Jarc v The Queen [2002] NTCCA 6

PARTIES:	ANTHONY WERNER JARC
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 22 of 2000 (SCC 9904344)
DELIVERED:	7 June 2002
HEARING DATE:	12 March 2002
JUDGMENT OF:	MARTIN CJ, MILDREN & BAILEY JJ

CATCHWORDS:

Appeal – Criminal Law – Appeal dismissed.
Criminal Law – Evidence – Rule in *Browne v Dunn.*

Statutes
Evidence – s 9(3) *Evidence Act NT*
Evidence Act (NT) 1994

Cases cited
Browne v Dunn (1894) referred to.

REPRESENTATION:

Counsel:

Appellant:	S. Odgers and S. Cox
Respondent:	M. Carey

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	bail0208
Number of pages:	26

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Jarc v The Queen [2002] NTCCA …
No. CA 22 of 2000 (SCC 9904344)

BETWEEN:

ANTHONY WERNER JARC
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 7 June 2002)

MARTIN CJ:

[1] I have had the benefit of a draft of the reasons for judgment of Bailey J. I agree that for the reasons given by his Honour leave to appeal be refused on ground one and that the appeal based on grounds two and three be dismissed. However, I should not be thought to necessarily agree with what his Honour has to say as to s 9(3) of the *Evidence Act.* Similar thoughts were expressed by Street CJ in *Greciun-King* (1981) 2 NSWLR 469 commencing at p 471 but it nevertheless remains a contentious issue.

[2] Although not raised in the appellant's written outline of submissions, counsel advanced a further argument to found a breach of the rule in

Browne v Dunn (1894) 6R 67. It arose from what was said by the prosecutor in closing address which it was argued amounted to an attack upon Dr Lee's professionalism and credibility of which he had no notice.

[3] In examination-in-chief Dr Lee was asked whether, after taking decomposition of the deceased body into account:

> "… [A]re you able to say in your opinion, that Mr Jarc's statements to police, as to how this incident unfolded and what was done, are borne out by the forensic evidence?" And he answered:
>
> "Yes, I think in general terms there is a close correspondence between his story and the facts that are shown during the course of the examination."

[4] In cross-examination the following exchange took place:

> "You did indicate there was close correspondence in general terms between Mr Jarc's story as you understand it to be and the facts that are shown during the examination? --- Yes.
>
> What does that exactly mean, in general terms? --- Well, in – well basically just that. In the sense that the story that was put to me yesterday indicating that the incident had commenced in the lounge room; had then moved from the lounge room to possibly the bathroom, and as I've said, I, I don't really know whether there was a first trip to the bathroom to give it a label; that it is then moved to the kitchen and then has moved from the kitchen back into the bathroom. I don't find any problem with, with saying that the evidence would appear to support that, that basic story.
>
> Or perhaps what other scenarios? --- It could possibly support other scenarios. I was asked to, to address ---
>
> Yes? --- That particular scenario, yes.

> All right. Who put that version to you by the way? --- That was a version that was put to me during the course of discussions originally with Ms Cox."

[5] Ms Cox was the solicitor for the appellant. Dr Lee may have misconstrued what was conveyed to him by Ms Cox as a request to adopt the particular attitude that he did.

[6] During closing address the prosecutor said:

> "Dr Lee you might have thought was doing what he could to make Jarc's version fit the forensic evidence. Dr Lee told you the two fundamental precepts of forensic science are these: you examine all the clues from the forensic evidence and try to reconstruct to work out what happened. He breached that rule, he took Jarc's version and tried to make it fit the forensic evidence instead of the other way round. And the other fundamental precept he told you about was that the forensic pathologist is in effect an advocate for the deceased, who is not here to tell us what happened. And Dr Lee breached that precept as well didn't he? He appeared there in that witness box as an advocate for Mr Jarc the accused. And it was plain for all to see the first day he gave evidence."

[7] Although in the context of a particular disagreement between the pathologist these remarks were of general application.

[8] I do not consider that there was any call for the prosecutor to put to Dr Lee anything further than had emerged in the evidence. The prosecutor was inviting the jury to take the evidence as it was and commented upon it. Dr Lee had adequate notice that it was intended to qualify the weight of his evidence through the cross-examination relating to the basis upon which he was requested to give an opinion.

