

*R v Simpson* [2005] NTSC 73

PARTIES: THE QUEEN

v

SIMPSON, Mark Andrew

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 20327073

DELIVERED: 22 November 2005

HEARING DATES: 15 to 17 November 2005

JUDGMENT OF: RILEY J

**REPRESENTATION:**

*Counsel:*

Applicant: G. McMaster

Respondent: J. Adams

*Solicitors:*

Applicant: Northern Territory Legal Aid  
Commission

Respondent: Office of the Director of Public  
Prosecutions

Judgment category classification: C

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

*R v Simpson* [2005] NTSC 73  
No 20327073

BETWEEN:

**THE QUEEN**  
Applicant

AND:

**SIMPSON, Mark Andrew**  
Respondent

**CORAM: RILEY J**

**REASONS FOR JUDGMENT**

(Delivered 22 November 2005)

- [1] Mark Andrew Simpson is charged with having unlawfully caused grievous harm to Adam Daniel Minutello on 19 November 2003. The matter came before me on 15 to 17 November 2005 on the hearing of various preliminary applications brought before the Court pursuant to s 26L of the Evidence Act.

**The Crown case**

- [2] The Crown case against the accused is that he, along with another person, severely assaulted Mr Minutello in the early hours of the morning of 19 November 2003 in the Smith Street Mall near to the Vic Hotel. The

accused does not dispute that Mr Minutello was assaulted but placed in issue whether he was one of the assailants.

- [3] The Crown alleges that Mr Minutello and a number of other people had travelled to Darwin from Newcastle Waters Station and other stations for work-related celebrations. At about 11 pm on 17 November 2003, the night before the assault, Mr Minutello along with others intended to visit the Lost Arc Nightclub. When they approached the club the doorman told them that they could not enter and that the “milkbar” was down the road. The effect of the conduct of the doorman was to send the group on its way in a distasteful manner. The party chose to go to another venue.
- [4] On the following night, the 18/19 November 2003, members of the group were again in the city. At some stage they went to the Lost Arc Nightclub. On this occasion they were admitted. When inside they saw the person who had been the doorman on the previous night and he was situated at the bar. Mr Minutello said that he recognised the man from the night before. Another witness, Mr Inglis, said that the man was staring at their table. Mr Inglis felt uncomfortable. He also recognised the man from the night before.
- [5] During the evening one of the female members of Mr Minutello’s group slipped over. The doorman from the night before came over as Mr Minutello helped her to her feet and confronted him “face to face”. The doorman said some things which Mr Minutello can no longer recollect but

which were not pleasantries. The female who had slipped over was escorted from the club by security staff. Mr Minutello also went outside. Whilst outside, the same doorman again approached him and stood within a foot of him. He said words to the effect of “Are you scared of me?”. Mr Minutello responded that he was not and asked whether he should be. The doorman responded that Mr Minutello should be scared of him and the conversation ended. The group left the venue.

[6] Later that night Mr Minutello and others were at the Value Inn when they were informed that one of their number, Mr Inglis, was experiencing some difficulties at the Vic Hotel. Five men, including Mr Minutello, went from the Value Inn to the Vic Hotel in order to find their friend. When they arrived at the Vic Hotel in the early hours of the morning of 19 November 2003 the security staff refused to allow them entry. They were near to the door of the Vic Hotel when two men came out of the hotel and confronted them. One of those men was recognised by Mr Minutello as the same doorman from the Lost Arc. Mr Minutello asked why they could not be admitted and said to the security staff: “Is it because of this dickhead?”, referring to the doorman. There were words exchanged with the doorman and Mr Minutello was assaulted. It seems he was hit twice but one of those blows was to the jaw causing a fracture to his jaw.

[7] Mr Minutello said in evidence before me: “I remember turning, facing and being hit and then that was it”. He said on one occasion that he saw the

doorman hit him but on another that he was not sure who hit him but that the doorman was present in such a location that he assumed it was him.

