

Giumelli & Ors v Bowen [2000] NTSC 96

PARTIES: GIUMELLI, Luke Matthew

v

BOWEN, John

AND

GIUMELLI, Garry Thomas

v

BOWEN, John

AND

ISAACS, William

v

BOWEN, John

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: JA 15, 16 & 17 of 2000

DELIVERED: 30 November 2000

HEARING DATES: 18 July 2000

JUDGMENT OF: MARTIN CJ

CATCHWORDS:

Appeal – general principles – whether findings of guilt were unsafe and unsatisfactory.

Criminal Code Act 1983 (NT), s 209

Summary Offences Act 1996 (NT), s 61

REPRESENTATION:

Counsel:

Appellant:	Mr G Dooley
Respondent:	Ms T Austin

Solicitors:

Appellant:	NTLAC (Katherine)
Respondent:	DPP (NT)

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Giumelli & Ors v Bowen [2000] NTSC 96
Nos. JA 15,16 & 17 of 2000

BETWEEN:

LUKE MATTHEW GIUMELLI
Appellant

AND

JOHN BOWEN
Respondent

AND:

GARRY THOMAS GIUMELLI
Appellant

AND

JOHN BOWEN
Respondent

AND:

WILLIAM ISAACS
Appellant

AND

JOHN BOWEN
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 November 2000)

- [1] These are appeals against conviction and sentence. Each of the appellants was found guilty by the Court of Summary Jurisdiction at Katherine for that on 8 July 1999 he did steal roof trusses and steel, the property of Edward Ah Toy (s 210 Criminal Code). Garry Giumelli and William Isaacs also appeal against the sentence imposed on each of them.
- [2] The prosecution case was wholly based upon circumstantial evidence. The appeal is upon the ground that the findings of guilt were unsafe and unsatisfactory. It has been necessary to review the whole of the evidence. The principal issue is whether the trusses and steel have been shown beyond reasonable doubt to have been stolen from Mr Ah Toy's property (Claravale Farm). The appellants claimed in evidence that the trusses and steel had been found by them elsewhere, abandoned.
- [3] The evidence discloses that as a result of receiving information regarding motor vehicle movements, Constables Sharkey and Chambers, who were stationed at Pine Creek, went to the intersection of the Stuart Highway and Claravale Road during the night of 8 July 1999. There they came across the appellants (and another man, Aubrey King) with two motor vehicles, namely a Toyota short wheel-base towing a tandem axle trailer and a green Ford truck. On the back of the trailer were the trusses and steel alleged to have been stolen, and, according to police, on the back of the truck was a utility vehicle and some water pipe.

- [4] According to Constable Sharkey he enquired of Luke Giumelli as to how he came by the “gear” and was told that Aboriginal people “down the road” had given permission to take it. It is undisputed that the “gear” referred to was the trusses and steel. The police then had no information regarding that property and left it at that. The truck and trailer were not registered, and, according to the police, Luke Giumelli said that he intended to leave them at the intersection until the following morning when he was to obtain a permit to move them.
- [5] After returning to Pine Creek, enquiries were made by police of a Mr Huddlestone, described as the traditional owner of the land in the area from which the appellants had come. As a consequence of what they were told and enquiries concerning other matters, the police returned to the intersection, but the people and vehicles were no longer there. The police pursued and caught up with them some distance away on the highway. During the course of a conversation with Luke Giumelli, during which he was informed by the police that Mr Huddlestone had said that no permission had been given to remove anything from his land, Mr Giumelli indicated that he did not want the gear anyway.
- [6] At that stage the police had no other information about the trusses and steel and were making enquiries about other matters which are presently irrelevant. However, they made further enquiries about the goods, having again spoken to Mr Huddlestone and a Mr Berry from Kybrook Farm and Mr Ah Toy. They also took photographs of the five trusses which had been

in the trailer and four trusses which were on Mr Ah Toy's property at Claravale. The two sets of trusses were described variously as being "similar". They were identified as "Sidney Williams trusses".

- [7] When Constable Sharkey inspected the area on Mr Ah Toy's property from which it was thought the trusses had come, he noticed that there was a small tree in the middle of the pile which he described as "obviously been cut to enable the trusses to be lifted off more easily". He conceded, however, that he was "no judge of trees". Nevertheless, there was no objection to this evidence, but in my view it could not have carried much weight, if any, beyond the observation that the top of the tree had broken off at some time.
- [8] It does not matter much, but the vehicle said to have been on the back of the truck, was said to have been an old "bull catcher". All of the appellants denied that there was any vehicle on the back of the truck at all, and his Worship's acceptance of the evidence of four policemen on that account caused him to have some doubts as to the credibility of the appellants. If they lied about that matter, however, it does not follow that they were lying about having found the trusses abandoned on property other than Mr Ah Toy's. It is possible they may have had a guilty mind about that vehicle, but it would not be right to deduce from that that they also had a guilty mind about the trusses.

