Barnes v Westphal [2008] NTSC 41

PARTIES:	BARNES, RODNEY ERIC JOHN v WESTPHAL, LINDSAY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 33/2007 (20621517)
DELIVERED:	2 October 2008
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JUDGMENT OF:	MILDREN J
APPEAL FROM:	Court of Summary Jurisdiction, delivered 30 November 2007

CATCHWORDS:

CRIMINAL LAW – appeal – appeal against conviction – offence of intimidation of a witness – whether appellant was aware that the person he intimidated was a potential witness – no committal had taken place at time of alleged offence – error by learned Magistrate – appeal allowed.

STATUTES:

Criminal Code, s 1, s 31, s 130A(1)
Criminal Act 1914 (Cth), s 36A
Justices Act, s 177(2)(f)

CITATIONS:
***Referred to*:**
Mathews v R (1992) 64 A Crim R 305

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	C Curtis

Solicitors:

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

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

Barnes v Westphal [2008] NTSC 41
No. JA 33/2007 (20621517)

BETWEEN:

RODNEY ERIC JOHN BARNES
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 2 October 2008)

Introduction

[1] This is an appeal against conviction imposed by a Magistrate sitting in the Court of Summary Jurisdiction.

[2] The appellant was convicted in an offence against s 103A(1) of the Criminal Code. That sub-section provides as follows:

> **"103A Intimidation of witnesses**
>
> (1) Any person who –
>
> (a) menaces or intimidates another person;

(b) threatens to do any injury or cause any detriment of any kind to another person; or

(c) does any injury or causes any detriment of any kind to another person,

because that other person has appeared, or has been called or may be called to appear, as a witness in any judicial proceeding is guilty of a crime and is liable to imprisonment for 7 years."

[3] The information alleged that on 19 August 2006 at Tennant Creek the appellant intimidated and threatened to do injury to Angus Gummow, by telling Angus Gummow to get out of a car and fight and said "you're fucking dead" and, this person may be called to appear as a witness in a judicial proceeding, namely case file number 20611668 Rodney Barnes".

[4] At the time of the alleged offence, the offence created by s 103A(1) was not a "Schedule 1 provision" as defined by s 1 of the Criminal Code. Accordingly it was submitted by counsel for the appellant that s 31 of the Criminal Code applied. That section provides as follows:

"31 Unwilled act, etc and accident.

(1) A person is excused from criminal responsibility for an act, an omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly

circumstanced and having such foresight will have proceeded with that conduct".

[5] Section 1 defines "act" to mean in relation to an accused person "the deed alleged has been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention";

[6] Section 1 defines "event" to mean the result of an act or omission.

[7] Both counsel submitted that there were no authorities in the Northern Territory which have considered s 103A (1) and having made researches of my own, I have been unable to find any.

[8] The only decision to which I had been referred which discusses a similar provision is the case of *Mathews v R*[1]. That decision concerned the proper construction to be given to s 36A of the Crimes Act 1914 (Cth). The relevant words of s 36A were;

> "A person who:
>
> (a) …intimidates… a person… on an account of his … being about to appear, as a witness in a judicial proceeding shall be guilty of an indictable offence."

[9] In that case, the Queensland Court of Appeal held that it was not an essential element of the offence that at the time of the intimidatory conduct

[1] *Mathews v R* (1992) 64 A Crim R 305

the accused should have had the intent that the complainant would thereby be dissuaded or deterred from giving evidence or truthful evidence.

[10] In my opinion, s 31 does not require proof that the appellant intended to dissuade the person menaced, threatened or intimidated, from giving evidence or truthful evidence in a judicial proceeding. In my opinion s 31 goes no further than that the accused must be shown to have intended to menace, or intimidate or threaten etc, or in the case of an allegation that he caused a detriment, that he intended to cause the detriment.

[11] I note that in the legislation being considered in *Mathews v R*[2], there was no provision similar to s 31 of the Criminal Code.

The facts as found by the learned Magistrate

[12] The evidence before the learned Magistrate was unsatisfactory in several respects. The prosecutor did not attempt to prove by the calling of admissible evidence, a number of key factual matters which inevitably needed to be proved in order to sustain a conviction. There was, for instance, no evidence led by the prosecution that the property of Angus Gummow had been burnt down or that the accused to be or had been charged with the offence of arson. There was no evidence led that Mr Gummow was to be a witness in that case. Much of the Crown case was made up through cross examination of the Crown witnesses, and by evidence given by the accused. No submission of no case to answer was made. One piece of

[2] *Mathews v R* (1992) 64 A Crim R 305

evidence which related to the date of the fire was allowed to be given by the prosecutor in his address to the Court when no evidence was called about the precise date. No point was taken about that on appeal.