[9] Dr Lee could have been given the opportunity in re-examination to avoid adverse comment based on that material.

[10] Although at the close of the prosecutor's address, counsel for the accused at trial raised some matters for consideration by his Honour, he did not seek to have the jury discharged upon this ground nor did he seek any directions from his Honour to address any perceived unfairness.

[11] I do not consider that the prosecutor acted unfairly in making those remarks in this closing address.

MILDREN J:

[12] I agree with Bailey J for the reasons he gives that leave to appeal should be refused on ground l.

[13] I agree with the conclusion of Bailey J that grounds 2 and 3 should be dismissed, but I wish to state my own reasons for reaching this conclusion.

[14] Part of the Crown case at trial to which these grounds relate is that the Crown contended that the appellant had stabbed the deceased with the knife before killing the deceased with a blow to the head with a fire extinguisher. The defence case was based on the appellant's version – or perhaps more accurately, one of the accused's versions – given to the police in his record of interview. That version was that the deceased made a homosexual advance on the appellant; the appellant responded by hitting the deceased over the head with a bottle of wine; after that he helped the deceased to

clean up in the bathroom; then a fight developed and the accused ran out of the bathroom, followed by the deceased who grabbed a knife. The accused then grabbed a fire extinguisher. The deceased fled to the bathroom and the accused followed him. The deceased had shut the bathroom door. The accused, still holding the fire extinguisher, opened the door, entered the bathroom and was confronted by the knife. The accused grabbed at the knife and received cuts to his hands. He then struck the deceased across the head with the fire extinguisher, killing him. He then wielded the knife a few times at the deceased but was unsure if he had cut the skin. The knife was blacked handled, with a single blade like a vegetable knife.

[15] The Crown case did not depend only on attacking this version but nevertheless, attack it they did. The Crown did this in a number of different ways including calling evidence from various witnesses, including police witnesses, to contradict various aspects of what the accused had said in his record of interview. In addition, the Crown called expert evidence from a forensic scientist, Dr Carmen Eckhoff, and a pathologist, Dr Sinton. The purpose of this evidence was to establish that the appellant had attacked the deceased with the knife before hitting him over the head with the fire extinguisher. The appellant did not give evidence but called evidence from a pathologist, Dr Lee, in order to show that the forensic evidence was consistent with a version of events in the record of interview relied upon by the accused at trial, which, it was submitted, raised a reasonable doubt as to

whether the accused was guilty of murder. The accused was ultimately found guilty of murder by the jury.

[16] Counsel for the appellant complains that a number of matters were relied upon by the prosecutor in his address to the jury which were not put to Dr Lee in cross-examination.

[17] The first matter complained of relates to a submission made by the prosecutor that a large blood stain found on the back of a chair in the loungeroom was consistent with a knife wound to the deceased's back. Dr Lee had given evidence that the stain was consistent with blood coming from a wound to the deceased's head caused by the use of the bottle of wine. In cross-examination he conceded that the stain may have come from the wound to the back. It was also put to him that if the wound was caused by the wine bottle, that would mean that blood must have poured down the deceased's back leaving staining of a somewhat different pattern. During his address the prosecutor referred to two photographs of the deceased which were not put to Dr Lee in cross-examination (although he had seen them before and they were referred to him in examination-in-chief) to demonstrate that the wound to the head had no signs of blood streaming down the head, neck or back of the deceased. It was submitted that this ought to have been put to Dr Lee in Cross-examination. I do not consider this was necessary. It was obvious that Dr Lee's opinion was being challenged and what the nature of the challenge was. In any event, the

question in issue was one that the jury could decide for themselves without the assistance of an expert.

[18] The second matter related to a submission by the prosecutor in his address to the jury that the stab wound to the back had been bleeding and that "a half-dead moron can see [from the photograph that shows the injury to the back] that it had been bleeding", whereas Dr Lee had given evidence that the wound did not appear to have been bleeding from the photographs. This was a jury question. Either the photograph showed bleeding or it did not. The jury could see this for themselves. There is nothing in this submission.

