PARTIES:	PETER JOHN PITCHER
	v
	ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	JUSTICE APPEAL
FILE NO:	JA 8 of 1997 (9610449)
DELIVERED:	16 May 1997
HEARING DATES:	7 May 1997
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal - against conviction and sentence - identification evidence - Magistrate's caution to himself - meaning of "threatened" with a dangerous or offensive weapon.

Legislation

Justices Act
Criminal Code Act

Cases

Domican v The Queen (1992) 173 CLR 555 approved.
Morris v The Queen (1987) 163 CLR 454 approved.

Texts

Macquarie Dictionary

REPRESENTATION:

Counsel:

Appellant:	Mr R Jobson
Respondent:	Mr R Noble

Solicitors:

Appellant:	Withnall Cavenagh Maley
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	MIL970005
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA8 of 1997 (9610449)

BETWEEN:

PETER JOHN PITCHER
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 16 May 1997)

The appellant was charged with unlawfully assaulting Margaret Eriha together with the following circumstances of aggravation:

1. The said Margaret Eriha had suffered bodily harm;

2. That the said Margaret Eriha was a female and the said Peter John Pitcher was a male.

3. That the said Margaret Eriha was threatened with an offensive weapon, mainly, a bottle.

The appellant pleaded not guilty. The learned Magistrate found the appellant guilty of the assault and each of the circumstances of aggravation. After considering the facts and submissions relating to penalty his Worship imposed a sentence of imprisonment for 5 months.

The appellant has appealed to this Court against both conviction and sentence. The grounds of appeal set out in the amended notice of appeal are as follows:

> "1. The learned Magistrate failed to properly direct himself in relation to identification evidence.
>
> 2. The finding of guilt was unsafe and unsatisfactory on the evidence.
>
> 3. The sentence imposed was manifestly excessive in all the circumstances of the offence and the offender.
>
> 4. Fresh evidence is now available from Loane Anderson Knox .... which was not available at the hearing ....
>
> 5. The learned Magistrate erred in convicting the defendant on aggravation (iii) of the information there being no evidence the complainant was "threatened".
>
> 6. The learned Magistrate erred in law by finding a bottle was an "offensive weapon" as defined in the *Criminal Code*."

The principle witness relied upon by the prosecution was Ms Eriha. Her evidence was that on the evening in question she was as the Rum Jungle Recreation Club sitting at the bar with a friend. Hearing someone call out her

name, she turned around and saw the accused standing near the front doors of the club, holding a beer bottle in his hand. She saw the appellant make a movement as if to throw the beer bottle in her direction. She turned her head away, heard the bottle smash and then felt some glass in her left eye.

There were no other witnesses called who could identify the person who threw the bottle.

There is nothing in the cross-examination of Ms Eriha to indicate that the question of her identification of the appellant was put in issue. It was not even suggested to her that she was mistaken or could have been mistaken as to who threw the bottle.

The issue as to the identification of the appellant was first raised by counsel for the appellant during addresses at the conclusion of the evidence.

After hearing submissions his Worship delivered an ex tempore judgement. He identified the main issue in the case as being whether it was the appellant who threw the bottle, and if so, did he throw it at Ms Eriha.

His Worship's ex tempore reasons are very brief. His Worship clearly accepted the identification evidence of Ms Eriha. This is not surprising in view of the lack of any real attack upon her evidence, and the failure of the appellant to give evidence. His Worship mentioned in his reasons the specific factors that would have had a bearing on the reliability of her evidence, namely the fact that Ms Eriha had known the appellant for some 3 months

prior to the incident; that Ms Eriha was a former friend of Ms Knox who at the time of the incident was in close proximity of the appellant; that the appellant was also a friend of Ms Knox; that there was other evidence, apart from Ms Eriha's evidence that the appellant was in the bar at the time and in the company of Ms Knox and that the bottle was thrown from a distance of about 8 metres away. His Worship took into account that Ms Eriha saw the appellant only for a brief moment before the bottle was thrown. Although his Worship does not specifically mention these matters, there was nothing in the evidence to suggest that the lighting was poor or that Ms Eriha, from her position at the bar, did not have a clear view of the appellant at the time that he was about to throw the bottle. It was not suggested that there were other persons in the vicinity of Ms Knox and the appellant at the time the bottle was thrown or that it was Ms Knox who threw the bottle. There was evidence before the learned Magistrate that the Ms Eriha had been consuming alcohol but there was nothing in the evidence to suggest that she was intoxicated. Nor was it suggested that the bottle was thrown from some place other than from the vicinity of someone standing near the door.

