CITATION:	*Kinkade v The Queen* [2018] NTCCA 4
PARTIES:	KINKADE, Nathan Gerrarde v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA 6 of 2017 (20818980)
DELIVERED:	13 March 2018
HEARING DATES:	1 March 2018
JUDGMENT OF:	Grant CJ, Blokland J and Mildren AJ

CATCHWORDS:

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL

Applicant had previously prosecuted unsuccessful appeal against conviction – no right of appeal beyond that granted by the relevant statute – on proper examination of the statutory provision there is a right to only one appeal – applications dismissed.

Victims of Crime Assistance Act (NT) s 64
Criminal Code (NT) s 410, s 411

A v The Queen [2012] NTCCA 9, *Burrell v The Queen* (2008) 238 CLR 218, *Director of Public Prosecutions (NT) v Moseley* (2013) 275 FLR 140, *Grierson v The King* (1938) 60 CLR 431, *R v Edwards* (No 2) [1931] SASR 376, *R v GAM (No 2)* (2004) 9 VR 640, referred to.

D Mildren, *The Appellate Jurisdiction of the Australian Courts* (2015 Federation Press).

REPRESENTATION:

Counsel:

Applicant:	Self-represented
Respondent:	MW Nathan SC

Solicitors:

Applicant:	Self-represented
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	8

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

Kinkade v The Queen [2018] NTCCA 4
No. CA 6 of 2017 (20818980)

BETWEEN:

NATHAN GERRARDE KINKADE
Applicant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND J and MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 13 March 2018)

THE COURT:

[1] The applicant seeks an extension of time within which to bring an appeal and leave to appeal against a conviction which was entered on 21 October 2011.

[2] The applicant was charged with committing offences of a sexual nature against the daughter of his *de facto* partner over the period between 2002 and 2007. The matter originally ran to trial in August 2009. The applicant was represented by counsel during the course of the trial. The applicant was found guilty of a number of those offences.

[3] The applicant brought an appeal against those convictions in which he represented himself. Counsel from the private bar appeared as *amicus curiae*. The appeal was heard in October 2010 and this court ordered a retrial.

[4] By fresh indictment dated 3 December 2010 the applicant was charged with nine sexual offences against the juvenile complainant. The new trial proceeded in September and October 2011. Again, the applicant represented himself and counsel from the private bar appeared as *amicus curiae* for the purpose of cross-examining the complainant.

[5] On 10 October 2011, the jury found the applicant guilty of counts 3 to 9 inclusive on the indictment. The jury acquitted the applicant on count 1 and was unable to reach a verdict in relation to count 2.

[6] On 21 October 2011, the trial judge sentenced the applicant to imprisonment for 12 years backdated to 25 March 2010. A non-parole period of eight years and six months was fixed.

[7] In November 2011, the applicant lodged a notice of appeal against conviction on the grounds that a prosecution witness had been coached and that the jury failed to take account of the judge's summing up of the defence case. Following an extended case management process, the matter proceeded to hearing before this court on 2 April 2011 on the following grounds:

(a) that the jury verdict was unreasonable and could not be supported having regard to the evidence, including medical evidence concerning a sexually transmitted infection carried by the complainant;

(b) that the complainant lied to police about a naked photograph of her on the applicant's mobile phone;

(c) that the trial judge should not have allowed the Crown to make a closing address in the circumstances and, having done so, should not have gone on to summarise the evidence in his summing up to the jury;

(d) that the trial judge erred in refusing to admit evidence disclosing that the complainant had committed offences while living with her father, at a time after the events giving rise to the charges on indictment;

(e) that there was no basis to sustain a conviction on counts 8 and 9 because on the complainant's evidence the family was living at an address other than that particularised in the indictment at the time those offences were alleged to have been committed;

(f) that police lied concerning a DVO made against the complainant's mother; and

(g) that Detective Megan Duncan (and other police) coached the complainant to give evidence contrary to the applicant's interests.

[8] On 17 April 2012, the Court of Criminal Appeal delivered its decision in *A v The Queen* [2012] NTCCA 9, variously refusing leave in relation to certain proposed grounds for which leave was required and dismissing other

grounds of appeal brought by right. Those orders were subsequently perfected.

[9] On 23 March 2017, the applicant made an application for an extension of time within which to bring a further appeal, and an application for leave to appeal. A prosecutor from the office of the Director of Public Prosecutions made an affidavit in response to the application for leave on 21 April 2017.

[10] On 23 June 2017, the applications were refused by a single judge. On 27 June 2017, the applicant made application under s 429(2) of the *Criminal Code* for the matter to be determined by the court constituted by three judges.

[11] The applicant is presently incarcerated and self-represented. During the course of the hearing to settle the appeal papers before the Registrar on 7 September 2017, the applicant expressed the expectation that the Court would prepare the appeal papers for him. The matter was subsequently referred to a judge for case management.