[19] The third matter related to a submission that the prosecutor had submitted to the jury that a cut to the spinous process was consistent with having been caused by a particular black knife which the Crown alleged the accused had used in the attack. The significance of this was that the defence case was that there were cuts on the appellant's hands which, according to Dr Lee, were defensive injuries caused by another knife found at the scene which had a brown handle and a blunt blade. The prosecutor submitted that those injuries were more likely to be self-inflicted, relying on the evidence of Dr Sinton. The difficulty with this submission is that the appellant had said in his record of interview that the only knife used had a black handle. The two black handled knives found at the scene both had serrated edges. It was not necessary in my opinion to cross-examine Dr Lee on the nature of the cut to the spinous process as Dr Lee gave no evidence about that cut in evidence-in-chief.

[20] The fourth matter relied upon was a photograph showing a trail of blood over the right shoulder of the deceased which the prosecutor submitted was consistent with having come from a wound to the right shoulder. This was relied upon as supporting the Crown theory that this wound was caused before death in accordance with the opinion of Dr Sinton. Dr Lee's opinion was that the wounds were all caused in the peri-mortem period, and therefore could have been caused a minute or two either before or after death. There were strong reasons why, on the evidence, the jury ought to have preferred the evidence of Dr Sinton on this issue but, to the extent that the photograph in question supported the Crown case, I do not consider that it was necessary to put the photograph to Dr Lee who had been cross-examined on the principal issue and who accepted that Dr Sinton was probably in a better position than he to judge whether or not that wound was caused before death. The photograph spoke for itself.

[21] The fifth matter related to some wounds to the neck and torso which the prosecutor submitted were "bleeding profusely". In my opinion it was open to the prosecutor to make that submission based on the evidence of Dr Sinton. The relevance of the submission was that it was some further evidence to support the view that the knife wounds were caused before the injury with the fire extinguisher. It was not necessary to cross-examine Dr Lee on that point as the prosecutor had already sufficiently challenged Dr Lee on whether or not the wounds were pre-mortem or in the peri-mortem period (which is the issue to which this submission related).

[22] The sixth matter raised related to a submission by the prosecutor that an injury to the deceased's ear was caused by a stab wound rather than by the fire extinguisher. In itself this was not an important issue in the trial except as going to the credit of Dr Lee. Dr Sinton's evidence was that the injury was a stab wound extending deeply into the external auditory canal which directly cut underlying bone and that the fact that the bone was cut suggested strongly that this was caused by a sharp, rather than a blunt, instrument. Dr Lee's evidence-in-chief was to the effect that that injury was caused by the fire extinguisher. In cross-examination Dr Lee was forced to concede that his opinion was based on photographs taken of the deceased at post mortem, that the photographs did not clearly show the problem area, that his opinion was based on a view of discoloration change which was in the same area as the skull fracture, that he was not able to disagree with Dr Sinton that that discoloration change was consistent with post-mortem change, that the findings of port mortem as to the damage to the membrane surrounding the brain described the duva being intact so that there was no bleeding and that he was not in a position to disagree with that finding. That cross-examination seriously undermined Dr Lee's original opinion that ear injury was caused by the fire extinguisher. The prosecutor in his address to the jury made all of the points referred to above but added a submission as follows:

> But we've go to (sic) fire extinguisher, which has in effect a straight line same as the glass (sic), hitting a rounded object. And if it hits

> the ear, how on earth does it hit some inches behind it, in such a way as to depress the bone without leaving (sic) the ear. It doesn't.

[23] The complaint is that this submission was not put to Dr Lee in accordance with the rule in *Browne v Dunn* (1894) 6R 67. I do not understand this submission and I doubt if the jury did either. It may be that the submission had something to do "with a space between (the injury) ... to the ear and the discoloration on the back of the head ..." (which was put to Dr Lee) as the prosecutor refers to this piece of evidence both before and after the submission complained of. If so, the submission still makes no sense to me. I am unable to reach a conclusion whether or not the submission ought to have been put to Dr Lee in cross-examination. Even if it ought to have been put to Dr Lee, I do not consider that there has been any miscarriage of justice. This ground therefore fails. There was another aspect of this submission in which it is complained that there was an unwarranted attack on Dr Lee's professionalism. I will deal with this later.