- [8] The identity of the doorman is one of the issues to be resolved.

### **The identification evidence**

- [9] The accused declined an invitation to participate in an identification parade and the investigating officer then arranged a photoboard identification to be conducted by an independent officer.
- [10] Four witnesses from the group were called on this issue, being Bradley Wade Inglis, Lewis Raymond Balcomb, David John Hughes and Mr Minutello. Each of these witnesses had seen the doorman on one or more occasions over the two day period to which I have referred.
- [11] On 11 December 2003 the four individuals were invited to attend the Elliott Police Station where they separately undertook a photoboard identification. Each person was presented with a photoboard containing 12 photographs and asked “to attempt to identify a person who may be responsible for an assault upon Adam Minutello on 19 November 2003 on Smith Street Mall in Darwin at the Vic Hotel”. They were told that the person may or may not be on the photoboard. The same photographs appeared on each board presented to the separate individuals but the photographs were arranged in a different order. Each of the witnesses identified the same photograph as being that of the

doorman/assailant and it is not in dispute that the photograph so identified was, on each occasion, of the accused.

- [12] Counsel for the accused correctly conceded that identification from a photoboard is prima facie admissible as evidence in the proceedings. The submission made on behalf of the accused was that I should exclude the identification evidence because the prejudicial effect outweighs the probative value in the circumstances of each of the witnesses to whom I have referred. The concerns of the accused differ for each of the witnesses. There was concern regarding the amount of alcohol that had been consumed by some of those witnesses on the evening before the assault and on the night of the assault. There was a concern that there may have been collusion or contamination of evidence as between the witnesses and there was also a concern expressed as to the manner in which the photoboard identification was conducted.

### **Mr Minutello**

- [13] The attack upon the admission of identification evidence from Mr Minutello centred upon his sobriety on each occasion that he saw the person subsequently identified as Mr Simpson. On the first night, at the Lost Arc, Mr Minutello said that he had been drinking but that he “would not have considered myself drunk in the sense of drunk”. In cross-examination he was taken through the day in an effort to establish how much alcohol he had consumed. His evidence was to the effect that he had not been counting but

he agreed with approximations put to him. He agreed that he may have had something in the order of 16 to 18 drinks by the time they reached the Lost Arc and had the conversation regarding the “milkbar” down the road. He said those drinks had been consumed over a period of some six hours. He said he felt “all right” although he would not drive a car. After that incident he went to another hotel and had further drinks following which he said he felt tired and “reasonably intoxicated” but not severely intoxicated. He went home to bed and stayed in bed until lunchtime on the following day.

[14] Mr Minutello was then cross-examined about his consumption of alcohol on the second day. He said that he met up with his friends at a hotel at about 5.30 pm or 6 pm. Again he had not taken particular notice of how much alcohol he had consumed. By the time they left the Lost Arc at 1 or 2 am he said he had “a fair bit to drink”.

[15] The evidence established that Mr Minutello was intoxicated on each occasion that he saw “Mr Simpson”. The submission of the accused was that his identification was therefore unreliable and that its prejudicial effect would outweigh its probative value.

[16] In my view, and in all the circumstances, that is not so. Whilst it is acknowledged that the level of intoxication of the witness is relevant to his ability to give effective evidence of identification, that evidence must be considered in its context. In this case Mr Minutello had a series of incidents in relation to the person concerned in which he was in close proximity to

him and was in discussion with him. On three occasions the exchanges between them were in a “face to face” situation and were quite intense. On the later occasions Mr Minutello said that he recognised the man and, accepting that to be so, this is a case of recognition rather than one of fleeting identification.

[17] It was not suggested to Mr Minutello that he was mistaken in relation to his identification of the doorman as Mr Simpson. It was not put to him that the accused was not the person concerned nor that any of the incidents that Mr Minutello described did not occur as he described them. There was no suggestion that Mr Simpson differed in appearance in any way from the person with whom Mr Minutello had his conversations. There was no suggestion that Mr Minutello had seen Mr Simpson on any other occasion or had seen a likeness of him which may have influenced his selection. The process was not contaminated in any way. It was acknowledged that Mr Simpson was the person in the photograph identified by Mr Minutello.

