Moseley v The Queen [2012] NTCCA 11

PARTIES:	MOSELEY, Neil Adam
	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:	CA 20 of 2011
DELIVERED:	6 June 2012
HEARING DATES:	5 & 6 June 2012
JUDGMENT OF:	MILDREN ACJ, SOUTHWOOD AND KELLY JJ
APPEAL FROM:	MARTIN J

CATCHWORDS:

CRIMINAL LAW – Appeal and New Trial – new evidence and fresh evidence – whether of sufficient cogency to establish innocence – whether of a sufficient quality to raise a significant possibility that a jury acting reasonably could have acquitted the accused

EVIDENCE – fresh evidence on appeal – what amounts to be discussed

R v Abou-Chabake (2004) 149 A Crim R 417; applied

Gallagher v The Queen (1986) 160 CLR 392; *Mickelberg v The Queen* (1989) 167 CLR 259; *Ratten v The Queen* (1974) 131 CLR 510; followed

REPRESENTATION:

Counsel:

Appellant:	S J Odgers SC
Respondent:	P Usher

Solicitors:

Appellant:	Ward Keller Lawyers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Moseley v The Queen [2012] NTCCA 11
No. CA 20 of 2011

BETWEEN:

NEIL ADAM MOSELEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN ACJ, SOUTHWOOD AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered 6 June 2012)

[1] This is an appeal against conviction and sentence, leave to appeal to the Court of Criminal Appeal having been previously granted.

[2] The appellant, along with another man, Maximillian Tippett, was found guilty after a trial before Martin J and a jury of aggravated robbery committed on 2 March 2011. On 18 August 2011 the appellant was sentenced to a term of imprisonment of nine years commencing on 3 August 2011. A non-parole period of eight years and three months was fixed. Tippett received a sentence of seven years imprisonment commencing from 1 June 2011. The balance of the sentence imposed on 31 July 2009 which

was held in suspense was restored to be served concurrently and a minimum non-parole period of three and a half years was fixed.

[3] The sole ground of appeal against conviction is that a miscarriage of justice has resulted from the absence at the trial of fresh evidence.

The evidence at the trial

[4] At the trial there was no dispute that two men committed an aggravated armed robbery at a Kentucky Fried Chicken (KFC) shop in Coconut Grove soon after 10.30 pm on 2 March 2011. The issue in respect of the appellant was whether the prosecution could prove beyond reasonable doubt that he was one of the two robbers. There was no identification evidence in respect of the appellant or Tippett as both robbers were masked, but the prosecution relied upon circumstantial evidence and alleged admissions made to a man named Frank Holden, a friend of the appellant and of Tippett. The appellant testified, denying that he was one of the robbers and asserting that at the time of the robbery, he was at the home of Holden.

[5] The evidence at the trial was that sometime after 10.00 pm when the KFC shop closed, one of the employees, Mr Huang, went outside the back door of the premises to take out the rubbish. At the back of the premises there was a car park where he saw a red Commodore sedan parked. After he went out to the rubbish bin two men approached him with their faces covered. One of them was holding a knife. He was told to go back inside the building

through the back door and into the store. He and the other members of the staff were told to sit down on the floor of the kitchen area. One of the workers called William jumped over the counter and ran through the front door. One of the robbers chased him over the counter and slipped over in the process. After that the robbers went into the manager's office. At the time the manager, Mr Nadeen Mohammed, was on the telephone when a man came in carrying a knife and told him to freeze. He was then asked to give him the money, to open the safe or else he would be stabbed in the stomach. He said he opened the safe and gave the robber the money in a silver metal box which contained the float. The money which was removed included notes and coins which were wrapped in brown coloured paper with the word "Armaguard" printed on it. Mr Mohammed also saw the second robber standing in the kitchen area telling the other staff members to sit down. After the money was handed over the robbers ran towards the back door and left. As soon as that happened Mr Mohammed went outside from the front and he saw the robbers sitting in a car which he identified as a red Commodore and which drove away quickly.

[6] It was an agreed fact that the amount stolen in the robbery was $2,900 in cash and coins.

[7] At the trial there was no dispute that the appellant had rented a 2010 red Commodore sedan on 26 February 2011 and that he was arrested in that car on 3 March 2011. There was considerable evidence supporting a conclusion that this car was used by the two robbers.

[8] There was no dispute at the trial that the red Commodore rented by the appellant was at some time during the night of 2 March 2011 left at a location very near the Tippett family home.

