

Martin v Trenerry [2001] NTSC 76

PARTIES: LAUREL MAREE MARTIN
v
ROBIN LAURENCE TRENERRY

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: APPEAL FROM COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction

FILE NO: JA28/2000 (9825367)

DELIVERED: 22 August 2001, Darwin

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JUDGMENT OF: THOMAS J

CATCHWORDS:

APPEAL AGAINST CONVICTION

Appeal from Court of Summary Jurisdiction – appeal against conviction – failure of accused to give evidence

Criminal Code 1983 (NT), s 120
Evidence Act 1939 (NT), s 4 and s 9(3)

Azzopardi v The Queen [2001] HCA 25, cited

REPRESENTATION:

Counsel:

Appellant: J Lewis
Respondent: P Elliott

Solicitors:

Appellant: David Francis & Associates
Respondent: Office of the Director of Public Prosecutions

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

Martin v Trenergy [2001] NTSC 76
JA28/2000 (9825367)

BETWEEN:

LAUREL MAREE MARTIN
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 22 August 2001)

- [1] This is an appeal against conviction of the appellant by a stipendiary magistrate in the Court of Summary Jurisdiction at Darwin on 25 February 2000.
- [2] On that date, the appellant was convicted of an offence committed between 17 August 1998 and 25 August 1998 of stealing cash valued at \$3820 the property of Woolworths Casuarina contrary to s 120 of the Criminal Code Act 1984 (NT).
- [3] The Crown alleged the appellant who was at the relevant time a supervisor employed by Woolworths Casuarina, obtained the cash by dishonestly obtaining refunds through the computer station at the checkout counter.

[4] An amended notice of appeal was filed on 12 June 2001. On the hearing of the appeal, Mr Lewis, counsel for the appellant, advised that the original Grounds 1 and 2 were abandoned and the appeal was proceeding solely on Ground 3, which reads as follows:

“The learned Stipendiary Magistrate was in error in finding, if he so found, that the failure of the Appellant to give evidence, was a circumstance bearing on the probative value of the evidence pointing to the Appellant having committed the offence charged.”

[5] The basis of Ground 3 is that s 9 of the Evidence Act 1939 (NT) makes provision for the notions of competency and compellability in criminal proceedings. In particular, s 9(3) provides:

“(3) The failure of an accused person to give evidence, shall not be made the subject of any comment by the Judge or by counsel for the Crown.”

[6] Pursuant to s 4 of the Act “‘Judge’ includes the member or members of any Court” and “‘Court’ includes any Court, Judge, Magistrate or Justice, and any arbitrator or person having authority by law or by consent of parties to hear, receive and examine evidence”.

[7] Counsel for the appellant submitted that the magistrate deciding this matter was bound by the provisions of s 9(3) of the Act.

[8] In his Reasons for Decision (t/p 126) the learned stipendiary magistrate stated as follows:

“Now, the defendant has the right to remain silent. There is no obligation on a defendant to give evidence. The persuasive burden is

on the prosecution, the standard of proof being reasonable doubt. However, in this particular case, these being summary proceedings, any prohibition in the Evidence Act on a jury being directed – sorry, being addressed in terms of the accused’s failure to give evidence I don’t believe applies in relation to proceedings in the Court of Summary Jurisdiction.

In any event, not that I’ve had a great deal of time to look at that prohibition in the Evidence Act, I don’t think it’s as broad as it might seem. I still think that there is still some latitude to a judge to make some comment about an accused’s failure to give evidence, but I needn’t worry myself about that because, in my view, that provision does not apply here. I perform the function of both judge and trier of fact.”

[9] I agree with the argument of counsel for the appellant that the learned stipendiary magistrate was bound by s 9(3) of the Evidence Act. However, the comments the learned stipendiary magistrate did make, with reference to the absence of evidence to the court by the defendant, do not demonstrate any error on the part of the learned stipendiary magistrate. The learned stipendiary magistrate went on to say (t/p 126 - 127):

“What does one make of the accused’s failure to give evidence in this particular case? I return to the very telling transaction on the video where the defendant was seen to be performing a cash register function in the absence of any customer. It is significant, I should say, that during the course of the police interview the defendant’s attention was drawn to that particular transaction and she was given the opportunity to explain what was occurring at that time and she chose not to give any explanation and indicated that she had no idea of what was going on.

