Grigor v Rigby [2008] NTSC 37

PARTIES:	GRIGOR, JAMES ANTHONY
	v
	RIGBY, KERRY LEANNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 19 of 2008 (20626867)
DELIVERED:	15 September 2008
HEARING DATES:	10 July 2008
JUDGMENT OF:	MILDREN J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

STATUTUES:
Criminal Code, s 132

CITATIONS:
Followed:
M v The Queen (1994) 181 CLR 487

Referred to:
CTM v The Queen (2008) 247 ALR 1
Edwards v The Queen (1993) 178 CLR 193
Osland v The Queen (1998) 197 CLR 316
Zoneff v The Queen (2000) 200 CLR 234

REPRESENTATION:

Counsel:

Appellant:	I Rowbottom
Respondent:	J Lawrence

Solicitors:

Appellant:	Withnalls
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID number:	mil08428
Number of pages:	15

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

Grigor v Rigby [2008] NTSC 37
No. JA 19 of 2008 (20626867)

BETWEEN:

JAMES ANTHONY GRIGOR
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 15 September 2008)

[1] This is an appeal against a conviction of one count of exposing a child under the age of 16 to an indecent act contrary to s 132 of the Criminal Code.

[2] The only ground of appeal is that the finding of guilt in respect of the charge was unsafe and unsatisfactory.

[3] The prosecution case was that on 15 July 2006 at approximately 4:30 pm the appellant attended at C-Max cinema complex at Palmerston, where he entered cinema 2 to watch a movie, “Superman Returns”. At the time two children, SJP and AMZ, who were both 10 years of age, were sitting in the theatre. There is evidence that they were sitting in row D. At some time

after the movie had started a person alleged by the Crown to be the accused sat down in row D one seat away.

[4] According to the evidence of AMZ, this person put his right leg on the seat in front of him and then turned his body left towards the girls and was looking at them in a strange manner. AMZ, who said she was seated furthest away from the man and to the man's right, glanced at the man and saw that he had his penis exposed out of his fly. She said something to SJP, who looked across at the man and also saw his penis exposed out of the top of his pants, although his fly was undone. The two children decided to leave the theatre immediately. After leaving the theatre, according to the evidence of AMZ, they met a friend of SJP in a park and told her what they had seen. After that they ran to SJP's home. According to SJP's mother, LMW, they both arrived home at about 6:00 pm. They came running through the door, one talking on top of the other in a very excited or nervous fashion. She told them to settle down and to tell her what had happened. They made a complaint to LMW of what they saw. LMW's partner, BMP, was at home. He overheard the conversation between the children and LMW. He said that he quickly put his runners on and his shirt because he was told that the movie was not over, ran out to his car and drove to the cinema complex where he parked his vehicle and waited outside.

[5] The evidence of LMW was that she called the police who arrived approximately 10 minutes later at her home. The police officers, Constable Riesenweber and Constable Monk, gave evidence that they attended at the

home and separately spoke to the two children who each gave a description of the person concerned. The police officers then went to the cinema and waited outside for the occupants to come out.

[6] The evidence was that the home of LMW was in very close proximity to the theatre. There was no evidence led of precisely how close it was. BMP estimated the distance at about 500 metres and he estimated that he arrived at the cinema about five minutes after the girls had arrived home.

[7] After BMP arrived he spoke to an employee at the C-Max theatre who reported the matter to his duty manager, Mr Papzoglou, who also gave evidence. After the matter had been reported to him, Mr Papzoglou went into the cinema to establish how many people were in the cinema at the time. According to him there were approximately 8–10 people sitting in the theatre. After he had done this he telephoned the police.

[8] According to the evidence of BMP, nobody left the theatre whilst he was there. The police arrived shortly afterwards and they waited until the audience came out of the theatre. The number of persons who came out of cinema 2 was estimated by Constable Riesenweber as between 20 and 50. BMP's estimate was about 20.

[9] The appellant was the only person who fitted the descriptions of the alleged offender and he was spoken to by Sergeant Jordan, another police officer who had attended the cinema in the meantime. He estimated the number of persons who came out of cinema 2 as between 10 and 15 people.

[10] Sergeant Jordan's evidence follows:

> "I asked him to stop, asked him if I could have a chat with him. I said to him that he fitted the description of somebody we want to speak to. I said to him – I asked him if I could get his details. He said, yes. He asked what did the person who we were looking for, what did he do. I told him that the allegation was that a male had gone into the cinema and sat next to 10 year old girls and unzipped his fly and played with himself, and he said words to the effect of "Oh fuck. It wasn't me." I said to him – and he said he's got a rash and his scratches it and its mites or something and then I said words to the effect that, "Mate, did you unzip your fly and flop your dick out?" And he said, "Fuck no". I then said to him, "Do you mind coming down to the station so we can sort this out?" As I was leading him to the van I said to him, "Mate, if we need to get a photo would that be OK?" and he said, "Yeah that was OK" and he was then placed into the back of the police van and conveyed to Palmerston Police Station where he – I attended at the police station. He was put into an interview room. I contacted the Duty Superintendent at that time and explained to her what the circumstances were and that we may need some investigators and in discussion of that it was decided that we would arrest him."