The learned Magistrate was well aware of the dangers of convicting solely on the evidence of identification of Ms Eriha. His Worship said:

> "I have cautioned myself in relation to identification. Identification is always something which the courts must be careful of. People quite often make identifications on the spur of the moment. Its clear that the victim in this matter saw the defendant only for a brief moment before the actual bottle was thrown."

There is nothing to suggest that Ms Eriha had had any difficulty in identifying the appellant to the police when she made her complaint to them; nor that her complaint was significantly delayed which might otherwise have thrown some doubt upon her evidence. Although counsel for the appellant obviously had a copy of Ms Eriha's statement to the police, she was not cross-examined upon her statement with a view to showing that she had departed therefrom in her evidence.

Although the learned Magistrate in his brief reasons does not refer to all of these matters, particularly the negative matters that I have mentioned, I do not think that it was necessary for him to do so.

Counsel for the appellant relied upon a number of authorities relating to the need for a warning to be given to juries in identification cases. Assuming that these principles are applicable to a magistrate sitting without a jury, as was pointed out in *Domican v The Queen (1992)* 173 CLR 555 at 565 the adequacy of the warning must be evaluated in the context of the evidence in the case. The warning which in the circumstances of this case the magistrate had to give himself was to focus attention upon any weaknesses in the identification evidence irrespective of whether they had been referred to by counsel or not. The only real weakness was the short period of time which Ms Eriha had to see that it was the appellant who was the person who was about to throw the bottle. The learned Magistrate did refer to that matter and I think that the warning that he gave himself in the circumstances of this case was sufficient.

It was submitted that the learned Magistrate in reaching his conclusions as to identification based this conclusion in part upon a conclusion that the person who called out Ms Eriha's name must have been the appellant. I accept the argument of Mr Jobson of counsel for the appellant, that it would not have been open to the learned Magistrate to reason in this fashion. There was no direct evidence as to who it was that called out Ms Eriha's name; indeed there was no evidence as to whether the voice of that person was that of a male or a female. But on considering the reasons given by his Worship, it is clear that his Worship reached the conclusion that it was the appellant who called out Ms Eriha's name after he had concluded that it was the appellant who threw the bottle. The purpose of the finding that it was the appellant who called out the name was not in order to arrive at a fact which could be used in the process of identification of who threw the bottle, but in order to arrive at a fact which could be used in the process in drawing the necessary inference that the bottle was deliberately thrown either at Ms Eriha or near her and that the appellant must have either intended to have struck her with the bottle or at least have intended to have thrown the bottle near to her and to have foreseen the possibility that the bottle would smash and cause her injury. There could be no attack on the learned Magistrate's process of reasoning in this regard.

As to ground 2 of the amended notice of appeal, having undertaken for myself an independent examination of the relevant evidence, I am satisfied that it was open to the learned Magistrate to find the appellant guilty. The test to be applied is to ask whether, the learned Magistrate, acting reasonably, must have entertained a reasonable doubt as to the guilt of the appellant: *Morris v Queen (1987)* 163 CLR 454 at 461-462. I have already referred to the relevant

circumstances of the case so far as they related to the Ms Eriha's evidence of identification. Looking at the matter for myself, there is nothing in her evidence to suggest to me that she may have been mistaken or that her evidence was not to be trusted. I would not describe her observation of the appellant as a fleeting one. The evidence shows that she had a clear view of the appellant and that saw him with a bottle in his hand and about to throw it from a distance of about 8 metres away.

Ms Eriha admitted that she was no longer friendly with Ms Knox, that this friendship dissolved a few weeks before the incident at the Club, and that since the incident at the Club she was no longer on friendly terms with the appellant, but there is nothing in her evidence to suggest that she bore any ill feeling towards the appellant at the time of the offence and at the time she made her complaint to police.

Some reliance was placed upon the failure of the Crown to call Ms Knox. There is no evidence as to why Ms Knox was not called. Although there was evidence that she was standing next to the appellant at the time, there is nothing in the evidence to indicate that she must have seen what had occurred.

Some aspects of Ms Eriha's account was supported by other evidence called by the Crown. Ms Cianne Burton gave evidence that having heard a voice from behind her calling out to Ms Eriha, she turned around saw a hand "come over" and heard the explosion of a bottle. Her evidence was that she did not see the person to whom the hand belonged; but the next moment she saw a man standing talking to Ms Knox and thereafter the manager, Mr

Manaway, removed the same man from the premises. The evidence of Mr Manaway was that the person he removed from the premises was the appellant who had been in the Club that night in the company of Ms Knox.