[13] It is common ground now that the house property situated at 27 Haddock Street, Tennant Creek, was consumed by fire on 16 April 2006. One of the persons who lived at that house was the complainant Angus Gummow. Some hearsay evidence was admitted without objection that the owners of the property were Steven Gummow, Angus Gummow and another brother of Steven and Angus Gummow.

[14] Evidence was given that the appellant was arrested about a week or a week and a half after the fire and charged with arson. The appellant spent approximately two months in remand on that charge before he was released on bail. The bail document was not admitted into evidence and the only evidence concerning it is some hearsay evidence from one of the police constables called to give evidence as to its terms and some evidence given by the accused.

[15] The accused's evidence was that he was given strict bail conditions that he was "not to approach any of the Gummows or threaten in any way, you know, and I obeyed those conditions".

[16] In cross examination he was asked again what his bail conditions were and he said:

> "Like I said, not to approach the Gummow family or threaten in any sort of way, or any witness to the Gummow family."

[17] Some evidence was given by Constable Curriez who said:

> "I can't remember word for word but some of the conditions were that Mr Barnes was to reside in an address in Tennant Creek and he was not to approach any of the witnesses including Angus Gummow and Steven Gummow".

[18] He said that he believed that those were the conditions imposed by the Court but he did not say that he was present when they were imposed. In those circumstances the evidence as to the terms of the bail given by Constable Curriez should have been excluded as inadmissible hearsay. The fact that no objection was taken to the evidence, is not to the point. It is the duty of any presiding judicial officer to ensure that inadmissible evidence is excluded.

[19] There was evidence from both Mr Gummow and Mr Barnes that there had been a long history of animosity between the Gummow and the Barnes families extending back many years. This was confirmed by Constable Curriez who said that there had been a long history of violence between the two families.

[20] There was also evidence that on the day after the fire, Mr Gummow's brother, Joe Gummow, had had a fight with Mr Barnes. It is not clear whether Mr Gummow's knowledge of this was hearsay. In any event the appellant gave evidence that he was attacked by members of the Gummow family, because they blamed him for setting fire to the house. The appellant

claimed he made a complaint to the police about that matter. This was confirmed by Constable Curriez.

[21] The learned Magistrate found that the committal proceedings for the arson charge were heard in February and April 2006 and that, as at 19 August 2006, although the arson charge had not been finalised, the appellant had been committed to stand trial.

[22] It is plain that the learned Magistrate misconstrued the evidence. The evidence was that the committal took place on 7 and 8 February 2007 and also in April 2007. Therefore, as at the time of the incident on 19 August 2006 there had been no committal proceedings and there is no evidence that the accused was made aware that Angus Gummow was to be a witness at the committal. Indeed the accused maintained in his evidence, that he was not aware that Angus Gummow was a witness.

[23] The findings of the learned Magistrate as to what happened on 19 August 2006 were that at dusk, or when there was only a little bit of daylight left on the evening of 19 August 2006, Angus Gummow parked his father's motor vehicle in Patterson Street, Tennant Creek, in front of the Headframe Bottle Shop. He was sober as he had not been drinking that day.

[24] The vehicle was parked at an angle, front end to the gutter. In the vehicle was his sister-in-law, Janice Sorti and a friend, Troy Woodwar. Troy

Woodwar was in the front passenger seat and Janice Sorti was in the rear. Sorti alighted and entered the Headframe Bottle Shop. Woodwar and Gummow remained in the vehicle with the engine running, the windows down and the CD player playing music.

[25] Angus Gummow's evidence was that about 5-10 seconds after Sorti entered the bottle shop the appellant came out of the bottle shop carrying a half carton of VB cans in one hand. The appellant saw Gummow and approached him and said words to the effect, whilst standing half a metre from the driver's side window where Gummow was sitting: "Get out of the car, let's fight. I am going to smash you. I am going to run your family out of town. A good job what happened to your house. I am going to get you."