[9] When the appellant was arrested driving towards Katherine on 3 March 2011, the police found more than $1,300 in cash in the appellant's wallet. The cash was all in good condition. The appellant in his evidence said that he had received $600 of that money as his Centrelink payments, he had received $400 for some work that he had done, he had won a couple of hundred dollars at the Casino and he had also borrowed $300 from Frank Holden, $150 of which he had given to Tippett. His evidence was that he needed about $1,000 of that money to pay for the hire car. There was also evidence that he had spent some money on purchasing petrol and food for the trip.

[10] The police found a pair of black pants on the rear seat of the vehicle with $21.80 in coins and some brown paper in the pocket. The brown paper had the word "Armaguard" printed on the paper. The appellant in his evidence was unable to provide any explanation of how he might have innocently obtained the coins in such paper rolls. He simply said that he had never seen that paper before.

[11] When arrested the appellant had a number of bruises to the side of the knee and the underside of his forearm which the Crown submitted to the jury were caused by his fall inside the Kentucky Fried Chicken shop.

[12] One of the victims described one of the offenders, allegedly the appellant, as having blue eyes, whilst another described the eyes as black and brown. The evidence was that the appellant had green eyes. One of the victims saw the face of one of the robbers for two or three seconds and drew a picture of him but was unable to identify the appellant from a photo board. Indeed he indicated that faces of two men who are not the appellant were similar to that of the robber.

[13] The appellant claimed in evidence at the trial that he had lent the rented Commodore to a friend named William Phillips on 2 March 2011 and he only got the car back when he went to pick it up from the location near the Tippett family home on the following day. However when stopped in the car by police the following day and told that they suspected it was used in a robbery, he did not take the opportunity to mention that he had lent the car to a friend. He was unable to provide any details about Phillips, other than saying that he lived on the Gold Coast. He claimed that he had never made a call to Phillips on his mobile phone, nor had he received a call from him. He claimed that he telephoned Phillips on the morning of 3 March when he was at the Northlakes Shopping Centre from a public phone because he had forgotten to take his mobile phone. Yet the centre was only a short distance from where he claimed he left his phone and there was no apparent reason why he would make such a call from a public telephone. The Crown also submitted that it was a remarkable and very suspicious coincidence that

Mr Phillips had chosen to leave the car at a location near the home of the Tippett family for no apparent reason.

[14] A phone call reporting the robbery was made at 10.48 pm immediately after the robbery. Telephone records proved that the appellant made six calls between 10.56 pm and 10.59 pm to Holden before he finally got through to him at 11.12 pm. The prosecution case was that the appellant was desperately wanting Holden to come and pick him up from a location where the rented vehicle had been left after the robbery because he was worried that the Commodore was being sought by the police. There was evidence that a lollipop girl, Miss McGrath, was working on the intersection of Rapid Creek Road and the road leading to Progress Drive and Nightcliff because there were problems with the traffic lights which were being changed. Her evidence was that a red Commodore had been stopped for between two to four minutes and then after it left it turned down either Progress Drive or continued straight on towards Nightcliff. Because of the behaviour of the driver, she made a note of the registration number of the vehicle which as it turned out was inaccurate but nevertheless very close to the actual number.

[15] The appellant's evidence was that at about 10.15 pm or 10.25 pm he had telephoned his girlfriend Ms Purcell and had arranged to pick her up from an address in Enterprise Street, Anula. In order to do this he had borrowed Frank Holden's Prado and they drove down to Casuarina Beach. After parking the car in the beach area they walked to the beach where they stayed for quite some time. As they left, the appellant rang Holden because he was

hungry and he was going to pick up some food. The appellant said that he rang Holden's number on quite a few occasions and eventually he managed to speak to him and asked if either he or Tippett wanted anything to eat. He said he was advised to get some food and they then went to McDonalds at Casuarina where food was purchased. After that, he stopped at a service station and went inside. Whilst inside he rang Holden again to see if they wanted any iced coffee or cigarettes. Whilst he was in the service station he also rang Ms Purcell who was in the car. He explained that it was his practice to ring her even though they were in close proximity and say things like "miss you bub" in order to make her laugh. He then returned to Holden's place with Ms Purcell.