- [9] Luke Giumelli was identified by the police as the driver of the Toyota with Garry Giumelli as the passenger, and the truck was being driven by William Isaacs with King as his passenger.
- [10] Constable Chambers' evidence in general supported that of Constable Sharkey and there was no great difference between them.
- [11] Mr Ah Toy, a storeowner at Pine Creek, said he had derived title to the Claravale Farm property upon his father's death. He employed a caretaker, Mr Melby, who had been there for about 12 years. On 9 July, Mr Ah Toy was contacted by the police and he inspected the five trusses and steel on the trailer which had been parked off the road by direction of the police. He said he recognised them as Sidney Williams roof trusses and asserted that they were his property. He was permitted to take them to Pine Creek where he conducted his business. They were photographed there and the photographs placed in evidence.
- [12] When asked about his knowledge concerning the trusses, Mr Ah Toy said that when his father returned from the war in 1945 he had purchased some Sidney Williams huts, some of which were used to build the shop at Pine Creek and the balance taken to the Claravale Farm about 45 years ago. Mr Ah Toy identified the photographs of the four remaining trusses at the farm and also referred to the broken tree. He also described an old sawmill which had been erected on the opposite side of the Daly River from the farm and said that it was built of timber with an iron roof and that no Sidney

Williams trusses were used in its construction. Nor was he aware of any such trusses being in the vicinity. He told the court that he was confident the trusses he had taken from the trailer were the same as those that had been at the farm.

[13] In cross-examination, Mr Ah Toy said that he had gone to Claravale about once a year to “have a look”. He had not been to visit the sawmill area since 1958. He said that he had not counted the number of trusses at Claravale, but he assumed there were nine because there were five on the back of the trailer and four remained at the farm when he inspected them on 9 July. No inventory had ever been made concerning the equipment at the farm. He agreed that “things may have gone missing” between the time he had last been at Claravale prior to inspecting the property on 9 July.

[14] Mr Ah Toy said that he relied on Mr Melby to keep an eye on things and the best that he could say was that he knew Sidney Williams trusses, and those on the trailer were similar to those that had been at the farm. However, there was nothing distinctive about any of them. He was aware that Aboriginals lived on land on the opposite side of the river at times.

[15] Mr Melby gave evidence in the prosecution case. He had been removed from his position by Mr Ah Toy immediately after the events in July and went to live with the “Giumelli boys”. He said he had been on the farm for nine years. He said he had been ill with the flu and had gone to bed on the morning in question. He said Luke Giumelli telephoned him during the

morning and obtained permission to use the “loading ramp” (on the farm). Mr Giumelli arrived with Mr Isaacs in the green truck and Mr Melby said they were supposed to load a vehicle on the back of the truck, but he did not see what had happened as he had returned to his sick bed and slept. Mr Melby knew that there were Sidney Williams trusses on the farm, he thought there were 12 or 14. He did not look at the stack before he left. He identified the white bull catcher vehicle which had been parked on the station, which he said belonged to “one of the boys”. He knew all of them well.

[16] According to Mr Melby, Mr Ah Toy had only been to the farm three times in nine years. Although he expected that he would be able to hear from the place where he lived if someone was loading trusses onto a trailer at the place where they had been stacked, he said that on that particular day he was overtaken with the flu and asleep after Mr Luke Giumelli and Mr Isaacs arrived. They were gone when he woke the following morning.

[17] Mr Berry inspected the trusses to ascertain whether they belonged to his employer. They did not. He noticed there were four or five of them on the trailer. He had seen similar trusses at Mr Ah Toy’s farm about a fortnight prior to 8 July. His “wild guess” as to the number of trusses at the farm is obviously unreliable. He had occasion to visit the area of the sawmill which he said was built of timber. He had not seen any trusses lying around the sawmill. He agreed that one Sidney Williams truss looked very much like another.

