Campbell v Gokel [2005] NTCA 2

PARTIES:	CAMPBELL, John Sam
	v
	GOKEL, Noel John
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 16 0f 2003 (20016083)
DELIVERED:	15 March 2005
HEARING DATES:	8 February 2005
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW

Appeal against conviction – burden of proof – circumstantial evidence – DNA evidence of appellant on bottle left in shop – appeal dismissed.

M v The Queen (1994) 181 CLR 487, applied.

REPRESENTATION:

Counsel:

Appellant:	I Rowbottom
Respondent:	D Lewis

Solicitors:

Appellant:	Withnall Maley
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	Mar0505
Number of pages:	9

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

Campbell v Gokel [2005] NTCA 2
No. AP 16 of 2003 (20016083)

BETWEEN:

JOHN SAM CAMPBELL
Appellant

AND:

NOEL JOHN GOKEL
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 15 March 2005)

Martin (BR) CJ:

[1] This is an appeal against a decision of Thomas J dismissing an appeal against convictions recorded by a Magistrate. The main ground of appeal advanced before the Judge and in this Court was that the verdicts were unsafe and unsatisfactory. At the conclusion of submissions the appeal was dismissed and the Court indicated it would subsequently deliver its reasons. I now set out my reasons for dismissing the appeal.

[2] The appellant was charged with three offences arising out of a breaking and entering into a pharmacy at Humpty Doo during the evening of 22 March 2000.

[3] On 22 March 2000 the pharmacy was closed and locked at about 8pm. The Manager left at about 8.10pm. At about 2.50am in the early hours of 23 March 2000 officers on patrol in the vicinity of the Humpty Doo shopping centre saw doors of the centre adjacent to the pharmacy open up. Two persons wearing dark clothing and balaclavas, and carrying a large set of bolt cutters and what appeared to be a crowbar, were about to emerge. Upon seeing the police officers, those persons re-entered the shopping centre and shut the door behind them. The officers could hear footsteps on the roof. Police subsequently found on the roof a pair of bolt cutters and a bar described as a seal breaker of the type used to break a seal between a motor vehicle tyre and the rim.

[4] In the early hours of 23 March 2000 the Manager of the pharmacy received a telephone call and returned to the shop. The roller doors at the front of the pharmacy were open and one of the front glass doors had been smashed. The door frame of a door leading to the storeroom of the pharmacy had been damaged as had a safe in that storeroom. The staff refrigerator in the storeroom was open. The Manager noticed that one of two bottles of water which had been in the fridge was missing. A bottle of water was on a shelf above the safe. A quantity of vaccines had been removed from the fridge. Other tablets were missing from the storeroom and shop area.

[5] There was no direct evidence identifying the appellant as an offender. The Crown relied upon circumstantial evidence.

[6] At about 9am on 24 March 2000, police searched the appellant's premises a short distance from the shopping centre. A balaclava was located on a shelf of a cupboard.

[7] The Manager gave evidence that when she saw the bottle of water on the shelf near the safe she recognised it as one of the bottles of water that had been in the fridge the previous evening. A DNA profile obtained from a sample from the rim of the bottle gave the same profile as the appellant's DNA. For the purposes of the appeal before the Judge, the appellant admitted that his DNA was found on the rim of the water bottle.

[8] The storeroom was not accessible to the public. The Crown case rested entirely upon the presence of the appellant's DNA on the bottle of water found on the shelf above the safe. In essence the Crown put to the Magistrate that the only rational conclusions were, first, that the bottle found on the shelf was a bottle removed from the fridge by an offender and, secondly, that the appellant handled the bottle while in the storeroom committing the offences.

[9] The appellant submitted that there was a reasonable hypothesis consistent with innocence to explain the presence of the appellant's DNA on the bottle which should have led the Magistrate and Judge to entertain a reasonable doubt about guilt.

[10] Evidence was led from the proprietor of the pharmacy that the appellant was a fairly regular customer. When interviewed in October 2000 the appellant

admitted having been a customer and said he had been at the pharmacy approximately two to three weeks previously. He estimated that during 2000 he had been to the pharmacy on approximately five occasions.

[11] The appellant did not give evidence. There was no evidence to indicate whether the appellant had attended at the shop on 22 March 2000 or at any time close to that date.

[12] Against that background, counsel submitted it was reasonably possible that the appellant had left the water bottle in the public area of the shop from which area it was subsequently moved to the storeroom either by a member of the staff or by an offender. The prosecution did not lead evidence from the other staff member who was in the shop on the day in question to negate the possibility that the staff member moved the bottle from the shop to the shelf in the storeroom.

[13] The hypothesis advanced by counsel for the appellant faced a number of substantial difficulties. First, the Manager of the pharmacy gave positive evidence that when she left the pharmacy at about 8.10pm the previous evening there were two bottles of water in the door of the fridge. This evidence was repeated in cross-examination and was not challenged.

[14] Secondly, the Manager of the pharmacy gave positive evidence that when she arrived in the early hours of the morning and saw the fridge was open and one of the bottles of water was missing. This evidence was not challenged.