[16] Ms Purcell also gave evidence that on that night she was picked up by the appellant at around 10.30 pm or 11.00 pm and they went for a drive down to the beach and then went straight back from there to Holden's place. She confirmed that they travelled in either a Pajero or a Prado, and that it was Frank Holden's car. She was unable to recall whether they had gone and bought any food that night because she said she was "pretty intoxicated" but that they could have. She was also unable to remember receiving any telephone calls that night from the appellant. There was however evidence that the appellant had telephoned her on several occasions.

[17] The main Crown witness was Holden who said that on the evening of 2 March 2011 the appellant and Tippett were at his home. They went out at some time in the late evening. He did not know how they left although they

did not take his Prado vehicle. Later he received a phone call to pick them up from a location near the Tippett home. He said that he went to that location and he took them back to his own place. The appellant then borrowed Holden's car to pick up his girlfriend. He said that the following day he drove the appellant to a location near Tippett's place to pick up the red Commodore which the appellant had rented sometime before. He also gave evidence that he lent the appellant $300 and that as far as he knew the appellant drove to Katherine.

[18] The prosecution sought to have Holden declared a hostile witness on the basis of two statements he had made to police in which he stated that when he picked up the appellant and Tippett from Tippett's house the appellant had said that "No, we weren't at the Beachfront, we just fucked up big time" and Tippett said "I was all calm, but you were freaked out" and that subsequently they had told him that they robbed a "KFC".

[19] In a voire dire in the absence of the jury, Holden admitted making these statements to the police, and also admitted to confirming them on oath at the committal proceedings, but he claimed that he felt intimidated by the police and in a state of "duress". He denied that any admissions had in fact been made by Tippett and the appellant to him. The trial judge concluded that Holden was an adverse witness, but in the exercise of his discretion his Honour decided it would not be appropriate to permit Holden to be cross-examined about his prior statements in front of the jury, bearing in mind that those statements could only be used to discredit him and not as evidence of

admissions of guilt. However during cross-examination by defence counsel more evidence was elicited from Holden that was directly inconsistent with the prosecution case. Counsel for Tippett at the trial got Holden to agree that Tippett was with him whilst he watched a movie that started at 9.30 pm and did not finish until midnight. Counsel for the appellant got Holden to agree that the appellant did not leave his home until 10.45 pm when he left in Holden's Prado. The trial judge reconsidered his initial ruling and allowed the prosecution to cross-examine Holden in front of the jury about his statements to the police in order to undermine his credibility.

[20] In cross-examination by the prosecutor, Holden admitted to making the statements to police. He claimed that some parts of what he told the police were not true, including the making of the alleged admissions by the appellant and Tippett that they had robbed a KFC, but he consistently said that it was true that the appellant and Tippett had left his home in the hire car and that it was true that the appellant said when he picked them up "No, we weren't at the Beachfront, we just fucked up big time" and Tippett said "I was all calm, but you were freaked out". When cross-examined by defence counsel he asserted in general terms that what he told the police was false, but he did not clearly retract his account about the sequence of events or what the appellant and Tippett said when he picked them up. He also gave evidence that the appellant had told him he had lent the rented Commodore to somebody. The jury were directed that they could use Holden's evidence and responses to prosecution questions about the

sequence of events and what the appellant and Tippett said when he picked them up.

[21] Tippett did not give evidence at the trial.

Fresh evidence

[22] On 6 October 2011, Miguel Da Silva, a prisoner at Darwin Correctional Centre, signed a statutory declaration confessing that he was the person who accompanied Tippett and committed the robbery at the KFC at the time in question. He was subsequently interviewed by the appellant's solicitor Mr Phelps on 28 October 2011 at the prison. That interview was very brief and was not recorded. On 30 November 2011 a formal interview was conducted which was tape recorded and subsequently transcribed. The transcript of that interview was tendered at the hearing of the appeal and became exhibit A1. On 22 November 2011 Mr Phelps also interviewed Tippett briefly at the Darwin Correctional Centre. On 5 December 2011 he also made a tape recording interview with Tippett which was transcribed and tendered as exhibit A2. Tippett also agreed that the person who committed the robbery with him was Miguel Da Silva.