- [18] According to Mr George Huddlestone, he, his wife and others occasionally lived on the opposite side of the river from Claravale, the same side as the old sawmill. He said that he walked all about that country hunting. Shown photographs of the trusses, he said he had never seen anything like that lying around. He confirmed that the appellants went to that area and helped him out with food. His brother Paddy also gave evidence to that effect. He said he had not seen any trusses except at “Fred’s”, meaning Mr Melby.
- [19] Constables DeNale and Lacey saw the appellants and the Toyota and trailer and the truck after they had left the intersection and were driving towards Katherine. They noticed a trailer being towed by the Toyota, that it had metal on it, and that there was a vehicle on the back of the truck. Constable DeNale thought the truck was a Bedford, not a Ford, but nothing turns on that.
- [20] That was the case of the prosecution. The appellants gave evidence. Mr Luke Giumelli said that he and the other two appellants and Mr King were going to the Claravale area on 8 July. He was driving a white short wheelbase Toyota and Mr Isaacs, the green truck. Their purpose was to pick up “gear” from the camping area about 15 kilometres downstream from the Claravale Crossing on the Daly River. The “gear” comprised pig traps, star pickets and camping gear. The evidence shows that he and others periodically camped at the waterhole, and whilst there, set traps for wild pigs. Their purpose on this occasion was to pick up the gear and take it back to Pine Creek.

[21] Mr Giumelli said that in the course of chasing pigs, he had come across what he described as “angle iron”. This material was variously described by him and other appellants from which I gain the impression that in their view it was old, rusty, of no value and so far as they were concerned, not recognisable as being anything in particular. It is undoubted, however, that what they picked up, from wherever they picked it up, and put it in the back of a trailer were Sidney Williams trusses and I shall refer to the material in those terms.

[22] Mr Giumelli said that the trusses were located about 200 metres from the old sawmill in long grass, and he reckoned that it had been there a long time. He decided to take it and cut it up to make pig traps. Given that the trusses had been lying at that place for such a long time, he thought nobody owned them.

[23] He said that he and Mr Isaacs had decided together to go and pick up the trusses. They did that with the Toyota and trailer, leaving Garry Giumelli and Mr Aubrey fishing at the crossing. Upon returning, they left the Toyota and trailer with the others and then took the green truck to visit Mr Melby. According to them, Mr Melby told them he was crook, that they gave him a couple of beers and returned to the crossing. He said that there was no vehicle on the back of the truck.

[24] Mr Giumelli said that the trailer and truck were unregistered, but denied that he had told police he was not going to drive those unregistered vehicles any

further. He confirmed they had driven away and were later stopped by the police. He was then informed that Mr Huddleston said the trusses were not his and said that he thinks he might have said to Constable Sharkey, "I got it off Aboriginal country. If its stolen and that well I don't want it, here take it". He denied that the trusses had been taken from Mr Ah Toy's property.

[25] In cross-examination he thought that Mr Melby was confused in that he had loaded a short wheel-base Toyota on the back of a truck at the loading ramp about 12 months prior to the occasion in July. He confirmed that he had not sought to find out who might own the trusses thinking that they belonged to the long deceased man who had the sawmill. He insisted that he had not told the police that he had permission of the traditional Aboriginal owners to take the steel, but that he had said that he had taken it from Aboriginal land. (There was no evidence to indicate whether the land in question was vacant Crown land or held under Aboriginal land title, but again nothing turns on that. There does not seem to be any doubt that it was occupied from time to time by Aboriginal people).

[26] Mr Isaacs confirmed the evidence regarding the finding and location of the trusses which they had loaded onto the trailer. He drove the truck from Claravale to the place where they were first spoken to by police. The effect of the evidence of these two witnesses was that the trusses were in long grass and not able to be easily seen. They said that the trusses were on Aboriginal land and that they sought permission from Mr Huddleston, who they regarded as having some authority in the matter, before they went onto

the land to trap pigs and fish, but they did not seek permission to go onto the land to pick up the trusses. They did not think that Mr Huddleston owned the trusses and they made no enquiry of him. Mr Isaacs also denied that there was a vehicle on the back of the truck, according to him there was only a pig trap and camping gear.

[27] Mr Garry Giumelli told the court how they had all gone to the camp and picked up a pig trap and some gear and returned to the crossing where he and Mr Aubrey remained fishing. The other two then went in the truck to see Mr Melby, and when they returned they took the Toyota and trailer and went in the direction of the sawmill. After returning from there, there were trusses on the back of the trailer and he and his brother then travelled together in the Toyota to the place where they were intercepted by police. According to him, there was no vehicle on the back of the truck. He said he did not know anything about a plan to pick up the trusses. The only evidence as to his involvement therefore was that he had driven the Toyota which was towing the trailer onto which his brother and Mr Isaacs loaded the trusses. There is no evidence to show that Mr Garry Giumelli knew anything about the location of the trusses or that he was aware that the other two intended to get them from wherever they were obtained.

