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| PARTIES: | PETER JOHN PITCHER |
| | v |
| | ROBIN LAURENCE TRENERRY |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA8 of 1997 |
| DELIVERED: | 23 May 1997 |
| HEARING DATES: | 21 May 1997 |
| JUDGMENT OF: | Mildren J |

**REPRESENTATION:**

*Counsel:*

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| Appellant: | Mr R. Jobson |
| Respondent: | Mr R Noble |

*Solicitors:*

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| Appellant: | Withnall Cavanagh Maley |
| Respondent: | Office of the Director of Public Prosecution |

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| Judgment category classification: | C |
| Judgment ID Number: | |
| Number of pages: | 9 |

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

No. JA8 of 1997

BETWEEN:

**PETER JOHN PITCHER**
Appellant

AND:

**ROBIN LAURENCE TRENERRY**
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 23 May 1997)

The final question to be determined in this appeal is based on s176A of the *Justices Act,* which requires this Court to admit further evidence not before the learned Magistrate in certain circumstances.

Section 176A(1) provides:

> "Where evidence is tendered to the Supreme Court, that Court shall, unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, admit that evidence if -

(a) it appears to it that that evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal;

(b) it is satisfied that that evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it; and

(c) it is satisfied that the appellant has complied with the requirements of subsections (2) and (3) in respect of that evidence."

There are 4 limbs which the appellant has to establish before new evidence can be received under s176A:

(1) The appellant must have given written notice to the respondent to the appeal of the evidence to be tendered at least 7 days before the hearing of the appeal: see s176A(2). That was not complied with, but an adjournment of the hearing of the appeal was granted by consent to enable the appellant to so comply. There is now no dispute about non-compliance with s176A(2).

(2) The appellant must satisfy this Court that there is a reasonable explanation for failure to advance the evidence in the Court of Summary Jurisdiction: (s176A(1)(b)).

(3) The appellant must show that the new evidence is likely to be credible.

(4) The appellant must show that the new evidence would have been admissible in the Court below.

If the appellant establishes the 4 matters referred to above, the new evidence must be admitted unless the Crown establishes that the evidence, if received, would not afford a ground for allowing the appeal.

In order for the appellant to establish the 4 matters referred to, the Court will receive evidence either on oath or by affidavit to determine these matters as a preliminary question. It is open to the respondent to call evidence in rebuttal. This evidence is received only to decide the question of the admissibility of the evidence.

If the evidence is admitted, what flows thereafter will depend upon the circumstances. The Court would not be bound to proceed to hear the appeal as a hearing de novo. It may do so; alternatively, it may allow the appeal, quash any conviction or sentence suspended, and remit the case back to the Court of Summary Jurisdiction.

The first question is whether there is a reasonable explanation for the failure to adduce the evidence in the Court below. This is a question of fact. In *Smith v Torney* (1984) 29 NTR 31 at 33, Muirhead J said that it would be wrong to attempt criteria of reasonableness, but the test in the case of an unrepresented defendant may be different to the situation where the defendant was legally represented. At p34, his Honour approved and adopted a passage from the judgment of Hogarth J in *Bean v Considine* [1965] SASR 351 at 359,

where that learned judge said that the court should be liberal in its interpretation of what amounts to a reasonable explanation, and that inexperience in court procedure and the age of the appellant may be relevant factors. There remarks were adopted by Muirhead J in the context of a case involving an unrepresented defendant in the Court of Summary Jurisdiction.

In this case, the facts are that the appellant claims to have no memory of the incident with which he was charged. However, he knew the broad thrust of what was alleged against him soon afterwards. He also knew shortly after he was charged that his friend, Loane Knox, was present and with him at the time, did not see the appellant commit the offence with which he was charged, and was prepared to give evidence on his behalf. I accept that the appellant at that stage knew only that Mrs Knox was a potential witness on his behalf, and was not in a position to judge how valuable she might be to him.

The accused sought legal aid, which was granted to him on 17 September. The offence was alleged to have been committed on 3 May 1996. Somewhere before December 1996 the appellant initially spoke to a Miss Cox, an experienced criminal lawyer employed by the Commission. At that stage, neither he, nor his advisers had seen the proofs of evidence to be relied upon by the Crown. He was advised to contest the matter until those proofs were available. On 28 August, the matter had been set down for hearing on 14 January 1997. He had been told on 17 September that a Mr Beckett was the

managing practitioner in respect of his matter. He did not tell anyone about what he knew of Mrs Knox.

The appellant did not receive the Crown's witness statements until about 21 December. He made an appointment to see Mr Beckett sometime after that, and attended upon Mr Beckett on 6 January 1997. I am satisfied that this was the first occasion he mentioned Mrs Knox to his solicitors.