[23] Da Silva subsequently swore an affidavit on 28 October 2011 and was interviewed by the police who conducted a lengthy record of interview with him on 17 January 2012. The appellant also swore an affidavit on 20 December 2011 in which he admitted that some of the evidence which he

gave at his trial was a lie. In particular he said that the vehicle had not been lent to William Phillips but he had lent it to Maximillian Tippett. He said that he also lied about giving $150 of the amount of $300 that he had received from Holden to Tippett in order to protect Tippett. Otherwise he said that the rest of the evidence that he gave at his trial was true. Tippett swore an affidavit on 2 February 2012 providing brief details in general support of the allegation that it was Da Silva and not the appellant who had accompanied him on the robbery. A short affidavit was also filed by Da Silva sworn and affirmed on 13 February 2012 clarifying further details of material which he had previously provided.

[24] During the hearing of the appeal Da Silva, the appellant and Tippett all gave evidence and were cross-examined at some length.

The contentions of the parties

[25] The principal contention of Mr Odgers SC of counsel for the appellant was that regardless whether the evidence was fresh evidence or new evidence the Court ought to find that the evidence was of sufficient cogency to establish the appellant's innocence or at least to establish that the Court ought to entertain reasonable doubt as the appellant's guilt, and that accordingly the verdict of guilty should be set aside and the appellant discharged. Alternatively it was submitted that if the evidence did not have that quality the evidence of Da Silva and Tippett was fresh evidence which was such that, if it had been given at the trial in the context of the evidence at the

trial, there was a significant possibility that the jury, acting reasonably, would have acquitted the accused, and therefore a new trial should be ordered.

[26] The respondent's position was that the evidence of both Tippett and the appellant was not fresh evidence and that the evidence of Da Silva lacked credibility, lacked plausibility and was not capable of belief. Mr Usher argued that there were such discrepancies in the accounts given by Da Silva and Tippett as well as between their accounts and the evidence given at the trial that the Court should infer that Da Silva and Tippett had together with the appellant conspired to engender a false story which should not be accepted.

The legal test

[27] The principles to be applied in a case like this were summarised by Kirby J in *R v Abou-Chabake*[1] as follows:

- "First, a distinction is made between "new evidence" and fresh evidence". Fresh evidence is evidence not available to the accused at the time of the trial, actually or constructively. Evidence is constructively available if it could have been discovered, or available at the trial by the exercise of due diligence.

- Second, great latitude must be extended to an accused in determining what evidence, by reasonable diligence, could have been available at his trial (*Ratten v The Queen* (at 512) per Barwick CJ).

[1] (2004) 149 A Crim R 417 at p427-428.

- Third, the Court is ultimately concerned with whether there has been a miscarriage of justice. The rationale for setting aside a conviction on the basis of new evidence or fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice. That evidence must be examined in the context of the evidence given at the trial (*Mickelberg v The Queen* (1989) 167 CLR 259 at 301; 43 A Crim R 182 at 210 per Toohey and Gaudron JJ).

- Fourth, the issue of whether there has been a miscarriage is to be approached on a number of levels, depending upon the order sought (whether a verdict of acquittal or a new trial), and the capacity of the new or fresh evidence to sustain the order sought.

- Fifth, where a verdict of acquittal is sought and the new evidence is of such cogency that innocence is shown to the Court's satisfaction, or the Court entertains a reasonable doubt as to guilt, the guilty verdict will be quashed and the appellant discharged. In such circumstances, it does not matter whether the evidence is fresh or simply new (*Ratten v The Queen* (at 518-519) per Barwick CJ; cf Gibbs CJ in *Gallagher v The Queen* (1986) 160 CLR 392 at 398-399; 20 A Crim R 244 at 248-249).

- Sixth, where the evidence does not have that quality, or where a new trial is sought, a number of issues arise. The verdict will be quashed and a new trial ordered only where the following questions are answered affirmatively:

    - Is the evidence fresh?

    - If it is, is it "credible" or at least capable of belief (*Gallagher v The Queen* (at 395; 246) per Gibbs CJ), or "plausible" (*Mickelberg v The Queen* (1989) 167 CLR 259 at 301; 43 A Crim R 182 at 210 per Toohey and Gaudron JJ)?

    - If it is, would that evidence, in the context of the evidence given at trial, have been likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused (*Gallagher v The Queen* (at 140; 257) per

Brennan J) or, if there is a practical difference, is there a significant possibility that the jury, acting reasonably, would have acquitted the accused (*Gallagher v The Queen* (at 402; 251) per Mason and Deane JJ)? See *Mickelberg v The Queen* (at 301-302; 210-211) per Toohey and Gaudron JJ.

