Cumaiyi v Jones [2014] NTSC 36

PARTIES:	CUMAIYI, Paul v JONES, Timothy
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 25 of 2014 (21350609)
DELIVERED:	14 August 2014
HEARING DATES:	12 August 2014
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	J NEILL SM

CATCHWORDS:

Domican v The Queen (1992) 173 CLR 555; *Winmar v Western Australia* (2007) 35 WAR 159, referred to.

Weapons Control Act 2001 (NT), ss 3, 8.

REPRESENTATION:

Counsel:

Appellant:	T Moses
Respondent:	D Jones

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Ril1413
Number of pages:	10

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

Cumaiyi v Jones [2014] NTSC 36
No. JA 25 of 2014 (21350609)

BETWEEN:

PAUL CUMAIYI
Appellant

AND:

TIMOTHY JONES
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 14 August 2014)

[1] On 13 March 2014, in the Court of Summary Jurisdiction, the appellant was found guilty of an offence arising out of events that took place at Wadeye on 9 October 2013. He was initially charged with having taken part in a riot and with having carried an offensive weapon, an axe, with the circumstance of aggravation that the offence occurred at night time. The hearing in relation to the alleged riot did not proceed. There was a hearing in relation to the allegation of carrying an offensive weapon.

[2] The prosecution case relied upon the evidence of Constable Damien Clarke. No other witness was called. At the conclusion of the evidence, the

magistrate found the appellant guilty. The appellant was convicted and sentenced to a term of imprisonment of three months.

[3] The appellant has appealed the conviction on two grounds:

(a) that the magistrate could not be satisfied as to the identification of the appellant beyond reasonable doubt; and

(b) that the magistrate erred in finding that the axe was an offensive weapon.

The evidence

[4] The evidence of Constable Clarke was that at about 9pm on 9 October 2013 he was stationed at Wadeye and was off duty. He heard a large disturbance in the community and he contacted Sergeant Rose. The two officers resumed duty to deal with the situation. Over some hours they drove their police vehicle around the community responding to various disturbances. At about 11pm, they drove to the Middle Camp area. Sergeant Rose drove the vehicle and Constable Clarke operated a spotlight from the front passenger seat.

[5] At Middle Camp, Constable Clarke said he saw "30 or 40 young males all armed with what looked like steel bars, axes, rocks. As we have come up to that – that area, the Middle Camp area, they've all run away". He said the people were "running away from the police truck". The only person Constable Clarke was able to identify was the appellant. He said the appellant ran in front of the police vehicle and was carrying an axe which

was described as a “small tomahawk axe” a bit less than half a metre in length. The appellant ran behind one of the houses.

[6] The evidence of Constable Clarke was that the person he identified as the appellant:

(a) had a bleached blonde Mohawk haircut;

(b) was wearing red football shorts;

(c) had a shirt hanging over his shoulders; and

(d) was a “bigger fellow”.

[7] In cross-examination, Constable Clarke agreed that the identification of the appellant took place at about 11pm and when it was dark. However he said the lights of the police vehicle were on high beam and he also operated a hand-held spotlight which he shone on the appellant. The appellant was running and was in the light for “maybe 10 seconds”. The appellant was lifting his T-shirt up apparently seeking to hide his face. Constable Clarke was about 10 metres away from him and he was running away. When Constable Clarke first saw the appellant he noticed his face and then, as he was running away, his back was turned to the Constable.

[8] Constable Clarke agreed that he noticed the distinctive blonde haired Mohawk. He agreed that there were a number of people in Wadeye who had blonde hair cut in a similar style. He also noticed the large build of the person.

[9] In his evidence in chief, Constable Clarke said of the appellant "I know him, he is Paul Stanley Cumaiyi" and, a little later, "Yeah I have known him for the whole time I've been out here". When challenged in cross-examination as to the identification of the appellant Constable Clarke responded, "No, I know Paul Stanley, he is the man I saw". Paul Stanley is a name by which the appellant is known. The Constable later said in cross-examination "I know him, I've known him for the long time I have been out here".