[26] Gummow said that these words made him scared and he felt threatened. He did not respond but tried to drown out the abuse by turning up the volume of the CD player. The abuse, which included other words and swearing which were not particularised in the evidence, continued for about three minutes. The appellant then got in the front passenger seat of the vehicle parked next to Gummow's and to the right of Mr Gummow's vehicle. As it reversed out the appellant swore again at Gummow and said words, "you're fucking dead". When Sorti got into Gummow's vehicle after exiting the Headframe Bottle Shop, Gummow drove straight to his father's house and entered the police station where he made a complaint about the appellant's behaviour and gave a statement to the police.

[27] Gummow's evidence was supported by the witness Troy Woodwar. The evidence of the appellant was that he was not present at the time and knew nothing about the incident which was alleged against him, because at the time he was at the Tennant Creek Caravan Park all day.

[28] The learned Magistrate after hearing the witnesses, preferred the evidence of Angus Gummow and Troy Woodwar to that of the appellant. He found beyond reasonable doubt that the appellant threatened Angus Gummow with injury.

[29] As to the requirement that the Crown proved that the threat was "because that other person has appeared, or has been called or may be called to appear as a witness in any judicial proceeding". The learned Magistrate said this:

> "It was submitted on behalf of the defendant that there was no evidence of nexus between the threats and the requirement under s 103A of the Criminal Code that the victim has appeared or has been called or may be called to appear as a witness in any judicial proceedings. In my view there is clear evidence of a nexus. Angus Gummow was the subject of Mr Barnes' bail condition, which was – which the defendant was aware of and had given evidence at the defendant's committal proceedings in April 2006 on the arson charge".

The grounds of appeal

[30] Grounds 2 and 6 challenge the finding made by the learned Magistrate that the appellant threatened Angus Gummow with injury because Gummow was to be called as a witness in a judicial proceeding.

[31] It is not in dispute that the learned Magistrate was in error in finding that the committal proceeding had already occurred. There was evidence that

Mr Gummow later did give evidence at the committal, but the only evidence he gave was to the effect that he was a resident of the house which burnt down.

[32] The only other evidence from which an inference might be drawn that the appellant's motive for the threats was because he believed that Mr Gummow was a witness against him, upon which the learned Magistrate relied, was the evidence relating to the appellant's bail condition. However, the evidence as to that condition was vague and the only admissible evidence as to the condition came from the appellant himself. The appellant's evidence did not make it clear that the reason for the condition not to approach any member of the Gummow family was because he was to be a witness in the subsequent arson proceedings.

[33] There was another possible explanation for the appellant's conduct which related to the longstanding antagonism between the two families, and the evidence that he himself had been assaulted by members of the Gummow family the day after the arson, albeit that Mr Alex Gummow had not been involved in that assault.

[34] I am satisfied that the appellant has established that the learned Magistrate was in error in his taking into account, in reaching his conclusion, that the committal proceeding had already taken place and that Mr Gummow had already given such evidence as he could as a witness. The only question which remains is whether in terms of s 177(2)(f) of the Justices Act, I ought

to dismiss the appeal if I consider that no substantial miscarriage of justice has actually occurred.

[35] There was no admissible evidence that the appellant was aware that Angus Gummow was to be a witness at the committal proceedings. A conclusion that he was so aware, notwithstanding his evidence to the contrary, could only be arrived at by way of inference. I do not think that an inference could be safely drawn from the appellant's evidence as to the terms of his bail conditions. That condition may well have been imposed because of the longstanding history of bad relations between the Gummow and Barnes' families, including the evidence that the appellant himself had been subjected to an alleged assault by members of the Gummow family.

[36] There was no evidence that the appellant was convicted of the arson charge. The evidence before the learned Magistrate was that the Crown entered a nolle prosequi. In any event, Mr Gummow was not present at the house at the time of the fire.

[37] In a circumstantial case, where there is a possible explanation consistent with innocence which the Crown has not rebutted beyond reasonable doubt, the accused is entitled to a verdict of acquittal. In my opinion that is the situation here. The burden of proving that no substantial miscarriage of justice has actually occurred rests upon the respondent to the appeal. I am not satisfied that I should dismiss the appeal on this ground.

Orders

[38] The appeal is allowed. The finding of guilt, the conviction and sentence imposed are quashed. In lieu thereof I enter a verdict of not guilty.