[24] The seventh submission was in the nature of a complaint that the prosecutor had submitted that blood found near the fire extinguisher was "thick" rather than "wet". That blood was consistent with having been placed there by the appellant when he removed the fire extinguisher. The defence case was that it got there after the appellant had tried to help the deceased in the bathroom following the hit over the head with the bottle of wine. The Crown case was that it got there after the deceased had been stabbed with the knife. Dr Lee had not given evidence that the blood near the fire extinguisher was "wet"

(by which I understand blood mixed with water), only that if it was wet, it was consistent with leaving that particular mark. It was open to the prosecutor to suggest to the jury that the blood was not wet, but "thick" (is not mixed with water). The only evidence directly bearing on the point were photographs 8 and 9 which the jury could see for themselves and the evidence of Dr Eckhoff which was open to the interpretation that the stain on the wall above the fire extinguisher was not "wet" in this sense and the stain on the cupboard appeared to be more like "blood" (i.e. not "wet") but that a particular drying stain on the cupboard could have been wet. Dr Eckhoff was not cross-examined on this issue. There is no substance to the submission that Dr Lee ought to have been cross-examined about whether any of the stains were "wet" as he did not say they were.

[25] The eighth submission related to an alleged unfairness by the prosecutor in putting to the jury that the blow to the head with the fire extinguisher was caused five to ten minutes after the commencement of the stab wounds. It was submitted that there was no evidence to support this submission. In my opinion there was. Dr Sinton said that the blood on the bathroom floor came from the stab wounds, the other wounds showed no evidence of significant associated bleeding (consistent with one of the blows killing the victim effectively instantly) and that the other blows were delivered after death. He also said that it would have taken five to ten minutes for those injuries to produce the amount of blood found in the bathroom. In cross-examination he said that very little, if any, of the blood loss in the bathroom was post-

mortem bleeding. It therefore followed from his evidence that the fatal blow was delivered some five to ten minutes after the stab wounds were inflicted. Dr Lee's evidence was that much of the blood was post-mortem bleeding. Later in cross-examination he said that the knife wounds were inflicted in the peri-mortem interval, i.e. he was not saying that the knife wounds occurred after death; what he was saying is that they *could* have been caused either before or after death. It was suggested by counsel for the appellant that the prosecutor did not challenge Dr Lee's evidence. The transcript however reveals otherwise (AB 228):

> If the slash or stab injuries in fact occurred prior to death – and I simply put this as a hypothesis, would that be a more reasonable explanation for the amount of blood found around the body?---Not necessarily. No I think the – a(s) I said, I think a significant proportion of the blood that's present in this particular instance is quite consistent with being post-mortem bleeding. So therefore it doesn't necessarily require that the injuries had to have been produced before death.
>
> And in fact ---?---If we look at photograph – which one is it? Yes photograph 36. This shows that although there is a considerable amount of smeared blood present around on the floor of the bathroom, relatively – well there's relatively dense blood on what would be described as the left-hand side of the bathroom, where the towel rail is. Then there's a lot of altered smudged, smeared blood on the right-hand side. But the, the densest area of blood depositioned is in the area where the head was, and along the side wall of the room.
>
> And that---?---And that's exactly where I'd expect post-mortem bleeding to, to cool, coming from basically the head area.
>
> And if in fact the body was resting in some way over the toilet, that's also the area where you'd expect pre-mortem bleeding to occur?---Well certainly. I mean, there's quite obviously been some degree of pre-mortem bleeding going on in that area because we have the, the

> evidence of the blood on the, on the toilet seat. I don't, I don't think there are any photographs that I've seen that, that show the other side of the toilet seat – in other words, the side towards the wall.

I do not consider that there is any substance to this submission.

[26] The remaining points were not pressed.