[18] In relation to the photoboard identification process it was conceded that Mr Minutello identified the photograph of Mr Simpson without hesitation or equivocation. He gave evidence that he “was 100% that I recognised that fellow”.

[19] It was submitted that the identification process was flawed in that Mr Minutello was asked to attempt to identify a person who may have been responsible for an assault upon him. The evidence of Mr Minutello was that



he did not see the person who assaulted him but that the person identified in the photograph was in a position to assault him at the time and he was not aware of anyone else who was in a similar position. In my view the posing of the question by the officer conducting the photoboard exercise, Constable Gargan, whilst loosely worded, does not make the photo identification process unsafe or unreliable. When seen in context it is clear that Mr Minutello was identifying the person described as the doorman at the Lost Arc and the person he recognised on the later occasions. The Crown does not rely on this as direct evidence to show that Mr Simpson assaulted Mr Minutello but, rather, it relies upon it to place him in a position where he was able to do so. Other evidence is relied upon for the purpose of identifying Mr Simpson as the assailant.

[20] A further submission was made that the various witnesses, including Mr Minutello, had the opportunity to talk together prior to undertaking the identification process. It was suggested that the process was thereby contaminated in some way. The evidence of the various witnesses does not support this conclusion. There was opportunity to discuss matters and there was some discussion that took place. However there was no evidence of any discussion that would have in any way affected the identification process.

[21] Further submissions were made regarding the so-called displacement effect. That effect is not applicable in the circumstances of this matter and no case for its application was made out.

## **Mr Inglis**

- [22] The evidence of identification of Mr Inglis went only to his statement that the person he identified as Mr Simpson in the photoboard identification process was the person seen by him at the Lost Arc on the Monday and again on the Tuesday and then earlier in the evening at the Vic when he was confronted by Mr Simpson in the bar of the Vic. It was never suggested that Mr Inglis was present when Mr Minutello was assaulted.
- [23] The challenge to the identification evidence of Mr Inglis was made on the basis that Mr Inglis was also intoxicated on the occasions that he said he saw Mr Simpson. That submission can be accepted for the purposes of this ruling. As with Mr Minutello, Mr Inglis had dealings with Mr Simpson that provided an opportunity for him to identify Mr Simpson. On the occasion of the drinking at the Lost Arc he talked of observing Mr Simpson over a substantial period of time whilst Mr Simpson was glaring at himself and others at the table they shared in those premises. Later at the Vic Hotel he also had an intense interaction with Mr Simpson when Mr Simpson “stood over” Mr Inglis and the two girls with whom he was drinking. On each occasion Mr Inglis described himself as feeling uncomfortable and intimidated by the attention he received from Mr Simpson.
- [24] As with Mr Minutello, he had no difficulty in identifying Mr Simpson on the photoboard. He said: “As soon as I seen it I just remembered him”.

- [25] When the photoboard identification process was undertaken it is clear that Mr Inglis was in fact identifying the person he had seen in the circumstances that he had described. Although the question asked of him by Constable Gargan was related to the assault, it is clear that the identification was not concerned with the time of the assault but, rather, other times. Nobody suggests that Mr Inglis was present when Mr Minutello was assaulted.
- [26] For the reasons addressed in relation to Mr Minutello I see no reason to exercise my discretion to exclude this evidence.

**Mr Balcomb**

- [27] Mr Balcomb was present outside the Vic Hotel at the time Mr Minutello was assaulted. There is no suggestion that he was affected by alcohol. He had gone to bed at about 10 or 11 pm the previous evening and had then been awoken in the early hours of the morning to go down to the Vic Hotel with others to check on their friend. He gave evidence of watching an altercation between two men he described as “a couple of big blokes” and Mr Minutello. He then saw a person he identified as Mr Simpson spit upon Mr Minutello. The other man then gave Mr Minutello “a bit of a clip with the elbow ... in the face”. Mr Minutello fell down and as he was getting up Mr Simpson hit him and then the other man hit him again. Mr Simpson hit him in the face.