- Seventh, the concept of a miscarriage of justice is not an abstract investigation of truth (cf and Inquiry under s 474D *Crimes Act 1900*). It is an investigation in the context of the adversarial nature of a criminal trial. Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked rather better (*Ratten v The Queen* (at 517)).”

[28] Both counsel submitted that these propositions accurately express the law and we respectfully agree.

Discussion

[29] At the conclusion of the hearing the Court unanimously decided that the quality of the evidence was not such as to warrant a verdict of acquittal but that it was, in the context of the evidence given at the trial, of a sufficient quality that there was a significant possibility that the jury acting reasonably would have acquitted the accused and we accordingly allowed the appeal, quashed the conviction and ordered a new trial.

[30] In those circumstances it was not necessary for the Court to consider the appeal against sentence.

[31] We said that we would provide our reasons at a later time. These are those reasons.

[32] It is common ground that the evidence of Da Silva is fresh evidence. We also think the evidence of Tippett is fresh evidence bearing in mind that he was not a compellable witness in the appellant's joint trial with Tippett. There was some confusing evidence by Tippett to suggest that the appellant had been told before the trial of the identity of Da Silva but the evidence as a whole satisfies us that that was not so. We therefore found that the evidence of both Da Silva and Tippett is "fresh" evidence.

[33] The evidence before the Court of Criminal Appeal is that Da Silva was arrested on 4 March 2011 for breach of a domestic violence order and was remanded in custody on the same day. He believes he is due to be released sometime between mid August or November 2013 and he had no other charges outstanding against him. There is no evidence that he had previously been involved in a robbery. There is no evidence that Da Silva has anything to gain by admitting to a robbery which he did not commit. No motive has been established to explain why Da Silva would give false evidence. Da Silva was made aware by the police of the kind of sentence which the appellant is serving and he is also aware that his confession was likely to result in a lengthy term of imprisonment for him, although his evidence is that he believes that his sentence would not be anywhere near the term imposed on the appellant, particularly as he intends to plead guilty and he does not have any prior convictions for armed robbery.

[34] The thrust of the submissions made by Mr Usher for the Crown relied upon discrepancies in the evidence as well as the inherent improbability of the story given by Da Silva and Tippett in respect to three areas:

- the circumstances under which they first met and later met in the days immediately prior to the robbery;
- the circumstances under which they met on the eve of the robbery; and
- the circumstances concerning the evidence of Da Silva after the robbery.

[35] As there is to be a retrial we do not think it is appropriate that we canvass this evidence in detail. Suffice it to say that on the whole of the evidence, it would be open to a reasonable jury to take the view that each of these circumstances could be satisfactorily explained.

[36] So far as the circumstantial evidence was concerned, we considered that the evidence of Da Silva and Tippett, if believed, provided a satisfactory explanation for the circumstances under which the paper with the word "Armaguard" was found in the appellant's pants by the police in the rear of the red Commodore. There was evidence from Tippett that he had borrowed the red Commodore and that he had supplied the clothes which were used in the robbery. The other circumstantial evidence was not particularly strong.

[37] The principal witness against the accused at the trial was Mr Holden who gave highly inconsistent and contradictory evidence. His evidence was

unreliable in a number of respects. The jury was entitled to disbelieve him and reject his evidence. If they rejected his evidence, it is likely that they would have found the appellant not guilty. In the light of the fresh evidence of the appellant, Da Silva and Tippett, there is a significant possibility that a reasonable jury would reject the evidence of Mr Holden and find the accused not guilty.

[38] It was put that the discrepancies in the versions given by Da Silva and Tippett raised a strong inference of collusion. We did not consider that the jury acting reasonably would necessarily have thought so.

[39] Having seen and heard both Da Silva and Tippett cross-examined we formed the impression that their evidence as a whole was capable of belief and therefore there was a significant possibility that, in the context of the evidence given in the trial, the jury acting reasonably could have acquitted the accused.

[40] However, we did not consider the evidence went so far as to satisfy us there was evidence of such cogency that we ourselves entertained a reasonable doubt as to the appellant's guilt. This was partly because of the extent of some of the discrepancies in the fresh evidence, but more importantly because (1) an area of the evidence which we thought was critical to the circumstances under which Da Silva became involved in the robbery was lacking in considerable detail; and (2) no evidence was led from Tippett about the circumstances in which he decided to commit and plan the robbery

and choose Da Silva, whom he had only met once some two to three years before the robbery, to be his accomplice.
