Loader v The Queen [2003] NTCCA 10

PARTIES:	LOADER, David Kevin
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 19 of 2002
DELIVERED:	12 November 2003
HEARING DATES:	28 October 2003
JUDGMENT OF:	Angel, Mildren JJ & Priestley AJ

CATCHWORDS:

CRIMINAL LAW – Appeal against conviction – Whether trial judge's summing up was inadequate – Effect of direction to withdraw manslaughter – Appeal allowed

CRIMINAL LAW – Summing up – Intoxication – Adequacy of directions

CRIMINAL LAW – Summing up – Whether speculation by counsel – Lack of evidence as to self defence or provocation – Reasonable possibility of innocence open on the evidence

Supreme Court Rules, rule 86.08

Barca v The Queen (1975) 133 CLR 82 at 105 & 109, referred to
Druett v The Queen (1994) 123 FLR 249 at 307, followed
Spencer v The Queen [2003] NTCCA 1, distinguished

REPRESENTATION:

Counsel:

Appellant:	C McDonald QC and I Read
Respondent:	R Wild QC and G Dooley

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Loader v The Queen [2003] NTCCA 10
No. CA 19 of 2002

BETWEEN:

DAVID KEVIN LOADER
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN JJ and PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 12 November 2003)

THE COURT:

[1] This is an appeal by the appellant against his conviction for murder. Leave to appeal was granted in relation to grounds two, three, four and six of the grounds referred to in the affidavit of the appellant's solicitor sworn the 3 December 2002 and leave to appeal was refused on grounds one and five. At the hearing of the appeal counsel for the appellant indicated that the only ground which would be pursued was ground three which reads as follows:

> "The effect of the trial Judge's directions to the jury were such as to remove the alternative verdict of manslaughter from the jury's deliberations and as an alternative verdict open to be returned against the appellant."

[2] At the hearing of the appeal this ground was further "refined" as follows:

> "(a) The learned trial judge's summing up was inadequate in that he failed to explain the issue of intent in the context of the relevant factual considerations which arose from the evidence
>
> (b) The learned trial judge's summing up was inadequate in that he failed to instruct the jury that an inference of an intent to kill or cause grievous harm might not be as readily drawn in the circumstances by reason of the appellant's intoxication."

[3] We are of the view that these are really fresh grounds of appeal and that leave is required for both of these grounds, as neither were the subject of an application by trial counsel for a redirection, see r 86.08. However, no objection was taken by counsel for the respondent. After hearing argument, the Court announced that the appeal would be allowed and ordered a retrial. We said that we would give our reasons later. We now do so.

Factual Background

[4] The Crown case at trial was that the appellant and the deceased were known to each other and both lived in the Mandorah area. They were seen together on the afternoon of 5 July 2001. Late in the evening of 5 July the appellant went to the houses of two of the deceased's friends, John Willard and Michael Upton. The appellant told Mr Willard that he had "knocked old George" and that his body was on the fire burning out the back of his place. He told Mr Willard that he was leaving town and that he had come to say goodbye. The appellant visited Mr Upton and rambled incoherently and was obviously intoxicated. Over the next few days it was noticed that the

deceased was missing and his remains were discovered nearly completely incinerated at the appellant's camp. The cause of death could not be determined due to the extent of the burning. At the time of the discovery of the deceased's remains the appellant had left the Northern Territory. He was arrested at Mount Isa on 10 July 2001. He later participated in a record of interview in which he admitted putting the deceased's body on the fire and burning it. He stated that he could not remember the events of that afternoon. He said that he remembered that he and the appellant had been drinking alcohol together at his camp and had consumed beer and bourbon. He said that he had blacked out and he came to his senses when he observed the deceased burning on the fire in his camp. He admitted to building the fire and assumed that he had placed the victim on it. He stated that he could not recall anything further and no admissions were made as to the circumstances of the cause of death. It was alleged by the Crown that the deceased had been struck and probably beaten to death with a piece of wood by the appellant. The Crown produced in evidence in support of this a piece of wood which was broken and stained with blood splatter. The Crown also called evidence from a prison officer, a Mr Blair, who overheard an incriminating statement made by the appellant whilst in custody. Officer Blair stated that he had heard the appellant saying words to the effect of "You should have seen his skull when I bashed it in." Officer Blair also saw hand motions made by the appellant as if using a baseball bat. There was also blood from the deceased on the appellant's shoes when he was arrested.

