R v O'Shea [2012] NTSC 62

PARTIES:	THE QUEEN
	v
	O'SHEA, Elisha
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21126431
DELIVERED:	17 August 2012
HEARING DATES:	20 July 2012
JUDGMENT OF:	MILDREN J

Barr v The Queen (2004) 14 NTLR 164; *R v Ireland* (1970) 126 CLR 321; *Woon v The Queen* (1964) 1009 CLR 529, applied.

REPRESENTATION:

Counsel:

Plaintiff:	T McNamee
Defendant:	F Keppert

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	C
Judgment ID number:	Mil12522
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v O'Shea [2012] NTSC 62
No. 21126431

BETWEEN:

The Queen
Plaintiff

AND:

Elisha O'Shea
Defendant

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 17 August 2012)

[1] The accused was charged with one count of unlawfully entering a building with intent, with circumstances of aggravation, and with one count of stealing.

[2] The Crown case was that, during the early hours of 15 August 2011, two females entered a flat in Houston Street, Larrakeyah, which was occupied at the time. They went into the spare bedroom, turned on the light and proceeded to gather together a number of items from the room, having previously taken some items from the kitchen.

[3] The occupants were both awoken when they heard a loud crash and they saw that the light to the spare room was on. The male occupant got out of bed

and stood at the doorway to the spare room and saw that there were two females therein. One female hurriedly walked past him and left the unit by the front door. The other female spoke to him briefly before also leaving through the front door.

[4] The male occupant was able to identify the accused as one of the intruders, but was only able to give a limited description of the other intruder. The female occupant also was able to identify the accused as one of the intruders.

[5] The police attempted to establish the identity of the other intruder, but were not successful in doing so. Counsel for the accused sought to lead evidence from a witness to be called by the Crown at the trial concerning an attempt to identify the other intruder by photo identification. This was objected to by counsel for the Crown as irrelevant.

[6] Counsel for the accused objected to parts of a record of interview conducted by the police with the accused on discretionary grounds.

[7] After hearing submissions relating to the evidentiary issues at the commencement of the trial, I ruled that the evidence concerning the attempt to identify the other intruder through a photo board identification would not be admitted but that I would defer ruling on that question finally until later in the trial. I also ruled that the objection to the parts of the record of interview which had been taken by counsel for the accused would be upheld. Subsequently, I allowed the evidence relating to the photo board

identification to be admitted. I said I will publish my reasons at a later time. These are my reasons.

[8] The accused's case at trial was that she was not one of the persons involved, notwithstanding the identification evidence to be given by both occupants of the flat. The evidence to be lead at trial was that one of the intruders was white skinned and the other had dark skin consistent with being either Spanish or Brazilian. This was part of the description given by the male occupant of the house to the female occupant of the house, who relayed it to the police at the time when they were contacted by telephone.

[9] At the commencement of the accused's record of interview, she was told that she was under arrest, and was formally cautioned. The accused gave an account in the record of interview that she had spent that evening with a female by the name of Sam. She had met Sam at her cousin's house in Gray. She did not know Sam very well. She and Sam drove in a ute to an address in Beagle Street in order to visit some friends of the accused, who were at that address at the time. After spending some time at the Beagle Street address drinking, she and Sam left that address and parked again in Houston Street. She did not know what happened to Sam. She said that she was arrested in Houston Street. She did not know why they went to Houston Street. She said she did not know anybody who lived in that street. She said that Sam was driving the ute and did not tell her why she wanted to go to Houston Street. As far as she knew, they were planning to go to town after they left the flat where they had been drinking with their friends. She had

been wearing a pair of white Rip Curl thongs that evening, but did not know what happened to them. Although she had been drinking all day – rum, Jim Beam and beer – she knew what she was doing at the time and that she was not "paralytic or anything". In relation to the majority of the questions which were put to her in the record of interview, she indicated that she did not wish to answer them.

[10] The accused later identified Sam to the police. A photo identification board was then prepared by the police, which included a photo of Sam. This photo identification board was shown to the male resident, who selected a person who was not Sam as the person who most resembled the other intruder.

[11] Initially, I was of the view that the evidence concerning the photo identification was irrelevant, but I said that I would finally rule upon it during the course of the trial after I have heard all of the evidence.

[12] Subsequently, evidence was given to the effect that the male resident, at the time he selected the person from the photo identification, indicated that all of the persons on the photo identification were of the wrong skin type, but that the person he selected most resembled the other intruder. He indicated only a 40 percent degree of certainty as to his identification.