- [28] Mr Balcomb had not seen Mr Simpson before. He was subsequently invited to participate in a photoboard identification and he picked out a photograph of Mr Simpson. He described himself as being “positive” in his selection.
- [29] On the night he said he was a matter of 5 to 7 metres away from Mr Simpson when he observed him. There was no suggestion that there was any impediment to his observations or that the circumstances of the evening impeded the view that he may have had.
- [30] I see no basis upon which I should exclude the evidence of identification provided by Mr Balcomb.

### **Mr Hughes**

- [31] The photoboard identification conducted by Mr Hughes was problematic in that Mr Hughes at first hesitated between two photographs and then firmed upon one as being a photograph of the person who committed the assault. In the circumstances Mr Adams, who appeared on behalf of the Crown, did not press the evidence of Mr Hughes in relation to identification.

### **The photoboard**

- [32] Counsel for the accused had three criticisms of the photoboard. The first was that some of the photographs were tinged with blue, the second was that the colour of the eyes of the persons photographed were different and, finally, that one of the persons included in the photographs was a police officer who was scowling. A viewing of the photographs does not suggest

that the criticisms are warranted. The photographs are of people who look like Mr Simpson and, to my mind, do not create any unfairness. The photographs were sufficiently close in likeness to the photograph of the accused to make the whole process a fair one. In relation to the police officer there is nothing that identifies him as such. The photograph appears to be of a person of similar characteristics to the accused and to the other photographs on the photoboard and there is no reason to think that any unfairness arose. This is not a case in which differences in some or any of the photographs means that one or more may readily be excluded from consideration. In my opinion the process was fair.

### **Unavailable witnesses**

- [33] The Crown indicated that it did not intend to call two witnesses to the surrounding events. Those witnesses were Simon Granger and Paul Lindsay Shawcross. Efforts had been made to locate those gentlemen but had not been successful. Mr Granger was thought to be in the United Kingdom and there was no address available for him. During the course of the trial Mr Shawcross was located and he gave evidence.
- [34] The accused submitted that the matter should not proceed in the absence of Mr Granger.
- [35] The statement of Mr Granger reveals that he did not see the actual assault although he was present at about that time. He gave evidence that his attention was directed towards other people when the assault took place.

Most of the evidence that he can give is inculpatory of the accused in that it places him at the location at which the assault occurred and at the time of the assault.

- [36] Whilst it would have been desirable for this witness to be available to give evidence, he is not available. On 24 June 2005 counsel for the accused raised the issue and the matter was adjourned to enable the witness to be pursued. Eventually the previously set hearing dates were vacated. There has been ample opportunity for both parties in the trial to conduct further investigations and, in my view, further delay was not warranted. It seems that the thrust of the evidence of the witness would be to support the Crown case. Any prejudice that may be experienced by the accused is limited to the speculative possibility that some additional information may have been provided. I note in passing that the Crown made an offer to agree that the statement made by Mr Granger be provided to the jury should that be the wish of the accused. That offer remained open throughout the trial and, at the end of the Crown case and with the consent of both counsel, was received into evidence.

### **Unfair investigation**

- [37] A submission was made on behalf of the accused that the investigation of this matter was unfair. It was submitted that Mr Simpson was identified as a suspect at a very early time and there was no pursuit of the second person who, the evidence suggests, was present at the time. Whilst that may be so

that does not mean that the proceedings against Mr Simpson cannot proceed.  
The process has not resulted in any unfairness to him although it may be of  
concern that his alleged fellow assailant has not been brought to justice.

[38] I see no reason to interfere with the trial on this ground.

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