[28] All of the appellants and the mother of Luke and Garry Giumelli gave evidence to the effect that police had for a long time and on a number of occasions unjustly suspected their involvement in criminal activity.

[29] The circumstances upon which it was invited to draw an inference beyond reasonable doubt as to the guilt of the accused may be summarised as follows:

- There was a stack of trusses on Mr Ah Toy's farm. The precise number cannot be determined.
- At the time giving rise to these charges, there were four trusses in the stack. There were five trusses on the trailer.
- Mr Melby saw Mr Luke Giumelli and Mr Isaacs on Claravale Farm on 8 July.
- There was opportunity for them to have taken the trusses from the stack, put them on the trailer without Mr Melby knowing about it because he was asleep.
- The trusses on the trailer were similar to the trusses in the stack.
- At the time of their interception by the police, Mr Garry Giumelli was driving the vehicle and trailer upon which the trusses were located.
- Such independent witnesses who had the opportunity to travel around the old sawmill area had not seen any trusses there.

[30] Against all that the appellants say:

- There was no evidence to indicate that Garry Giumelli went onto the farm that afternoon.
- There was no evidence (apart from the broken sapling) of any disturbance of the long grass or dirt around the area where the trusses were kept on the farm. Driving the Toyota and trailer to the stack and loading trusses onto the trailer would leave signs.
- Neither Mr Berry nor Mr Melby looked at the place where the trusses were kept on the farm after 8 July so as to give any evidence as to whether there was any diminution in the number which they had previously observed. There is a possibility that if the trusses had come from the stack on Mr Ah Toy's farm, they could have been removed from there years ago and there was no evidence that anybody would have noticed that fact.
- Even if lies were told about the vehicle on the back of the truck, no adverse inference can be drawn in relation to the trusses.
- They have established a case that they appropriated property upon the reasonable belief that the property had been lost and the owner could not be discovered (see definition "Steals" s 209 *Criminal Code*).
- As to being in possession of goods reasonably suspected of being stolen, they had all discharged the onus on them of establishing the defence (see s 61 *Summary Offences Act*).

[31] Turning to his Worship's reasons. He described Mr Ah Toy's evidence as to the identity of the trusses as "not particularly persuasive". He found Mr Berry's evidence that he had not seen trusses in the area where the appellants say they found them as "not conclusive". As to the tree, his Worship took the view that it had been broken after Mr Berry had last seen the heap of trusses on the farm about a fortnight prior to 8 July. From that, his Worship said that "its not essential but one may infer that within the period" between Mr Berry's last visit and 8 July the trusses had been taken. He then posed the question whether it was a coincidence that "the trailer heap equalled what was gone from the Ah Toy heap". In that regard I consider that his Worship fell into error in that the coincidence simply had not been made out.

[32] It was open to his Worship to find as he did that the appellants had lied about there being no utility on the back of the truck, but with respect to his Worship, he misapplied the significance of that finding. He said that it did not help the appellants, but nor did those lies "by itself make up for deficiencies in the prosecution case". From that, I infer that his Worship did take the lies into account against the appellants to some extent. In my opinion, that was not permissible. They may have had a guilty mind about the utility, but that cannot be transferred to the trusses as well. He placed no significance on the absence of evidence regarding the disturbance around the heap on Mr Ah Toy's land (apart from the broken tree) and I consider that was an important matter.

[33] As to the appellants evidence about the place from which the trusses came, his Worship again took into account the lies he found they had told about the utility on the back of the truck. His Worship's views about the relevance of those lies (there are other references in his reasons) seem to me to have had a significant impact upon his reasoning to the finding of guilt of stealing and his consideration of the charges under s 61 of the Summary Offences Act in respect of the same property – “the rather large lie about the carried vehicle, carries over into this too”.

[34] Accepting his Worship's finding that the appellants told lies about the utility, it does not follow that they had a guilty mind in respect of the trusses. Nor does it follow that their credibility in that regard can be called in question in relation to the real issue in the case. The lies were not connected with the offence charged, and the explanation for the lies about the utility does not mean that the truth about that would implicate any of them in the offence charged.

[35] For these reasons the appeals are allowed and the convictions quashed.