[13] All of the persons in the photo identification were rather dark skinned, although it was possible that some of them are racially Caucasians.

[14] The person called Sam had also been charged with this offence, but the matter against her was not proceeded with through lack of evidence.

[15] At the trial, I admitted the evidence of the photo board identification on the basis that it was some evidence supportive of the defence's case that the person, Sam, whom the defendant claimed to have been in the company of that evening, was not one of the intruders.

[16] As to the record of interview, shortly after the accused had been cautioned, Senior Constable Brooker said to the accused:

> "Okay, Elisha, as I stated earlier, what I want to talk to you about is an unlawful entry and stealing which occurred at 2/6 Houston Street, Larrakeyah this morning. What – what do you want – was there anything you want to tell me about that question? O'Shea: No. Brooker: Sorry. O'Shea: (inaudible) I got arrested on that street last night, that's about it."

Questions then proceeded about the accused's movements that day and into the evening, who she was with, et cetera. A description was sought concerning the appearance of Sam and what she was wearing. No admissions were made during the record of interview. Later on in the record of interview, Constable Brooker put to the accused a number of allegations which were plainly taken from the statement of the residents and asked her whether she wanted to make any comment about them, to which the accused either shook her head or gave no audible response, or said 'no' or said 'no comment'. Detailed questions concerning a number of matters were put to the accused in this fashion over a considerable length of time. The

questions concerned material taken from the male resident's statement, to the effect that he had seen the accused in the flat; that she had some of his property in her hands at the time; that she left the flat; that he pursued her and found her in Beagle Street near a housing unit called Tuckwell Court with his property in her hands, but there was an altercation between them which resulted in her running to a nearby house; that the resident of the house spoke to them; that the male resident then took his property and left the area to return to the unit as he had seen a police patrol car heading in that direction; that he told the police that he located the accused; that he and the police then returned down Houston Street where they found the accused and she was arrested. From time to time, some of the questions were plainly cross-examination:

> "Brooker: Okay, um, now as I said, that's a secure complex only accessible by key entry so it's not open for public use. So if I was to say to you that – that you and Sam entered that complex by some means, possibly jumping the front fence and then climbing up the side of the balcony, possibly by boosting each other up and then climbing into the downstairs balcony and over a second balcony into the victim's veranda, is there anything you'd like to say about that? O'Shea: No. Brooker: Okay, will there be any reason for your fingerprints or DNA to be anywhere on the surrounding railings over the victims' residence? O'Shea: (no audible response)."

[17] As later transpired, the police had not located any of the accused's DNA or fingerprints on the surrounding railings or within the residence at all.

[18] In *R v Ireland*,[1] the respondent had been warned that he was not obliged to answer any questions. During the interview, he either responded, *"I don't wish to answer."* or *"No comment."* Barwick CJ, with whom McTiernan, Windeyer, Owen & Walsh JJ agreed, said at 331:

> "But in my opinion the account of questioning was not relevant at all to the issue. The respondent had been warned that he need not answer any questions asked of him. The failure to answer questions that were asked could not be accounted as an admission. In those circumstances, the fact that he was asked and made no answer was not relevant: it would not have been probative of any relevant fact or circumstance. It was therefore not admissible."

[19] Similar questioning was held to be inadmissible in *Barr v The Queen*.[2] In that case, evidence had been given of an electronic record of interview conducted by police. The prosecution and the trial Judge drew attention to a 13-second pause after the appellant had been asked, *"Did you, at any time, damage that vehicle?"* The interview was preceded by a clear statement that the appellant was free to answer or to refuse to answer. The Court of Criminal Appeal (Martin BR (CJ), Angel and Mildren JJ) held that evidence of hearsay statements made to the appellant during the record of interview were of no probative value to the issues to be determined by the jury and, as such, were irrelevant and inadmissible, following *R v Ireland*, and that negative inferences against the appellant could not result from mere refusals to answer or from statements that amounted only to refusals to answer, and

[1] (1970) 126 CLR 321.
[2] (2004) 14 NTLR 164.

nor should the jury be invited to draw such an inference, applying *Woon v The Queen*.[3]

[20] Accordingly, I ruled that those questions and answers in the appellant's record of interview were inadmissible and could not be admitted into evidence. In the end result, I excluded all questions and answers which commenced from approximately halfway through the record of interview up to shortly before the end of the record of interview, including some questions and answers which were not in themselves inadmissible. In relation to those questions and answers, counsel for the accused was prepared to make formal admissions and, therefore, that evidence became irrelevant.

[3] (1964) 109 CLR 529.