[27] This leaves a submission made, although not a ground of appeal, that the rule in *Browne v Dunn, supra,* was further breached by the prosecutor's submission that Dr Lee was in effect an advocate for the accused. I have read what Martin CJ has to say about that issue and I agree with it. I would add that the comment of the prosecutor that "it was plain for all to see the first day he gave evidence" was obviously a reference to the demeanour of the witness, which of course cannot be elicited from the transcript. We were referred to a number of authorities where appeals have been allowed because the prosecutor attacked the credit of a key witness in his address to the jury in circumstances where either the witness was not cross-examined at all, or at least the key allegation was not put in cross-examination. In three of those cases the witness was called by the prosecution: see *R v Walton* [1999] NSWCCA 452; *R v ATM* [2000] NSWCCA 475; *R v Kennedy* [2000] NSWCCA 487. (It appears that in New South Wales there is a mechanism allowing the prosecutor to cross-examine an unfavourable witness to be called by the Crown, vide s 38 of the *Evidence Act* (NSW): see *R v ATM, supra,* at para 56.) In this case, the prosecutor did have the opportunity to cross-examine Dr Lee who was called by the defence and although the

suggestion that he was an advocate for the accused was not directly put to him, the witness was extensively cross-examined about his opinions and the basis for them. It must have been clear that the witness' evidence was being challenged and that that challenge was based in large part upon the fact that the witness was called to give evidence upon a limited basis. However, it is not always necessary to put to a witness that he is partial. It depends on the circumstances. The matter may be so obvious that no cross-examination is required, particularly where it is based on the witness' demeanour.

[28] Finally, I wish it to be noted that I do not wish to associate myself with the observations of Bailey J in paragraph [43] of his Honour's judgment. Whilst I acknowledge the strength of his Honour's views, there are also compelling arguments why s 9(3) of the *Evidence Act* should be retained. This is not the occasion to debate this issue.

BAILEY J:

Background

[29] The appellant was convicted after trial of the murder of Peter Charles Bowden. There was no dispute at trial that the appellant had killed the deceased by hitting him over the head with a fire extinguisher. Nor was there any dispute that he had stabbed the deceased a number of times. The issues were whether the appellant acted in self-defence or under provocation.

[30] In brief, the defence case was that the deceased made a homosexual advance to the appellant; the appellant responded by hitting him over the head with a bottle; there was a continuing confrontation in various rooms of the deceased's apartment in which the deceased ultimately attempted to stab the appellant with a knife and the appellant, in response, struck him over the head with a fire extinguisher, killing the deceased, and then, having lost control, stabbed the deceased with the knife which had been held by the deceased.

[31] The Crown case was that, having regard to all of the circumstances including the nature of the assault, there could be no doubt that the appellant intended to cause the death of the deceased, or at least to cause him grievous harm. The Crown submitted that, even accepting the appellant's version of events both self-defence and provocation had been negatived; the appellant was always free to walk away at any time and chose not to do so; the provocation (homosexual advance and later production of a knife by the deceased) was not such as would cause an ordinary person to act in the manner of the appellant; the appellant's response was out of all proportion to any provocation from the deceased and, in any event, any such provocation had passed by the time the appellant inflicted the killing blow to the deceased. However, the Crown also contended that the appellant's version of events should be rejected and the jury should find that at no time did the deceased have a knife; the appellant was at all times the attacker;

and the appellant stabbed the deceased with a knife some five or ten times before killing the deceased with a blow from the fire extinguisher.

Grounds of Appeal

[32] The appellant's grounds of appeal are:

1. The Crown prosecutor commented on the failure of the appellant to testify.

2. The learned trial judge erred in failing to direct the jury regarding the failure of the Crown prosecutor to put the prosecution scenario to Dr Lee.

3. The failure of the Crown prosecutor properly to put the prosecution scenario to Dr Lee caused a miscarriage of justice.

[33] On 4 April 2001, Angel J granted leave to appeal on ground nos. 2 and 3. Leave to appeal on ground no. 1 was refused by Angel J.

Ground No 1 – Comment on appellant's failure to testify

[34] The Court heard the application for leave and the merits together.

[35] Section 9(3) of the *Evidence Act* 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."

