Karui v Malogorski [2011] NTSC 17

PARTIES:	Karui, Arthur
	v
	Malogorski, Mark Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 46 of 2010 (21021753)
DELIVERED:	4 March 2011
HEARING DATES:	19 November 2010
JUDGMENT OF:	KELLY J
APPEAL FROM:	M CAREY SM

CATCHWORDS:

Carr v The Queen [1988] HCA 47; (1988) 165 CLR 314; *Gipp v R* [1998] HCA 21; 194 CLR 106; *M v R* [1994] HCA 63; (1994) 181 CLR 487; followed

Arroyo v The Queen [2010] NTCCA 9; *Jones v The Queen* [1997] HCA 12; (1997) 72 ALJR 78; *Knight v The Queen* [1992] HCA 56; (1992) 175 CLR 495; mentioned

Cross on Evidence (4th Ed)

REPRESENTATION:

Counsel:

Appellant:	G Lewer
Respondent:	L Brown

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
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

Karui v Malogorski [2011] NTSC 17
No. JA 46 of 2010 (21021753)

BETWEEN:

ARTHUR KARUI
Appellant

AND:

MARK ANTHONY MALOGORSKI
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 4 March 2011)

[1] The appellant, Arthur Karui (who is sometimes known as James) was charged with aggravated assault upon his then wife, causing her harm. The essence of the allegation against him was that he had stabbed his wife in the left leg near the knee with a pair of scissors, in the house at Palumpa they were both living in at the time.

[2] The victim went to the clinic and was treated for a stab wound to the knee. The sister who treated her gave evidence about treating the wound. Photographs of the wound were also tendered.

[3] The victim also made a statement to police in which she said that the appellant had stabbed her in the knee with scissors, and gave other consequential details about the incident. She said the appellant had stabbed her in the knee after he became angry at her because their baby was sick; he said she should have taken the baby to the clinic.

[4] At the appellant's trial in the Court of Summary Jurisdiction, the victim was asked what had happened on the day in question. Initially she said they were fighting each other and they took the baby to the clinic together. She was asked, "Did anything happen between you and James that day?" and she answered, "No."

[5] When she was reminded that she had to tell the truth, she said (through the interpreter): "Thinking about Arthur, he doesn't want to go back to gaol. …. "…. he want to stay with his family."

[6] Asked if she knew why Arthur was in gaol, she said she wanted the charge dropped, and added (a number of times), "I don't want Arthur to go back in prison." When the prosecutor insisted on an answer to his question, "Do you know why Arthur went to gaol?" she said, "Arthur just get wild for our baby problem." She also said that she and the appellant were no longer together, but she wanted his mother to take him out bush to their outstation.

[7] The victim was shown the signed statement she made to police, but said she did not remember making the statement. The prosecutor called the police

officer to whom the statement was made. She identified the statement and it was tendered.

[8] After the statement was tendered, the victim was recalled. The prosecutor read the statement to the victim in sections and asked her if each section was true. During this process the victim agreed that the following parts of the statement were true:

(a) At night when it was dark, she was in her bedroom with James and their baby and the baby was asleep. James was acting cranky and upset because his family was fighting at Port Keats.

(b) James was yelling at her because their son was sick and he was angry with her because he thought she should have gone to the hospital or to the clinic.

(c) She was sitting on her bed which is a mattress and James sat down next to her and he was facing her.

(d) James stabbed her one time, in her left leg on the inside of her knee.

(e) After he stabbed her, James said to her, “Why didn’t you take [the baby] to the clinic,” and she didn’t say anything back.

(f) She was paining a lot because her wound was bleeding. [She subsequently said she was not paining a lot.]

(g) She could hardly walk because of the wound, and her left knee was so swollen.

(h) She went and saw a woman named Roma with her mother.

(i) She told her mother she wanted police help.

(j) Just after lunch time, two days after she got stabbed, the nurse from the clinic came and picked her up and took her to the clinic.

(k) At the clinic she met a police lady there from Peppi station.

(l) She showed the police lady the stab wound and she took some photos.

(m) Then the nurse looked at her wound and gave her a dressing.

[9] The police officer had given evidence that the victim drew some scissors, but the victim denied it. A drawing of scissors was attached to the statement which was tendered.

[10] That is to say, when questioned by the prosecutor, the victim adopted substantially the whole of her previous statement to police. Importantly, she adopted that part of the statement in which she stated that the accused had stabbed her in the left leg on the inside of her knee and linked that to the evidence given by the nurse including the photographs of the wound.

[11] The victim was asked to show the magistrate her knee and he noted that a scar was clearly visible.

[12] The victim was asked whether Arthur's father and mother had talked to her about what she should say in Court. She agreed that they had. She was asked if she was frightened to give evidence about Arthur and what he did. She said, "No."

[13] The prosecutor then asked, "So why did you tell a different story at the start?" She answered (through the interpreter), "Arthur want to stay with his family." The magistrate asked, "Is that why you told the different story?" and she replied, "Yeah."

[14] The victim was then cross examined by defence counsel. He said, "When you were arguing in that bedroom Arthur didn't hit you with those scissors, did he?" and she said, "No."

[15] He then put to her a version of events in which they were arguing about the baby and also because Arthur had been at Port Keats and had not been paying her enough attention. The victim answered, "Yes," or "Yeah," to each of his questions, up to the point when he suggested to her (presumably on instructions), "And when you were throwing those nappies around you found a pair of scissors?" To that question she answered, "No."

[16] The following series of questions and answers followed:

> "Were you holding a pair of scissors that night? --- No.
>
> Did you ever see Arthur hold a pair of scissors that night? --- No.