I find that on that date he indicated to Mr Beckett that Mrs Knox might be a potential witness. I am satisfied that the arrangement was that the appellant undertook to have Mrs Knox brought to his solicitors to be interviewed and to have her available to give evidence at the trial on 14 January. The appellant had known for some months that this was the trial date. He also knew on 6 January that Ms Morris would be representing him at the trial.

The appellant, who lived in the Batchelor area, returned to Batchelor on or shortly after Monday 6 January. He made no attempt to contact Mrs Knox. He claims to have had transport difficulties, but he knew her telephone number. He expected to see Mrs Knox on Friday 10 January at the Rum Jungle Club. He claims to have seen her that evening and arranged with her that he would telephone her on the evening of Monday 13 January if she was needed. He did not ask her to go to Darwin on Monday 13th with him to see his solicitors although he had an appointment to see Ms Morris, who was his

counsel, that day. He claims he did not ask her to go with him because neither he nor she could afford the cost involved. I note Mrs Knox lived in Batchelor. She had a telephone and access to a car, and worked as a cleaner. She did not claim to be so impoverished that she could not afford the trip, or would not have telephoned Ms Morris or Mr Beckett if asked to do so. Another reason advanced was that the appellant said he was doubtful whether the case would go ahead. He had been told that the complainant was living in Western Australia and would probably not turn up for the hearing, in a casual conversation by a Police officer who apparently had nothing to do with this particular case. He did not mention this to his solicitors.

On Monday 13 January he met Ms Morris. He told her about Mrs Knox, but again I find that the information given to Ms Morris was not encouraging. Nevertheless Ms Morris decided she should try to speak to Mrs Knox. Attempts were made to telephone her at home. She was not at home, because she was at work. I find that the appellant knew that this would be so. Mrs Knox had told him that she would not be home until about 8.30 that evening.

The appellant's evidence is that he tried several times that evening, up to 10pm, to ring Mrs Knox at her home. He clearly had the correct telephone number. He claims she did not answer. Mrs Knox said she was at home from shortly after 9pm. There is nothing to suggest she would not have heard a telephone or have been unable to answer it had a call been made after she got

home. I do not believe that the appellant tried to telephone her after 9pm. Even if he had made a call as late as 10pm, it was not unreasonable not to continue trying that evening until at least 11pm, or early the following morning. He did neither. Ms Morris had impressed upon him that he should continue to follow up Mrs Knox and arrange for her to come to Darwin for the hearing.

The next morning Ms Morris tried to ring Mrs Knox sometime between 8.15 and 9.30am, and again from the Court house some time later. She could not contact her. Unfortunately Mrs Knox was not then at home.

The question of an adjournment of the trial was considered by Ms Morris. It was her professional judgment that an adjournment would be refused, and that the application might reflect adversely upon the appellant. The appellant did not insist on the adjournment application being made. He accepted his counsel's advice. The trial proceeded that day. Mrs Knox was not called to give evidence. The case was completed on 14 January and the appellant was convicted.

I have not accepted the evidence of the appellant where it conflicted with other evidence. I found him to be an unsatisfactory witness. I consider that he did not have as clear a memory of the events as did the other witnesses. Ms Morris was able to refresh her memory from file notes, and was a credible

witness. I have also accepted Mrs Knox's account on this issue and I prefer her evidence on this issue to that of the appellant wherever there is conflict. Mr Beckett was not cross-examined.

I am not satisfied that there is a reasonable explanation for Mrs Knox not being available to give evidence. The failure to have his legal advisers speak to Mrs Knox was entirely the appellant's fault. He was not justified in assuming that the trial would probably not proceed, and not justified in failing to make any real efforts to have Mrs Knox spoken to by his solicitors before the trial. Such efforts as he did make were not reasonable. I bear in mind that he is 29 years of age and has spent 3 years at University doing a combined Law/Arts degree. He is not unintelligent. Further, a conscious decision was made by his counsel not to seek an adjournment, and he accepted that advice at the time. I do not consider that Ms Morris can be criticised for making that decision or for the advice she gave to the appellant. On what she knew then, the application was most unlikely to have been granted.

In my opinion it has not been shown that there is a reasonable explanation for the failure to call Mrs Knox. Had more persistent efforts been made even as late as after 9pm on Monday 13 January, I am satisfied that Mrs Knox would have been available. By then, the matter was urgent as the appellant well knew, but I am not satisfied that he made any attempt to contact Mrs Knox that evening.

Accordingly the evidence is not admissible. Ground 4 is therefore not made out, and the appeal is dismissed.

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