[11] According to Sergeant Jordan, the appellant was then arrested and held in custody until he was spoken to by other police.

[12] Senior Constable Wilson was called to give evidence that he was present when a record of interview was conducted by Detective Senior Constable Alan Hodge. I will come to the record of interview later.

[13] At the trial evidence was also given by a registered nurse, Ms Havnen, who said that she was consulted by the appellant on 17 July 2006 concerning midges and insect bites to his groin, leg and arm. Her evidence was that there was no evidence of any bites that she could see, nor any evidence of any skin irritations.

[14] Evidence was also given by Mr Staunton that he did not see every single person who came out of the cinema on that day because he has to go into other cinemas and clean and do other things like that. He did recall one person coming out the cinema 2 whilst the film "Superman Returns" was playing. He said that it was difficult to say whether the person he saw came from out of cinema 2 because people would come out of all of the cinemas from time to time and he was not always able to say where they came from. He was not able to describe the person he recalled seeing.

[15] The police did not conduct a formal line up nor did they conduct a photo identification with either of the two children. No attempt was made to obtain any CCTV footage.

[16] The issue in the case was essentially whether or not the prosecution had proved that it was the appellant who was the person who the girls saw in the cinema exposing himself.

[17] The only other evidence as to identity was that AMZ, in cross examination, gave this evidence:

> "Q: The last time you saw him [the offender] was for those few minutes half way through the Superman film? – Yes
>
> Q: You never saw him again? – Except yesterday
>
> Q: Except for here in the Court and today of course? – Yes."

[18] In re-examination the prosecutor was permitted to conduct a dock identification. AMZ pointed to the accused and said that she was 100 per cent sure that he was the offender.

[19] Both SJP and AMZ gave evidence of a description of the offender. The learned Magistrate in his reasons said that if the prosecution case rested solely upon the descriptions he could not be satisfied on the basis of that evidence that the appellant was the person observed by the two complainants. There were, as the learned Magistrate observed, a number of discrepancies in the description of the appellant. In material respects the description did not match the clothing, age or hair of the offender when he was arrested.

[20] So far as the dock identification by the witness AMZ is concerned, his Honour said that he did not rely upon that because he was aware of the dangers of acting upon an in-court identification. The learned Magistrate was quite correct to reject that kind of evidence.

[21] The process of reasoning adopted by the learned Magistrate in convicting the appellant rested upon what the accused said in the record of interview. The accused did not give evidence. Without going to the record of interview in detail, suffice it to say that the appellant denied that it was him, denied that he was sitting in row D, denied that he had taken his penis out and exposed it to anybody, but admitted that he might have undone the zip or the

top button of his pants in order to scratch the itch caused by mites. The learned Magistrate's reasoning was as follows:

> "In my view, in the record of interview the defendant was very quick to proffer an explanation for what the two girls might have observed. That is, he was quick to put forward a hypothesis consistent with innocent conduct. It might be recalled from the evidence that when he was interviewed by one of the officers outside the cinema… he was again very quick off the mark to say that he was scratching himself.
>
> One really has to ask themselves if the defendant was not the male observed by the two girls, why did he consider it necessary to explain what he was doing? If indeed he was sitting up the back in the theatre and was nowhere near these two girls, then why bother? Why put forward an explanation which seeks to put an innocent complexion on what is said by the two girls to be of a more serious nature? There are, in my view, other difficulties with the statements made by the defendant in his record of interview. In my view, when critical questions were put to him, and again I would look to the visual record of interview, when critical questions were out to him, he turned to the padre who was present before answering.
>
> He was in fact directed by the interviewing police officers to respond to questions directly and in my view, throughout the record of interview at critical points, he was defensive. His denials were not definitive in my view and at the end of the day I form the view that the account that he gave was wholly unconvincing. There are other reasons for that conclusion. The defendant puts forward what can only be considered a fanciful explanation. He complained of having a rash. It would appear that he had that rash for about two months. It had been giving him hell, but he hadn't bothered to go and see a doctor about it. He hadn't received any medication for the complaint. However, and I think it is probably two or three days later, he attends upon a nurse at the barracks complaining of the rash and seeks to have some treatment for it.
>
> Significantly he was fairly, and I think again this is clear from the evidence, that he was anxious for the nurse to actually record the fact that he had a rash in that area. However, the telling part of course is that nurse discerned very little in the way of the rash that the defendant complained of and really, at the end of the day, the evidence of the nurse does not, in my view, support the hypothesis