[10] In re-examination Constable Clarke gave evidence that he recognised the appellant. He said:

> I observed that it was him. I've known him for the last two and a half years I've been out here, I have played footy with him, gone out (inaudible) with him, crabbing, stuff like that. … I recognised him, yes.

The findings – identity

[11] In ex tempore reasons for decision, the magistrate concluded that Constable Clarke knew the appellant "well" but observed that "nevertheless it was not the length of knowledge or the degree of intimate contact which is generally necessary for the court to be satisfied on the basis of recognition evidence". His Honour noted, correctly, that even recognition evidence can be mistaken. His Honour summarised the evidence and then concluded:

> If it were merely the observations that Officer Clarke made without his particular knowledge of this defendant then there would be a questionable doubt. If it was that the two taken together start to make a very strong case indeed... I am satisfied on the evidence of Officer Clarke that he did see the full face of the defendant very brightly lit, headlights on full, and a hand-held spotlight, at a distance of no more

than 10m for a sufficient period of time for him to know whom he saw.

I'm satisfied that he did not rely solely upon the feature of the bleached Mohawk which, as was pointed out on the evidence, a number of other people including the defendant's own brother may have sported around that time. Officer Clarke had sufficient knowledge of the defendant on his evidence crabbing, playing football as well as the observation he was able to make in all the circumstances, and I am satisfied beyond reasonable doubt as to his evidence identifying the defendant.

The applicable principles

[12] Reference was made to the familiar authorities on the dangers of identification and recognition evidence. Particular reference was made to the observations of the High Court in *Domican v The Queen*[1] and the decision of the Western Australian Court of Criminal Appeal in *Winmar v Western Australia*[2]. It is sufficient for present purposes to refer to two passages from *Winmar*: [3]

> [12]The danger, then, is that evidence which is inaccurate may be apparently convincing and that it will be difficult to test whether it is as accurate as it seems. The danger which must be warned against in every case, therefore, is the danger that an honest witness may be mistaken, and that an honest but mistaken witness may be convincing (authorities ommitted).
>
> …
>
> [14] Finally, it is obvious that a person's ability to observe an offender may be very limited in the circumstances of a particular offence, and the dangers of which a jury must be warned include, where appropriate, the danger that the witness will simply have not

[1] (1992) 173 CLR 555.
[2] (2007) 35 WAR 159.
[3] (2007) 35 WAR 159 at 163- 164 per Wheeler, McClure, Pullen, Buss and Miller JJA.

had an adequate opportunity to observe, so as to be able to identify anyone.

[13] At the appeal hearing, it was conceded by the appellant that his Honour was fully aware of the relevant principles and had them in mind at the time of making the findings.

The submissions

[14] The appellant submitted that the magistrate erred in accepting the identification evidence. It was argued that the finding of his Honour was unsafe and unsatisfactory in all the circumstances. Those circumstances were said to be that the quality of the observations made by Constable Clarke were adversely affected by: the brevity of his observation of the person; the intense nature of the lighting distorted what was seen; the fact the subject and observer were in motion; the fact Constable Clarke was 10 metres away from the subject; and, finally, that the past dealings of Constable Clarke with the appellant were “not at the higher end of the scale of recognition”.

[15] The appellant submitted that, notwithstanding the apparent honesty of Constable Clarke and his confidence in his claimed recognition of the appellant, the risk of inaccurate recognition was too great to support a finding beyond reasonable doubt on the issue of identity.

[16] It was pointed out that there was no corroborating evidence to support the identification.

