

Paula v The Queen [2005] NTCCA 11

PARTIES: PAULA, TOIRO MOSES

v

THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE
SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: CA19 of 2004 (20114719)

DELIVERED: 30 JUNE 2005

HEARING DATES: 27 & 30 JUNE 2005

JUDGMENT OF: MARTIN (BR) CJ, MILDREN &
THOMAS JJ

CATCHWORDS:

CRIMINAL LAW – Appeal – appeal against verdict – application for extension of time in which to appeal – application granted

CRIMINAL LAW – Evidence – verdict unreasonable and cannot be supported having regard to the evidence – evidence of witnesses at trial inconsistent with evidence at preliminary hearing and statements given to police – evidence provided by security camera did not support evidence given by witnesses – security camera images positively rebutted the direct Crown evidence or at the least created a reasonable doubt – appeal allowed – finding of guilt quashed and judgment and verdict of acquittal entered

M v The Queen (1994) 181 CLR 487 at 493, followed

REPRESENTATION:

Counsel:

Applicant: Mr Jon Tippett QC
Respondent: Mr Rex Wild QC

Solicitors:

Applicant: Northern Territory Legal Aid Commission
Respondent: Office of Director of Public Prosecutions

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

Paula v The Queen [2005] NTCCA 11
No. CA19 of 2004 (20114719)

BETWEEN:

TOIRO MOSES PAULA
Applicant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 30 June 2005)

MARTIN (BR) CJ:

- [1] On 21 April 2004 the applicant was convicted of the offence of Dangerous Act, contrary to s 154 of the Criminal Code. He was also convicted of two circumstances of aggravation. In November 2004 the applicant sought an extension of time within which to file an application for leave to appeal. That application for an extension of time was subsequently refused by a single Judge. By application dated 24 December 2004, the applicant seeks the extension of time from this Court.
- [2] The sole ground of the proposed appeal is that the verdict is unreasonable and cannot be supported having regard to the evidence. In these

circumstances, the Court heard the parties in full as if hearing submissions on the appeal.

- [3] The essence of the dispute before the jury can be stated quite briefly. It was common ground that in the early hours of 23 September 2001 at Katherine, the applicant ejected Nathan O'Donnell from a nightclub. In that process, Mr O'Donnell's head struck the solid pavement of the footpath immediately outside the nightclub causing a serious head injury which resulted in the death of Mr O'Donnell.
- [4] It was the Crown case that after a short struggle on a landing outside the door to the nightclub, the applicant pushed or threw the deceased down steps leading from the landing to the footpath. The deceased landed on the steps or the footpath and immediately attempted to make his way back up the steps, either on his hands and knees or in a crouched position. On the Crown case, the applicant then committed the offence of dangerous act by kicking the deceased forcefully in the area of his face as the deceased was endeavouring to move back up the steps. The kick resulted in the body of the deceased being propelled backwards onto the footpath where the deceased's head struck the pavement causing the fatal injury.
- [5] The defence case disputed that a kick was delivered. On the defence case, the applicant threw the deceased off the landing and in the process of the deceased coming to rest on the footpath his head struck the pavement. The

deceased was rendered unconscious immediately. There was no movement by the deceased back up the steps and no kick by the applicant.

[6] The trial Judge told the jury that the critical issue was whether the Crown had proved that the applicant deliberately kicked the deceased. No issue of justification was raised and the Judge did not give the jury any directions as to justification. In substance, the case was presented to the jury on the basis that if they were satisfied that the applicant deliberately kicked the deceased in the face, with the consequence that the deceased fell back and struck his head on the pavement, the Crown had proved its case. There was no suggestion that the applicant could be convicted on the basis of his act of throwing or pushing the deceased from the landing. If such a basis had been suggested, the jury would have been required to consider the issue of whether such an act was without justification and it would have been necessary for the judge to give appropriate directions as to justification pursuant to the provisions of the Code.

[7] The events were partially recorded by security cameras. The significance of the images taken by the cameras is discussed later in these reasons.

[8] The Crown relied upon the evidence of a number of persons who were outside the nightclub at the time that the applicant and the deceased came through the door of the nightclub onto the landing. Six of those witnesses gave evidence consistent with the theme of the Crown case that after the applicant ejected the deceased from the landing, the deceased landed on the

steps or footpath, recovered and endeavoured to move back up the steps either on his hands and knees or in a crouched position. As the deceased endeavoured to move back up the steps, the applicant kicked the deceased in the area of his face. All six witnesses gave evidence that as a consequence of the kick, the deceased was propelled backwards and landed on the footpath where his head came into contact with the pavement.

[9] Other witnesses did not see how the deceased came to be moving backwards from the area of the landing and steps. They saw the last movements of the deceased through the air and observed his head strike the pavement of the footpath. While the evidence of those witnesses did not exclude a kick, in my view it tended to support the defence case of a single ejection from the landing which resulted in the deceased striking his head on the pavement and being rendered unconscious.

[10] In addition to the direct evidence to which I have referred, the Crown led evidence of minor injuries to the deceased's face. It is unnecessary to consider that evidence in detail. The evidence did not assist the Crown case as on the Crown case more severe injuries might have been expected if a solid kick had been delivered to the face of the deceased. However, the evidence did not exclude a kick to the face as described by the witnesses.

[11] There were a number of unsatisfactory features associated with the evidence of the eyewitnesses who spoke of both the initial ejection from the landing and of the subsequent kick. A number of those witnesses had met together

after the incident and discussion occurred about the incident. Details of the discussion did not emerge in the evidence, but one of the witnesses acknowledged that enough discussion occurred to make her aware that her version was different from others.