> put forward by the defendant that he was suffering from a rash. In this particular case and I guess this is the irony of it, that on the face of the exculpatory statements really serves as a double edged sword and **they really, in my view, provide the link that is missing from the prosecution case** and what I am referring to there, of course, is the deficiencies in the circumstantial evidence relating to identity (emphasis mine).
>
> In the record of interview the defendant, when he had the allegations put to him, in my view, in a very unconvincing fashion said something along these lines, "Well, it's like, it's nice to know what you're talking about". However, the evidence indicates that that theatre, that earlier point in time, those very same allegations were put to him. So the defendant, in my view, did not serve himself well by responding in the way he did during the record of interview as if to express some surprise about what it was all about because at a previous time it had been put on notice what it was all about. In my view that demonstrated some caginess on the part of the defendant.
>
> The other thing about the exculpatory statement is that certainly has the defendant doing something in the groin area and although it is not the same as the conduct that is alleged by the two complainants, it goes someway towards their account. The account or the explanation given by the defendant in the record of interview, in my view, for the reasons I have given, incriminates the defendant. I don't accept the exculpatory statements. I don't accept the explanation given by the defendant."

[22] Subsequently on 5 March 2008 the learned Magistrate gave some further reasons for his decision. At that time he said:

> "In the record of interview, the allegation was put to him and he denied it but he proffered an explanation for what he was doing and he attempted to explain his conduct as if he were the person the two girls had observed one or two seats away from him and what I was trying to get across was that you can infer from the attempted explanation and the context in which he was giving that explanation, that he was the person that the two girls saw seated near him and in my view, that inference was strengthened by the suggestion that what they saw was his hand and not his penis. In fact, he suggested that it was his hand and not his penis. It was then later in the record of interview he says that he was in the back row and one can infer from that that he was not the person the two girls saw.

> So it is in that context that I was of the view that he was having the each way bet that I had referred to. What I didn't do and I had intended to do this, I overlooked this. I should have added that there is another interpretation of the record of interview though one that I don't believe is tenable when one closely examines the record of interview, and that interpretation involves the defendant at all times sitting up in the back rows and scratching himself in the groin area. Now, even if that interpretation was reasonably open on the record of interview, I think you can be safe to reject it.
>
> I do recall referring in my decision to the unlikelihood of there being two males meeting the same general description at the cinema at the same time engaging in activity in the groin and genital area. Furthermore, if is fact, and I think I referred to this, if in fact the defendant was up the back of the theatre, why attempt to give a fanciful explanation to his conduct when there is simply no need to explain his conduct anyway? If he wasn't the person that had been seen by the two girls, then he could not have done what it was alleged to have been done. He wasn't guilty of anything, and furthermore why attempt to lie about the explanation that he proffered?"

[23] At no time did his Honour give himself a direction in accordance with the well known case of *Edwards v The Queen*.[1] No submission was made by the prosecutor that the prosecution relied upon any lie told as evidence probative of guilt and that matter was not raised in argument by the learned Magistrate.[2]

[24] The problem for the Crown case was that there was an opportunity between the time when the two girls had left the cinema and BMP arrived at the cinema for whoever the perpetrator was to have left the cinema. Indeed, having regard to the fact that the two girls had left the cinema, it might well

[1] *Edwards v The Queen* (1993) 178 CLR 193 and the many cases which since followed it and applied it.
[2] *c.f. Zoneff v The Queen* (2000) 200 CLR 234 at [16]–[17]; *Osland v The Queen* (1998) 197 CLR 316 at [42]–[44] per Gaudron and Gummow JJ.

be expected that the perpetrator would have done the same. The time gap between the girls leaving the cinema and BMP returning to the cinema is not able to be calculated precisely, but at the very least it must have been something in the order of 10 minutes. There is no evidence to show that no one left the cinema in that 10 minute period. There is, therefore, a reasonable hypothesis open on the evidence that it was some other person and not the appellant who was the perpetrator. The learned Magistrate considered this possibility, but rejected it because he found that the admissions made by the appellant in the record of interview incriminated him.