[36] The appellant did not give evidence. The Crown tendered a video-tape of three records of interview. In opening his final address, the prosecutor said:

> "Well, let's have [a] look first what version he gave or should we say what versions he gave to the police and there's something else you ought to remember about the record of interview as it's called and it's this; that unlike the other evidence you heard here in this court, the record of interview is not under oath and it has not been tested by cross-examination and you should look at [it] in that light.
>
> It's what's called a self-exculpatory version of events given to police a couple of days after it happened and you should look at it carefully in the light of **the fact that no one's been given the opportunity to test it at all**."

[37] Counsel for the appellant, Mr Odgers makes no complaint as to the prosecutor's reference to the record of interview as being "not under oath and it has not been tested by cross-examination". Mr Odgers accepted that such words do not carry with them the necessary inference that the accused could have given evidence and been subject to cross-examination.

[38] In *Massie v The Queen* [1993] 3 NTLR 105, this Court considered whether the following observation by the learned trial judge, directed to an accused's record of interview, infringed s 9(3) of the *Evidence Act*:

> "It was not evidence before you in this sense that it was not given in the witness box before you and therefore was not subject to cross-examination. It serves as the accused's self-exculpatory account given to the police the day after it happened."

[39] Angel J (with whom Thomas and Priestley JJ agreed) held at 106 that the learned trial judge's statement was:

> "… a proper comment as to the quality of the appellant's statement. Although his Honour referred both to the witness box and to cross-examination, I am of the view his Honour's remarks were not directed and could not be reasonably taken to have been directed to the personal position of the accused or as to the course he had taken or chosen in not giving evidence at the trial. I consider his Honour's remarks were limited and could only have been taken to be limited to the relative value of the statement made, and did not either expressly or by implication suggest that the appellant had an option to give or not give evidence and had chosen not to go into the witness box – *Bridge v R* (1964) 118 CLR 600 at 603, 604; *R v McFadden* (1957) 57 SR (NSW) 262 at 263. In short, I do not think his Honour's statement contravened s 9(3) of the *Evidence Act*."

[40] In the light of this Court's decision in *Massie*, I agree with Mr Odgers' concession that no valid complaint can be made as to the prosecutor's reference to the appellant's record of interview not being under oath and not tested by cross-examination. However, Mr Odgers sought to distinguish this reference from the prosecutor's invitation to the jury to carefully consider the record of interview in the light "of the fact that no one's been given the opportunity to test it at all".

[41] Mr Odgers sought to draw a distinction between an observation that the record of interview was not in fact subject to cross-examination and the prosecutor's observation that no one had been given the *opportunity* to test (by cross-examination) the record of interview. In Mr Odgers' submission, the only reasonable inference which could be drawn from the prosecutor's observation was that the appellant could have given his version of events in court and been subject to cross-examination, but chose not to do so.

[42] For my part, I consider the distinction sought to be drawn by Mr Odgers is a distinction without a difference. It is permissible in accordance with s 9(3) of the *Evidence Act* for the prosecutor to explain the status of the appellant's self-serving statement to the police out of court and to contrast it with the weight of sworn evidence in court. The prosecutor's observations did not expressly or by implication suggest the appellant had an option to give or not give evidence in court and had chosen not to enter the witness box.

[43] In my view, the prohibition enacted by s 9(3) is to be strictly interpreted. The provision is an historical anomaly designed to keep secret from the jury an accused's right to give evidence and his failure to avail himself of that right. In my view, it is frankly astonishing in a free and democratic society that prosecutors and judges are prohibited from accurately informing a jury of an accused's rights. It is absurd to suppose that jurors, or at least a very high proportion of them, do not know that an accused has a right to give evidence in his own defence. In the light of such knowledge, s 9(3) requires that juries are to be left without direction or assistance in assessing the significance of an accused's failure to avail himself of his right to give evidence. In the absence of appropriate guidance, there is a real risk that a jury will draw an adverse inference against an accused because of his failure to enter the witness box. Faced with a direct question from a jury as to an accused's failure to give evidence, a judge is forced to outright refusal to answer or resort to evasion. The provision is an affront to the combined wisdom and commonsense of juries. The courts have no option but to give

effect to the law as it presently stands, but that is no warrant for extending the prohibition beyond its precise terms.