[12] On 13 September 2017, a further directions hearing was conducted in relation to the application. During the course of the directions hearing the applicant indicated that his proposed grounds of appeal were:

(a) that there were various irregularities in the evidence arising from the fact that he only had one testicle; and

(b) that the trial judge failed to exclude evidence from the complainant's sister of a conversation in which the complainant told her sister that the applicant had touched the complainant's breast.

[13] During the course of the directions hearing the applicant also indicated the documents on which he intended to rely in the prosecution of his application for leave to appeal and extension of time.

[14] The applicant subsequently sought the production of notes taken by investigating police officers during the course of the investigation. The office of the Director of Public Prosecutions produced a statutory declaration made by Detective Megan Duncan for the purposes of the original prosecution file with her investigation diary notes attached.

[15] On 21 February 2018, the applicant served a subpoena on the Director of the Crimes Victims Services Unit requiring the production of an application for victim's assistance made by the complainant's sister. By summons and supporting affidavit filed on 23 February 2018, the Director of the Crimes Victims Services Unit made application to have that subpoena set aside on the basis of s 64 of the *Victims of Crime Assistance Act* (NT) and that there was no legitimate forensic purpose for the issue of the subpoena.

[16] Subject to exceptions not presently relevant, the statutory provision is to the effect that a person must not be required to produce in any civil or criminal proceeding a document prepared for an application for financial assistance under the legislation; and that such documents are not admissible as

evidence in any such proceeding. On 26 February 2018, the subpoena was set aside on the basis of the statutory provision.

[17] During the hearing of the applications on 1 March 2018 the applicant pressed four grounds of appeal, three of which were additional to the grounds originally notified. The four grounds were:

(a) that the applicant had not been provided prior to trial with the diary notes prepared by the investigating police officers which would have disclosed inconsistencies in the evidence given by those officers at trial suggestive of the fact that the complainant and her sister had been coached by police officers, and that police had maliciously prosecuted a domestic violence order against the applicant's *de facto* spouse because she had threatened to make a complaint against them;

(b) that investigating police had conspired with the Crown prosecutor and the Solicitor for the Northern Territory to procure an unlawful payment of $10,936.10 to the complainant's sister under the crimes compensation legislation in order to induce her to fabricate inculpatory evidence;

(c) that at no point in her statements leading up to trial had the complainant made mention of the fact that the applicant had only one testicle, and during the course of an adjournment in the complainant's evidence at trial the Crown prosecutor had coached the complainant to give false evidence that she was aware of that matter; and

(d) that the trial judge had erroneously excluded evidence disclosing that the complainant had committed offences while living with her father, at a time after the events giving rise to the charges on indictment.

[18] It was not readily apparent from Detective Duncan's notes or the applicant's submissions how it is that the diary notes disclose the matters asserted in ground (a) above. Ground (b) was premised on the misapprehension that a payment may only be made under the crimes compensation legislation where there has been a criminal conviction. Charges had initially been laid alleging offences of a sexual nature in relation to the complainant's sister as well. Those charges were subsequently withdrawn. The award under the crimes compensation legislation was open to be made following a finding on the balance of probabilities that the complainant's sister was a victim of crime. Ground (c) was based on the applicant's assertions and suspicions, unsupported by evidence. Ground (d) was dealt with by this court in the first appeal.

[19] Leaving aside the merits of the applications for leave and an extension of time, there is a threshold question of whether the applicant may now bring a second appeal against conviction.

[20] The right to appeal is a creature of statute. The statutory provisions in Australia are based upon the *Criminal Appeal Act* 1907 (UK). Since the introduction of those provisions in Australia, the High Court, and intermediate courts in other jurisdictions in which the issue has arisen, have

consistently maintained the position that there is no right of appeal beyond that granted by the relevant statute, and on a proper examination of the statutory provision there is a right to only one appeal: see *Burrell v The Queen* (2008) 238 CLR 218; *R v GAM (No 2)* (2004) 9 VR 640; *Grierson v The King* (1938) 60 CLR 431; *R v Edwards* (No 2) [1931] SASR 376; *Director of Public Prosecutions (NT) v Moseley* [2013] NTSC 8; 275 FLR 140 at [36]-[37]; and see generally D Mildren, *The Appellate Jurisdiction of the Australian Courts* (2015 Federation Press) at [8.67]-[8.77].

[21] The textual basis for these decisions is that a provision allowing that "the convicted person may appeal against the conviction" is properly construed to mean one appeal only. That same reading governs the operation of ss 410 and 411 of the *Criminal Code* (NT). Unlike the position in South Australia, the Northern Territory legislature has not provided for a second or subsequent appeal against conviction in certain circumstances: see *Statutes Amendment (Appeals) Act 2013* (SA).

[22] For this reason, the application for an extension of time and the application for leave to bring a second appeal against conviction are dismissed. During the course of the hearing of these applications the applicant also sought to make an application for bail pending the outcome of the appeal. Given the result on the substantive question, that application is necessarily refused.

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