> So you're saying in that room there was no one who had any scissors? --- No."

[17] It was not put to her, and she did not say, that Arthur did not stab her in the leg.

[18] The learned magistrate found the appellant guilty of aggravated assault. In doing so he gave the following reasons.

> "I'm satisfied that there was an assault that night, that it was caused by the defendant. She said he didn't – she eventually said he stabbed her. The - the injury is consistent with the story she gave that he stabbed her knee with those scissors. I don't accept – I'm entitled to accept half or all of the evidence of witnesses. I accept that that part of her evidence which is consistent with the injury and the story that she told to the police later because of consistency, and in my view she's only changed her mind in the meantime for reasons I cannot but only hint at.
>
> I'm satisfied that the truth of the matter is that he stabbed her in the way she described it with scissors in the knee. He was extremely angry over what he perceived as her negligence in respect of the baby and not taking him to the clinic. But in any event the injury is consistent with the state of cause and I'm satisfied that she told the truth originally whatever her reasons may be for trying to resile from that situation later on.
>
> I don't have any doubt whatsoever that on the night in question, or the day in question, that Mr Kauri (sic) stabbed his wife in the Aboriginal way in the left knee in the way that it was described. It's consistent with the injury she received."

[19] The appellant has appealed against his conviction on the ground that it is unsafe and unsatisfactory.

[20] The appellant complains that the magistrate made improper use of the statement which was tendered, effectively using it as evidence of the truth of

the matters contained in it. The appellant submitted that the statement was admissible only in relation to her credibility and the veracity of the evidence she gave that day. Its contents were not admissible as her evidence unless adopted by her.

[21] The simple answer to this submission is that the victim did adopt substantially the whole of the statement when questioned by the prosecutor. In particular she agreed that the accused had stabbed her in the leg; that she had received treatment at the clinic for the resulting wound; that the wound had been photographed; and that she had talked to the police about it. It was the victim's evidence in the witness box – agreeing that the matters set out in paragraph 8 above were true - that the learned magistrate had regard to in reaching his verdict.

[22] It is plain from the magistrate's reasons quoted at paragraph 18 above that the magistrate did not misuse the statement. He used it for its proper purpose – namely to judge the consistency of the witness's conduct. He believed that part of her evidence which was consistent with both the physical evidence of the assault and with her prior statement – "because of consistency". He was perfectly entitled to do this.

[23] In support of the submission that the verdict was unsafe, the appellant relied on the following passage from *Cross on Evidence* (4th Ed at p 532):

> "Statement and testimony usually cancel each other out because there is no particular reason why one should be preferred to the other. The testimony is on oath, but in absence of some convincing explanation

of the inconsistency, it is the testimony of someone who has, or may have, lied on the same point on a previous occasion."

[24] Findings of fact and credibility are maters for the learned magistrate. Moreover, the victim herself gave a "convincing explanation of the inconsistency" in her testimony. Initially she said that nothing had happened between her and the accused. Then she agreed that the material parts of her earlier statement put to her by the prosecutor were true. The reason she gave for telling a different story at the start of her evidence was that, "Arthur want to stay with his family." She did not want him to go back to gaol.

Principles

[25] The question which the appeal court must ask itself is whether it thinks that upon the whole of the evidence it was open to the magistrate to be satisfied beyond reasonable doubt that the accused was guilty.[1] If upon the whole of the evidence a magistrate, acting reasonably, was bound to have a reasonable doubt, then the verdict of guilty must be set aside.

[26] In answering that question the appeal court must keep in mind that the magistrate is the person entrusted with the primary responsibility of

[1] *Gipp v R* [1998] HCA 21; 194 CLR 106 per McHugh and Hayne JJ at p 123, paragraph [49] re-affirming the test laid down in *M v R* [1994] HCA 63; (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at p493 paragraph [7] and affirmed in *Jones v The Queen* [1997] HCA 12; (1997) 72 ALJR 78; 149 ALR 598.

determining guilt or innocence, and has had the benefit of having seen and heard the witnesses.[2]

[27] "An appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict, but the appellate court does not substitute its assessment of the significance and weight of the evidence for the assessment which the jury, properly appreciating its function, was entitled to make."[3]

[28] "The appellate court's function is to make its own assessment of the evidence not for the purpose of concluding whether that court entertains a doubt about the guilt of the person convicted but for the purpose of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused."[4]

[29] The fact that the victim gave inconsistent evidence does not mean that the magistrate was bound to reject all of her evidence. He had a convincing explanation for the change in her evidence and was perfectly entitled to accept (as he did) that part of her evidence which was consistent with the physical evidence, and with the story she had told previously to police. (Note that it was the consistent evidence in court he acted upon – not the

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2 *M v R* [1994] HCA 63; (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at [**7**]

3 *Carr v The Queen* [1988] HCA 47; (1988) 165 CLR 314 per Brennan J at p 330-334, applied by Gaudron J in *Gipp v R* at p 114 paragraph [18]

4 *M v R* [1994] HCA 63; (1994) 181 CLR 487 per Brennan J at [3] citing *Knight v The Queen* [1992] HCA 56; (1992) 175 CLR 495; See also *Arroyo v The Queen* [2010] NTCCA 9

statement. The only reference in the reasons which was not contained in the victim's evidence in court was the reference to scissors as the weapon.)

[30] In my view, on the whole of the evidence, (which includes the physical evidence of the stab wound to the leg, and the victim's evidence set out in paragraph 8 above that the appellant stabbed her and linking that stabbing with the wound which was treated and photographed) the learned magistrate was not bound to entertain a reasonable doubt about the guilt of the appellant. The appeal is dismissed.