[25] The test to be applied in a case of this kind is whether this Court thinks that upon the whole of the evidence it was open to the learned Magistrate to be satisfied beyond reasonable doubt that the appellant was guilty. In answering that question, I must not disregard or discount either the consideration that the learned Magistrate was entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the learned Magistrate had the benefit of seeing and hearing the witnesses. It is only where the learned Magistrate's advantage in seeing and hearing the evidence is capable of resolving a doubt which I may experience that I may conclude that no miscarriage of justice has occurred, but, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by me is a doubt which the learned Magistrate ought to have experienced. If the evidence

upon the record itself contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to leave me to conclude that, even making full allowance for the advantages enjoyed by the learned Magistrate, there is a significant possibility that an innocent person has been convicted that I am bound to act and to set aside the verdict based upon the evidence.[3]

[26] So far as the supposed lies are concerned there was no particular finding as to what lie it was that the appellant told. One may presume from the learned Magistrate's reasons that the lie which he identified related to having an itch caused by mites which caused him scratch himself. There was evidence from the witness Havnen upon which it might have been open to have to been concluded that the appellant lied about that subject matter. However, as is well known the usual consequence of telling a lie is that the explanation offered by the accused is simply disregarded. As was said in *Edwards v The Queen*:[4]

> "Ordinarily, the telling of the lie will merely affect the credit of the witness who tells it. A lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt. In this way the telling of a lie may constitute evidence. When it does so, it may amount to corroboration provided it is not necessary to rely upon the evidence to be corroborated to establish the lie. At one time it was thought that only a lie told out of Court could amount to an implied admission, but the distinction in not logically supportable and is no longer drawn. When the telling of a lie by an accused amounts to an implied admission, the prosecution may rely upon it as

[3] See *M v The Queen* (1994) 181 CLR 487 at 493-494.
[4] *Edwards v The Queen* (1993) 178 CLR 193 at 208-209 per Deane, Dawson and Gaudron JJ

> independent evidence to "convert would otherwise have been insufficient evidence of guilt" or as corroborative evidence.
>
> But not every lie told by an accused provides evidence probative of guilt. It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie might constitute evidence against him. In other words, in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie. To say that the lie must spring from the realisation or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that "if he tells the truth, the truth will convict him"."

[27] In the learned Magistrate's reasons, he refers to the lie as "evidence which incriminates him" and "the link that is missing from the prosecution case". On one view of his Honour's remarks, his Honour was saying that this was either the only evidence against him or the link in the chain of evidence to prove his guilt. If that is so, the lie, and its character as an admission against interest, must be proven by the prosecution beyond reasonable doubt.[5] There is no finding by the learned Magistrate that he was satisfied to that standard.

[28] However, another view of his Honour's reasons is that he used the lie as a piece of circumstantial evidence, together with the other evidence in the case, to find the offence proved. If so, the lie does not have to be proved to any particular standard of proof.[6] The other evidence to which his Honour referred, was the "unlikelihood of there being two males meeting the same

[5] *Edwards v The Queen* (1993) 178 CLR 193 at 210
[6] *Edwards v The Queen* (1993) 178 CLR 193 at 210

general description at the cinema at the same time engaging in activity in the groin and genital area".

[29] Nevertheless, as was said in *Edwards v The Queen*:[7]

> "A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence (i.e. it relates to a material issue) and if it was told by the accused in circumstances in which the explanation for the lie is that he knew the truth would implicate him in the offence. Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it is an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg v Lucas (Ruth)*, because of "a realization of guilt and a fear of the truth"."

[30] Further their Honours said:[8]

> "Moreover, the jury should be instructed that there may be reasons for the telling of the lie apart from the realisation of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognised that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters."

[31] His Honour gave himself no such instruction which, in my opinion, he should have done. Assuming that what the appellant said in his record of interview and what he told the police concerning having an itch is in fact a

[7] *Edwards v The Queen* (1993) 178 CLR 193 at 210–211
[8] *Edwards v The Queen* (1993) 178 CLR 193 at 211

lie, in my view it does not necessarily amount to an implied admission of guilt. It may well have been told in order to escape an unjust accusation that he exposed himself by proffering a possible explanation for what the children may have seen.

[32] There is nothing exceptional about denying having exposed himself and offering as a possible explanation that if it were he who the girls were looking at, they may have seen his hand. Inconsistent defences in criminal proceedings, although they present obvious forensic difficulties, do not imply guilt.[9]

[33] Moreover, even if it could have been used as an admission against interest as a piece of circumstantial evidence, the circumstantial evidence was inherently weak. The only other piece of circumstantial evidence was what the learned Magistrate referred to as "the inherent unlikelihood of there being two males of the same general description at the cinema at the same time engaging in activity in the groin and genital area". The finding that the appellant was of the "same general description" is inherently vague, but, even so, it by no means follows that there is such an inherent unlikelihood that the circumstantial evidence as a whole is sufficient to amount to proof beyond reasonable doubt and excludes the hypothesis that some other person who was the offender left the cinema before BMP arrived.

[9] See *CTM v The Queen* (2008) 247 ALR 1 at [191] per Hayne J

[34] In my opinion the appellant has made out his ground of appeal. Having considered the evidence myself, I have come to the conclusion that there is a significant risk that the appellant was wrongly convicted. The appeal is allowed and I order that the finding of guilt, the conviction and the sentencing orders be quashed and in lieu thereof a verdict of not guilty entered.