[12] While each of the witnesses consistently maintained that the applicant kicked the deceased, each gave evidence that was inconsistent in some respect with their statements to the police and evidence at the preliminary hearing. Some of the inconsistencies were particularly significant. Two of the witnesses initially gave versions to the police and at the preliminary hearing which were consistent with each other and which had the applicant ejecting the deceased on two occasions before the kick occurred. Images from the security cameras demonstrated that only one ejection occurred. Both witnesses changed their versions and said in evidence that there was only one ejection before the kick. One of those witnesses admitted the change in version came about because she reconstructed events after seeing the security camera footage. Three of the witnesses had seen the footage shortly before giving evidence at the trial.

[13] It is unnecessary to discuss the evidence of the individual witnesses in detail. It is sufficient to recognise that notwithstanding the unsatisfactory features and inconsistencies, in the absence of images taken by the security cameras the verdicts of the jury would have been unassailable. In the absence of images it would have been open to the jury to accept and rely upon the fundamental features of the evidence of those witnesses and to find

that after the initial ejection from the landing, and as the deceased attempted to move back up the stairs, the applicant delivered the fatal kick in circumstances that amounted to the offence of Dangerous Act.

- [14] The security cameras did not provide a complete record of the events on the landing. The system controlling the security cameras was programmed to capture an image every 1.875 seconds. Each image was recorded in 1:25th of a second following which there was a gap of 1.875 seconds before the next image was recorded. When played on playback equipment this results in a series of static images which do not record the entirety of the events under surveillance.
- [15] The kick upon which the Crown case was based was not recorded on an image. The Crown contended that as approximately 98% of the movements that occurred in front of the camera was not recorded, it was open to the jury to conclude that the kick occurred, but was not recorded.
- [16] To approach the issue from the starting point that 98% of the movements was not recorded is apt to mislead. It is necessary to examine the contents of each image particularly carefully and to assess whether it was open to the jury to find beyond reasonable doubt that the kick occurred notwithstanding the absence of a kick on any image.
- [17] The first relevant image captures the applicant and the deceased in the vicinity of the door leading from the nightclub. The second image shows the applicant and the deceased on the landing at the top of the steps. They

are seen facing and holding each other. The only reasonable conclusion open on the evidence is that the second image was taken as the applicant was in the process of ejecting the deceased from the landing.

[18] In the third image the applicant is seen standing on the edge of the landing at the top of the steps looking down in the direction of the footpath. The lower parts of the deceased's legs are visible at the bottom of the image and are flat on the footpath. The only reasonable conclusion is that in the 1.875 second gap between the second and third images, the applicant pushed or threw the deceased down the steps and, as a consequence, the deceased was propelled onto the pavement of the footpath.

[19] In the fourth image the applicant is engaged on the landing with another person. The legs of the deceased are still visible on the pavement of the footpath. Although there is a slight change in the position of the legs between the third and fourth images, the deceased's legs are in substantially the same position. Significantly, the legs remain in the same position throughout the balance of the security footage which covers several minutes and includes the arrival of the police.

[20] A number of conclusions are unavoidable. First, the ejection from the landing occurred in the 1.875 second gap between the second and third images. Secondly, the deceased did not move from the position in which the legs are visible in the third image. Thirdly, if the kick upon which the

Crown relied occurred, it must have occurred in the 1.875 second gap between the second and third images.

[21] For the Crown case to succeed, in the 1.875 second gap between the second and third images, the following events occurred and were not caught on any image:

- (1) The applicant ejected the deceased from the landing.
- (2) The deceased landed on the steps, recovered and commenced crawling back up the steps or the deceased landed on the footpath, recovered, made his way to the steps and commenced coming up the steps in a crouched position.
- (3) As the deceased either crawled up the steps or came up in a crouched position, the applicant kicked the deceased.
- (4) As a consequence of the kick, the deceased's body went up and back off the steps and onto the footpath, finishing in a prone position with the deceased's legs flat on the footpath in time to be captured in that position by the fourth image.

[22] In my opinion, even on the assumption that although the deceased had consumed a quantity of alcohol he recovered quickly from the ejection, it is highly unlikely, if not impossible, for those events to have occurred in 1.875 seconds. The images taken by the security camera positively rebutted the Crown evidence of the kick to which I have referred. At the least, it created a reasonable doubt as to whether the kick occurred. The Crown did not

exclude as a reasonable possibility that when the deceased was ejected from the landing , he fell to the footpath and was rendered unconscious when his head struck the pavement.

[23] The principles are not in doubt. Making due allowance for the fundamental role of the jury and the advantage experienced by the jury having seen and heard the witnesses, this Court must ask itself whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty: *M v The Queen* (1994) 181 CLR 487 at 493.

[24] In the circumstances under consideration, a doubt experienced by this Court is a doubt which the jury ought also to have experienced. This is not a case in which the advantage of the jury in seeing and hearing the witnesses is capable of resolving a doubt experienced by this Court. The jury was in no better position to assess the significance of the failure of the security cameras to record the alleged kick than this Court.

[25] In my opinion it was not open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty. There is a significant possibility that an innocent person has been convicted.

[26] I would extend the time within which the application for leave to appeal may be filed. I would allow the appeal, quash the finding of guilt and direct that a judgement and verdict of acquittal be entered.

MILDREN J:

[27] I agree with the reasons expressed by the Honourable Chief Justice and with the orders which his Honour proposes. I have nothing further to add.

THOMAS J:

[28] I agree with the decision of the Chief Justice. I have nothing to add.