[44] There is no merit in the first ground of appeal and I would refuse the application for leave.

Ground Nos. 2 and 3 : Failure of the prosecutor to put the prosecution scenario to Dr Lee causing a miscarriage of justice

[45] Appeal ground nos. 2 and 3 were argued together. The essence of the appellant's submissions under these grounds of appeal was that the prosecutor breached the rule in *Browne v Dunn* (1894) 6 R 67 by failing to put the prosecution scenario and various submissions advanced by the prosecutor in his closing address to Dr Lee.

[46] Much of the important evidence in the trial was forensic. A forensic pathologist called by the Crown, Dr Sinton, expressed opinions regarding various matters, including the nature of the injuries to the deceased and how and when they might have been inflicted. He also expressed an opinion as to whether injuries to the appellant's hands were consistent with self-infliction. The defence called a forensic pathologist Dr Lee who testified with respect to these issues.

[47] Mr Odgers referred to the following statement of principle by Hunt J, summarising the rule in *Browne v Dunn*, supra, in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation (Cth)* [1983] 1 NSWLR 1 at 16:

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67."

[48] See also: *White v Flower and Hart* (1998) 156 ALR 169 at 216; *Flower and Hart v White* (1999) 163 ALR 744; *Reid v Kerr* (1974) 9 SASR 367 at 373; *Bulstrode v Trimble* [1970] VR 840 at 847; *Birks* (1990) 19 NSWLR 677.

[49] It is well established that a breach of the rule in *Browne v Dunn* by a prosecutor may cause a miscarriage of justice: *MRW* (1999) 113 A Crim R 308; *R v Kennedy* [2000] NSWCCA 487, unreported, delivered 23 November 2000.

[50] In support of his submissions that the prosecutor had breached the rule in *Browne v Dunn*, Mr Odgers identified a number of submissions made by the prosecutor in his closing address which were said not to have been put to Dr Lee in cross-examination. Many of the matters complained of were raised by the prosecutor in the context of suggesting a scenario as to what had occurred between the accused and the deceased on the basis of the forensic evidence of Dr Sinton and, in some instances, concessions made by

Dr Lee in cross-examination. No complaint was made about any aspect of the learned trial judge's summing up. In particular, no criticism was made as to His Honour's treatment of the evidence of Dr Sinton or Dr Lee. It was said that counsel for the appellant at trial had requested the learned trial judge to direct the jury in accordance with *Browne v Dunn* that the jury should take into account the Crown's failure to cross-examine Dr Lee on various matters in assessing the Crown's arguments. However, this is not borne out by the transcript. The appellant's trial counsel (transcript p 353) made what might have been an oblique reference to the rule in *Browne v Dunn* and indicated that he would examine the transcript of the prosecutor's closing address, but he made no application for a direction beyond seeking confirmation that his Honour would direct the jury how generally to approach the evidence of experts.

[51] I mean no disrespect to counsel, but I consider it is unnecessary to canvass in any detail the list of matters which Mr Odgers submitted were not the subject of cross-examination of Dr Lee by the prosecutor. However, I would add that I have had the advantage of reading Mildren J's analysis of the matters raised on behalf of the appellant and I agree with His Honour's reasons for concluding that there is no substance in appeal grounds 2 and 3.

[52] In *Brown v The Queen* [1980] Tas R 61 at 75, Neasey and Cosgrove JJ of the Tasmanian Court of Criminal Appeal said of the rule in *Browne v Dunn*:

> "Thus the rule is one of proper professional practice, and of fairness in the conduct of a trial. From Lord Herschell's statement in

> *Browne v Dunne, (supra),* and from the many cases which exemplify the application of the rule, it is clear that it is a rule of broad substance rather than a rigid rule which requires every significant fact about which the opposing party intends to give evidence to be put in cross-examination. What is fair or unfair will depend upon the particular circumstances of the case; and as Lord Herschell points out, it may be so clear that the witness' version is to be impeached that specific questions may not even be required."