It would further appear from the evidence of Sergeant White that he was called to a disturbance at the Club that evening, spoke to Ms Eriha at the Health Clinic before going to the Club, received information from her that evening as to the identity of her assailant, and that later that evening, he attempted to interview the appellant but was unable to locate him as the bar by that time was closed. This does not suggest that Ms Eriha had any doubts at the time as to the identity of her assailant. There was also evidence from a Mr Norris who was sitting at the bar next to Ms Eriha, that a glass bottle smashed on the uprights that hold the sliding shutter doors used to close the bar in the evening in the vicinity of where Ms Eriha was sitting. There is also evidence from this witness that there was a clear view between where he and Ms Eriha were sitting to the area of the doorway where the appellant had been seen. He was unable to identify the appellant or the person who threw the bottle; in fact he did not see the bottle being thrown at all as he was looking in the opposite direction.

Having regard to all of those matters I am satisfied that the learned Magistrate acting reasonably should not have entertained a reasonable doubt as to the guilt of the accused.

As to ground 3 of the appeal this abandoned by Mr Jobson and I do not need to consider it.

As to ground 4, s 176A of the *Justices Act* requires that this Court shall, unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, admit evidence to be tendered at the hearing of the appeal if it appears that the 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; is satisfied that the evidence was not adduced in the proceedings in the court below and that there is a reasonable explanation for the failure to so adduce it; and is satisfied that the appellant has complied with the requirements of ss 176A (2) and (3).

In this case, it is common ground that the appellant has not complied with ss 176A (2) which requires the appellant not less than 7 days before the hearing of the appeal, to give written notice to the respondent of the evidence to be tendered. By consent I have adjourned further consideration of this ground until after consideration of the remaining grounds of appeal.

As to ground 5, the learned Magistrate found that the assault was constituted by the intentional throwing of the bottle at or in the general direction of Ms Eriha, and that it smashed in close proximity to her on the uprights of the shutters. The learned Magistrate identified the assault as being one of the indirect application of force. The learned Magistrate did not specifically address the argument which has been put to me in submissions, namely, that there was no evidence that the victim was “threatened” with a dangerous or offensive weapon. Mr Jobson’s argument is that there is a

difference between the use of an offensive weapon and threatening someone with an offensive weapon.

The Macquarie Dictionary defines "threatened" as "to utter a threat against: menace; to be a menace or source of danger; to give an ominous indication of; to indicate impending evil or mischief." The numb of Mr Jobson's argument was that if an assault is carried out with the use an offensive weapon the circumstance of aggravation set out in s 188(2)(m) of the *Criminal Code* cannot apply.

Mr Jobson's argument has some attraction. The definition of assault includes the attempted or threatened application of force, where the person attempting or threatening has an actual or apparent present ability to affect his purpose and the purpose is evidence by bodily movement or threatening words. As I understand it the way Mr Jobson put his case was that the circumstance of aggravation in s 188(2)(m) was appropriate only where the assault was constituted by an attempted or threatened application of force. However I do not think this is necessarily the case. It may be that one single incident began with the threatened application of force and was completed by the direct or indirect application of force. In this case there is evidence that Ms Eriha was threatened in that, on the findings of the learned Magistrate, the appellant called out her name and as she turned she saw the appellant with a bottle in his hand about to throw it at her. At that stage I do not think it is difficult to conclude that she was being threatened by the bottle. I would therefore reject ground 5 of the amended notice of appeal.

As to ground 6 of the notice of appeal it was submitted that the bottle could not have been an offensive weapon. The definition of offensive weapon contained in s 1 of the *Criminal Code* is as follows:

> "Offensive weapon" means any article made or adapted to cause injury or fear of injury to the person or by which the person having it intends to cause injury or fear of injury to the person."

Mr Jobson's submission was that the words "by which the person having it" referred back to the words "any article made or adapted to cause injury or fear of injury to the person". He submitted that a bottle is not an article made or adapted to cause injury or fear of injury to any person. The difficulty with Mr Jobson's argument is that it would mean that the word "or" in the definition should read "and". The natural meaning of the pronoun "it" in the definition is simply to refer to the words "any article", unqualified by the following words "made or adapted" etc. In the end Mr Jobson conceded the point which was not pressed. I therefore dismiss ground 6 of the notice of appeal.

I will hear counsel further in relation to ground 4 of the amended notice of appeal.