[17] The respondent submitted that the magistrate was entitled to be satisfied as to the identification of the appellant to the requisite standard. Attention was drawn to the fact that Constable Clarke had been stationed at Wadeye for two and a half years and had known the appellant for that period. He had played football with him and gone crabbing with him "and stuff like that" during that period. He knew where the appellant lived. He had a long and familiar relationship with the appellant in a small community. On the night, he recognised the appellant who was wearing red football shorts, had a blonde Mohawk hairstyle which stood out and was carrying an axe. Contrary to the submission of the appellant the lighting was good, consisting of the police headlights which were on high beam assisted by a hand-held spotlight which Constable Clarke shone on the appellant. He provided a description of the movements of the appellant. He made appropriate concessions in cross-examination including that other people in Wadeye sported a similar hair colour and style. Nevertheless, he was firm in his identification of the appellant.

Conclusions – identification

[18] In my opinion, error on the part of the magistrate has not been demonstrated. There was a sound basis for the conclusion of his Honour that the evidence regarding identification established beyond reasonable doubt the appellant as the alleged offender. Constable Clarke was able to recognise the appellant having interacted with him over a period of some two and a half years. He had played football with him, gone crabbing with him and had other

connection with him over that period. Constable Clarke knew sufficient about the appellant to know where he lived. In addition, the appellant had a "distinctive" hairstyle, which his own counsel described as "his signature", and he also had a particular build which was familiar to the Constable and which assisted in identification.

[19] I dismiss this ground of appeal.

Offensive weapon

[20] The appellant was charged with possession of an offensive weapon. Section 8 of the *Weapons Control Act 2001* (NT) provides:

> (1) A person must not, without lawful excuse, proof of which is on the person, possess, carry or use an offensive weapon.

[21] An offensive weapon is defined in s 3 of the Act in the following terms:

> ***offensive weapon*** means an article:
>
> (a) made or adapted to cause damage to property or to cause injury or fear of injury to a person; or
>
> (b) by which the person having it intends to cause damage to property or to cause injury or fear of injury to a person;
>
> but does not include a prohibited weapon, controlled weapon or body armour.

[22] It is necessary for the prosecution to establish that the item is an offensive weapon as defined and then the onus shifts to the accused to establish that he or she had a lawful excuse for possessing, carrying or using the weapon.

[23] The issue in the present proceedings was whether or not the prosecution had established that the axe was an offensive weapon by which the appellant

intended to cause injury or fear of injury to a person. His Honour dealt with the issue in detail. His Honour found the following:

(a) there was a series of "riotous disturbances" in Wadeye on that night;

(b) Constable Clarke and Sergeant Rose travelled from point of disturbance to point of disturbance over a period of hours;

(c) at the relevant point of disturbance at Middle Camp there were 30 to 40 young males armed with steel bars and axes, they dispersed when police arrived; and

(d) Constable Clarke identified the appellant as one of the group and he was in possession of an axe.

[24] In the Court of Summary Jurisdiction, it was argued that a range of innocent explanations for those findings could not be excluded. His Honour described the explanations as fanciful. In the Supreme Court, counsel for the appellant relied upon a further possible explanation being that the appellant was present at the scene to quieten the group of armed young men or, possibly, to remove a relative from the scene and came into possession of the axe in the process. In my opinion, this is also a fanciful explanation. The prospect that the appellant arrived at the scene and somehow came into possession of an axe does not fit with the unchallenged evidence of what took place. When the police arrived, the heavily armed group immediately dispersed. The appellant was one of that number. He was armed with the axe. As the appellant ran from the scene he carried the axe with him. At the same time,

he unsuccessfully endeavoured to hide his appearance by pulling his shirt over his face. These actions are not consistent with someone arriving at the scene with the possible intentions identified by counsel. These are not rational inferences to be drawn from the evidence.

[25] In the circumstances, there was a sound evidentiary basis for his Honour to conclude that the axe was possessed in order to cause fear of injury to a person. In my opinion, no other rational inference has been identified. I see no error on the part of his Honour.

[26] The appeal is dismissed.

++++++++++++++++++++++++