That, I must say, is surprising. And as to what was occurring at that point of time, I consider is or was within the peculiar knowledge of the defendant. And she is the person in the best position to explain the nature of that transaction. When one looks at the record of interview, she doesn’t couch her reply in terms ‘Well, I can’t remember. It was so long ago’. It’s not couched in those terms at all.

And it seems to me that one would expect, in all the circumstances of this case, that she was in a position to explain what was going on

and, indeed, continued to be in a position to explain what was going on at the time that she was questioned. And bearing in mind the nature of this matter, one in the normal course would expect that she would continue to retain relevant knowledge as to the nature of that transaction.

Now, she's declined to give evidence and that is in circumstances where, when one juxtaposes the view registered audit with the video, that I'm satisfied beyond reasonable doubt just on the strength of that evidence that what was being affected was a return in circumstances which clearly established that the transaction was a bogus one. And yet she declines to offer any explanation to contradict that or any explanation that is consistent with innocent conduct.

I must say also during the record of interview, other questions were put to the defendant in relation to the other transactions which are said to constitute bogus refunds and, again, her position was simply 'I can't' – I just need to refresh my memory about that.

I beg your pardon. She did say 'I can't recall any of the transactions' in relation to those. In relation to the video – the transaction where she's depicted performing a function in the absence of a customer, she says 'I can't explain. I have no idea'. So I should correct what I said earlier in that regard.

But notwithstanding that, I am of the opinion that she was in a position to give an explanation of those transactions. Now, the next thing that has to be considered is what use can be made of the transaction depicted on the video. In relation to that particular transaction, when I put that alongside all of the other circumstantial evidence – that is, opportunity, capacity, missing monies, the documentary evidence – I'm clearly satisfied beyond reasonable doubt that in relation to that transaction, the defendant is guilty."

and at t/p 129:

"I just want to make sure I've covered every aspect. I should just make it clear because I think I may have created some uncertainty about the things I said about the explanations given by the defendant during the record of interview. In relation to the video transaction, she said 'I can't explain. I have no idea'.

In relation to the transactions generally, she says 'I can't recall that transaction'. Now, in my opinion they are not honest responses. In my opinion, especially in relation to the video transaction, she was well positioned to give an explanation about that and she didn't. I believe that it was within her peculiar knowledge to provide an explanation that would contradict the case that's been advanced by

the prosecution. So for all of those reasons, I am satisfied beyond reasonable doubt.”

[10] The issue of an accused person not giving evidence has been the subject of pronouncement by the High Court in *Azzopardi v The Queen* [2001] HCA 25 Gaudron, Gummow, Kirby and Hayne JJ at par 34:

“The fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt [*RPS v The Queen* (2000) 199 CLR 620 at 630]. It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt [*Weissensteiner v The Queen* (1993) 178 CLR 217 at 229]. Further, because the process is accusatorial and it is the prosecution that always bears the burden of proving the accusation made, as a general rule an accused cannot be expected to give evidence at trial. In this respect, a criminal trial differs radically from a civil proceeding. ...”

[11] From a total reading of his Worship’s reasons for decision, it is clear that he did not use the defendant’s failure to give evidence to fill in any gaps in the prosecution case nor has he used it as a “make weight in considering whether the prosecution has proved the accusation beyond reasonable doubt.”

[12] The learned stipendiary magistrate analysed the Crown case. This included a finding; that the documentary evidence which was tendered, provided overwhelming evidence that monies were stolen. His Worship was satisfied

beyond reasonable doubt that the refunds that were made were bogus. The learned stipendiary magistrate made the following finding (t/p 124 – 125):

“The next circumstance upon which the prosecution rely is constituted by the video which depicted the defendant performing a number of functions at the cash register. One particularly telling event was the transaction which is said to represent a refund of the sum of \$400.

That particular part of the video depicts the defendant performing a cash register function when there is present no customer and it’s important that the video, of course, be viewed in conjunction with the view registered audit because when the two are juxtaposed, it is clear that the function being performed in relation to that transaction was a refund of \$400.