[15] Thirdly, the Manager gave positive evidence that the bottle of water which had been in the fridge the night before was on the shelf above the safe. Although when giving evidence in May 2002 the Manager was unable to identify a bottle produced to her in court and could only say it looked like the bottle, she said that when she saw the bottle on the shelf she recognised it as the bottle that had been in the fridge. Even if the identification evidence was ignored, that evidence of the Manager carried with it the implication that the bottle of water was not on the shelf when she departed from the store the previous evening.

[16] It was open to the Magistrate to conclude beyond reasonable doubt from the evidence to which I have referred that the bottle found on the shelf was a bottle which had been in the refrigerator when the Manager left the premises at about 8.10pm the previous evening. Once that finding was made it almost inevitably followed that the bottle had been removed from the fridge by an offender and that either the appellant removed the bottle from the fridge or he handled it in the storeroom after a co-offender had removed it from the fridge. At the least such a finding was open to the Magistrate.

[17] In addition, there was evidence from which the Magistrate could have concluded that it was unlikely that the appellant had left the bottle in the public area of the shop from where it had been moved either by a member of the staff or an offender. The Manager gave evidence that she and other members of the staff cleaned the pharmacy every night. She said that another staff member would have done the vacuuming on the occasion in

question. According to the Manager, as a matter of practice any rubbish found in the pharmacy would have been removed at the end of the day when rubbish was taken out to the bins.

[18] While the evidence of the cleaning practice could not, in itself, exclude the possibility that the appellant had left the bottle in the shop, in the absence of evidence that the appellant had visited the shop at the relevant time it was a piece of circumstantial evidence that tendered to negate the hypothesis advanced by counsel for the appellant. It was a piece of circumstantial evidence to be considered in conjunction with the other evidence to which I have referred.

[19] Counsel for the appellant on the appeal sought to attack the reliability of the evidence of the pharmacy Manager on the basis that the Manager was reconstructing events from the usual practice. Having read the evidence of the Manager, I do not agree. Read in its entirety, the evidence is convincing. While the Manager relied on normal practice when questioned as to the likelihood that a staff member would have taken the bottle from the public area of the pharmacy and left it on the shelf in the storeroom, and she also relied upon normal practice when asked about how much water was in the bottles, plainly the Manager was not replying upon usual practice or guessing when giving evidence that there were two bottles in the fridge when she left the night before and that one was missing when she returned in the early hours of the morning. Nor was she reconstructing when she said that she recognised the bottle on the shelf as having come from the fridge.

A reading of the transcript of the evidence given by the Manager conveys the clear impression that she was a reliable witness.

[20] In response to the Crown case, the appellant called his former partner to give alibi evidence. Although there was some confusion about dates, in essence the appellant's former partner gave evidence that on the night in question the appellant had spent the evening with her and that he could not have left their residence without her knowing. They lived in a caravan. The double bed was in a restricted area which required the appellant to climb over her if he was to leave the bed and the caravan. The relevant night was fixed by reference to a visit from the police the following morning.

[21] The Magistrate concluded that the witness was "apparently truthful". However, in the face of the Crown evidence, his Worship rejected the evidence of the alibi witness.

[22] Counsel for the appellant submitted that the Magistrate, and the Judge on appeal, had erred in their application of the burden of proof. I do not agree. While the Magistrate used the word "prefer", when his Worship's remarks are read in their entirety it is clear that he correctly applied the burden of proof and rejected the evidence of the alibi witness. That conclusion was open to his Worship.

[23] In addition, there is no substance in the submission that the Judge on appeal misdirected herself as to the burden of proof. Plainly she did not.

[24] The evidence was capable of supporting the conclusion reached by the Magistrate. There is no error apparent in the reasons of the Magistrate. The decision of the Magistrate and the evidence was reviewed by a Judge of this Court. There is no error apparent in the reasons of the Judge for dismissing the appeal. Her Honour considered the evidence independently and approached her task in accordance with the principles enunciated in *M v The Queen* (1994) 181 CLR 487. Her Honour specifically reached the conclusion that as an appellate court she did not experience a doubt about the guilt of the appellant.

[25] No error by either the Magistrate or the Judge on appeal has been demonstrated. Having considered the evidence, I do not experience a doubt about the guilt of the appellant.

[26] The appellant also complains that the Judge erred in failing to properly consider whether the prosecution had proved that the offence occurred at night time, that is, between 9pm and 6am.

[27] The Manager left the pharmacy at about 8.10pm. Police were patrolling the area from about 11pm. At about 2.50am two men wearing balaclavas and carrying bolt cutters and a bar were seen about to exit a door of the shopping centre near the pharmacy. Counsel for the appellant did not dispute that it was open to the Magistrate and the Judge to conclude that the persons seen exiting the premises at about 2.50am were the persons who broke into the pharmacy.

[28] On the case for the appellant, it is reasonably possible that the offenders smashed the front door of the pharmacy and entered the premises at some time between 8.10pm and 9pm. On this hypothesis the offenders either remained in the pharmacy for something in excess of five hours or, having entered the pharmacy, spent the next five hours both in the pharmacy and elsewhere in the shopping centre. It was open to the Magistrate and the Judge to reject such a hypothesis.

[29] For these reasons I was of the opinion that the appeal should be dismissed.

Angel J:

[30] My reasons for dismissing this appeal concur with those of the Chief Justice.

Southwood J:

[31] I agree with the Reasons for Judgment of the Chief Justice.