[53] This passage was cited with approval by King CJ of the South Australian Court of Criminal Appeal in *R v Costi* (1988) 48 SASR 269 at 274. With respect I agree with Neasey and Cosgrove JJ that what is fair or unfair will depend on the particular circumstances of the case.

[54] In the present case, notwithstanding the meticulous dissection of the transcript by Mr Odgers to identify matters relied upon by the Crown which may not expressly have been brought to the attention of Dr Lee, I am unable to agree that there was any unfairness to the appellant arising from the prosecutor's treatment of Dr Lee.

[55] Dr Lee was furnished with all the photographs and notes of Dr Sinton and other experts called by the Crown. He had transcripts of their evidence. Dr Lee was present in court for the cross-examination of Dr Sinton. The defence was granted an adjournment of half a day to permit the appellant's trial counsel to prepare for the cross-examination of Dr Sinton in consultation with Dr Lee. Dr Lee was very well acquainted with the evidence of the Crown's experts.

[56] The purpose of calling Dr Lee was, in effect, to rebut the expert evidence of the prosecutor's expert witnesses whose evidence had already been given. The appellant, through his counsel had the opportunity to have Dr Lee rebut any evidence called by the Crown which he chose. If there was a failure to rebut or attempt to rebut any part of that evidence this cannot now be laid at the feet of the Crown.

[57] In considering whether there was any unfairness to the accused, it is important to keep in mind the nature of Dr Lee's evidence. His evidence in chief was that "in general terms there is a close correspondence between (the appellant's) story and the facts that are shown during the course of the (forensic) examination". Following the cross-examination of Dr Lee, the learned trial judge in summing up observed:

> "What Doctor Lee is saying is, as I interpret it – and what he is saying really depends upon your interpretation – but, as I interpret it, he's saying, 'Well, looking at all of the forensic evidence, rather than it being consistent, it's not inconsistent. There is nothing in there that contradicts what the accused has said to you'. So it doesn't necessarily confirm what he said to you, but, rather, it doesn't contradict it."

[58] No complaint is made about that observation.

[59] After giving evidence that he did not "find any problem with saying that the evidence would appear to support" the appellant's version of events in his record of interview, the prosecutor asked Dr Lee "or perhaps other scenarios?". Dr Lee replied:

> "It could possibly support other scenarios. I was asked to address that particular scenario."

[60] This answer, in my view, places a cloud over Dr Lee's evidence. It appears that he was asked to provide an opinion on a limited basis: is the forensic evidence consistent with the appellant's version of events? He was apparently not asked to provide expert opinion as to what *in fact* occurred between the appellant and the deceased on the basis of the forensic evidence. In the event Dr Lee's evidence amounted no more than to an opinion that the forensic evidence was not inconsistent with the appellant's version of events and could be consistent with other versions of events (which he had not been asked to examine).

[61] The rule in *Browne v Dunn* does not apply, in the sense that it is not transgressed, where the witness is on notice that his version of events is to be challenged. Such notice may be found in the manner in which the case is conducted (see Goldberg J in *White v Flower and Hart*, supra at 218). In the present case, Dr Lee could have been under no illusion that the appellant's version of events which effectively he was seeking to support was not to be the subject of attack by the Crown. This is not a case where it can be said that Dr Lee had been ambushed in closing submissions by reliance on Dr Sinton's evidence, the existence of which he was unaware. On the contrary, the appellant, the appellant's trial counsel and Dr Lee were all fully aware that the jury would be invited to reject the appellant's version of events based on the evidence already given by the Crown's experts. In such

circumstances, I do not think the prosecutor was under an obligation to cross-examine Dr Lee on every submission he might make to the jury, particularly having regard to the very limited basis upon which Dr Lee was called to give evidence by the defence.

[62] In all the circumstances, I do not consider that any unfairness or miscarriage of justice arose from the failure of the prosecutor to put matters of significance to Dr Lee. I do not consider that there is any merit in appeal ground nos. 2 and 3. The appeal should be dismissed.

[63] Finally, I note what Martin CJ and Mildren J have had to say about Mr Odgers' submission that the rule in *Browne v Dunn* was further breached by the prosecutor's submission that Dr Lee was in effect an advocate for the appellant. I agree with the observations of their Honours.

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