Again, that is an item which – no item in the store sells at that value. The video clearly shows the absence of any customer and, as I say, that is a particularly telling piece of evidence.

Now, of course, one cannot form that view unless one reaches a more basic conclusion and I’m satisfied beyond reasonable doubt that there is a correlation between what was depicted in the video and what is described in the view registered audit. There, of course, the evidence shows that there was a time discrepancy or differential between the time on the video and the times mentioned in the view registered audit document.

But I am satisfied beyond reasonable doubt that the discrepancy has been adequately explained and, as I say, I’m satisfied that what is described in the document corresponds with what is on the video, and the reason for that is that although I was not in a position to identify the products which were the subject of the transactions in question – although I must say I was able to identify some bananas and what appeared to be a carton of some sort, but by and large not able to identify all the items that were the subject of those transactions.

What is significant is the timing of each of the respective transactions and the intervals between each of those respective transactions. So although there is a time differential which I believe has been adequately explained, the correlation in times and duration of transactions and intervening intervals leaves me in a state where I am satisfied beyond reasonable doubt that what’s on the video is replicated in the view registered audit, replicated in verbal terms.

So one has the verbal account and the visual account correlating. It had been suggested, of course, that the times might have been

manipulated. I think that is just far too fanciful to even entertain, though I have entertained it but I dismiss it out of hand.

So I'm satisfied beyond reasonable doubt that what is on the video accords with the audit document. I had admitted the audit document into evidence under the business records provisions. Of course, one then has to consider what weight to attach to that and, in all circumstances of this case, I attach substantial weight to it. And the reason why I do that is because of that direct correlation between the document and the video. They are mutually corroborative and they compliment one another."

[13] The learned stipendiary magistrate then dealt with the evidence given by a Mr Gilmour, who was the only person apart from the defendant whom the learned stipendiary magistrate found had the opportunity and capacity to effect these transactions. His Worship believed the evidence given by Mr Gilmour, in particular his denial that it was he, Mr Gilmour, who had taken the money. His Worship noted that the court had the opportunity of seeing and hearing Mr Gilmour unlike the defendant who did not enter the witness box. However, the learned stipendiary magistrate clearly acknowledged that the defendant had every right not to enter the witness box. His Worship did not use her failure to give evidence to fill any gap in the prosecution case or to take the defendant's failure to give evidence as any admission of guilt.

[14] The learned stipendiary magistrate then dealt with submissions made by Mr Francis, counsel for the defendant in the Court of Summary Jurisdiction. Mr Francis had submitted that there were other persons who could have effected these transactions because PIN numbers were freely available to anybody in the store. The learned stipendiary magistrate concluded that in these circumstances it was fanciful to suggest that anyone else could have effected

the transactions because the evidence was there was only two people present at the material time, i.e. Mr Gilmour and the defendant. The learned stipendiary magistrate has not been shown to be in error in making this finding.

[15] In his reasons for decision, the learned stipendiary magistrate referred to the statement made by the defendant in her record of interview with police that PIN numbers were freely available and there was opportunity for other persons to use those numbers. His Worship acknowledged that as the record of interview had gone into evidence then the entire statement became evidence and anything said by the defendant that was favourable to her case, must be treated as evidence of the truth of the matters asserted. His Worship made reference to a statement out of court affecting the weight to be attached to the statement and commented that the defendant's evidence had not been subject to cross-examination. With respect to the defendant's out of court statement, the learned stipendiary magistrate concluded he was in the position that he did not know whether to believe her or not.

[16] Again, I do not consider the learned stipendiary magistrate has been shown to be in error.

[17] I agree with the submission made by Mr Elliott, counsel for the respondent, that in his reasons for decision the learned stipendiary magistrate was doing no more than stating the obvious, that is, that in the face of a strong prosecution case, the accused has not led any evidence that would create a

doubt or diminish the strength of the prosecution case. I agree with Mr Elliott's further submissions that specifically, the learned stipendiary magistrate did not find the accused's failure to give evidence, by itself, strengthened the Crown case.

[18] I do not consider that there has been any error such as to lead to a miscarriage of justice.

[19] For these reasons this appeal is dismissed.
