time also did not suggest any reasonable possibility of consent, either express or implied. Nor was it suggested during the course of cross-examination that any issue of consent arose.

[55] Similar considerations arise in relation to the possibility of defensive conduct. It may be accepted that it was for the prosecution to eliminate

it as an issue by proving beyond reasonable doubt that the appellant's conduct as described by the victim was not done as lawful defensive conduct. Accepting that to be so, a consideration of the victim's evidence as a whole discloses no reasonable possibility that the appellant believed at the time of the assault that it was necessary to do what he did in order to defend himself, or that the appellant's conduct as described was a reasonable response in the circumstances as he reasonably perceived them.

Disposition

[56] The appeal is dismissed for these reasons.