The evidence also was that the appellant had fled from Mandorah the day after the deceased's death after setting fire to his own camp. The appellant did not give evidence at trial. The appellant did not raise a positive case, but effectively put the Crown to proof.

[5] The Crown was not able to positively establish the cause of death. The appellant may have been killed by being struck with a stick. Alternatively, the deceased may have been still alive when his body was placed on the fire. The nub of the defence submission to the jury was that as the Crown was not able to establish a cause of death, they were not able to show that at the time when the appellant killed the deceased, he intended to kill or cause grievous harm to the deceased.

[6] There was also a body of evidence to the effect that the appellant had consumed a considerable quantity of alcohol on the day of the deceased's death. There was also evidence that the appellant had consumed alcohol at a time after which it may be inferred that the deceased had already been killed. There was no evidence which established the level of the appellant's intoxication at or about the time of the deceased's death other than that the appellant was probably significantly intoxicated.

[7] There is no doubt that this was a strong Crown case. The Crown invited the jury to infer that the deceased was killed by the appellant and that the appellant intended to kill the deceased or cause him grievous harm as a result of inferences to be drawn from the circumstantial evidence.

Intoxication

[8] We are not convinced that the trial Judge's directions on the subject of intoxication were inadequate. This was not a case like *Spencer v The Queen* [2003] NTCCA 1 where the jury was asked to infer an intent to kill or cause grievous harm from the nature of the wounds to the deceased. In that case Mildren J said at par [20]:

> "In the present case, there was evidence critical to the appellant's defence that the appellant was intoxicated and it would have been necessary for the jury to consider whether, in the circumstances, an inference could be drawn from the nature of the wound which caused the deceased's death, that the prosecution had proven an intent to kill or cause grievous harm, particularly as that wound was to the area of the thigh which I previously described required only mild force. In those circumstances, the learned trial Judge was required not merely to draw to the jury's attention the evidence which bore on the extent of the appellant's intoxication, but to instruct the jury that an inference of an intent to kill or to cause grievous harm might not be as readily drawn from the nature of the injury or injuries inflicted if he were intoxicated as might be the case if he were sober and that the critical question was whether by reason of his intoxication, he might have inflicted that fatal wound without intending to kill or cause grievous harm: see *R v Wingfield* (1994) 156 LSJS 14 at 18; *R v Williams* (1999) 205 LSJS 472 at 472-3."

[9] Here there is no question of drawing an inference from the nature of the deceased's wounds. It is easy to see how it is necessary to be careful about drawing inferences from wounds caused by a knife or other weapon when the accused is in a state of intoxication. Intoxication may cause the perpetrator to misjudge his aim; he may have less control over his own balance and over the fine movements of his hands and arms. But that is not this case. Here the jury was being asked to draw inferences from a

combination of facts, none of which relied upon drawing inferences from the deceased's wounds. We would not allow the appeal on that ground.

[10] However, particularly bearing in mind the cross-examination of the witness Blair which was directed to establishing that Blair's account of what he saw and heard was unreliable, there was a significant issue as to whether or not the Crown had proven that at the time the appellant killed the deceased he did so with the necessary intent. If the evidence of Blair was not accepted by the jury, it was open to the defence to argue that there was no evidence as to the circumstances under which the deceased met his death and whether, amongst other possibilities, the initial blow was the result of an accident. Whether the evidence of Blair was accepted or not, there was no evidence to show whether or not the deceased was alive at the time his body was placed on the fire. In those circumstances a verdict of not guilty of murder but guilty of manslaughter or dangerous act was plainly open.

[11] Although the learned trial Judge did direct the jury on both manslaughter and dangerous act as alternatives to the charge of murder and did tell the jury that they might reach a verdict of guilty of manslaughter if the accused foresaw the possibility that his acts might cause the death of the deceased and that a reasonable person having that foresight and being in the appellant's position would not have done that act, his Honour did not direct the jury's attention to how they might on the evidence have arrived at a verdict of guilty of manslaughter or dangerous act. This was particularly critical, as the Crown submission was the deceased's loss of memory was

not to be believed. The Crown submitted that the jury ought to draw that inference from the fact that the appellant was able to remember events leading up to the moment of the killing and shortly thereafter, but not the actual events which caused the deceased's death as indicative of a falsehood. The evidence of officer Blair demonstrated, if it was accepted, the extent of that falsehood.

[12] When instructing the jury as to how it may arrive at a verdict of manslaughter the learned trial Judge said:

> "Now, it's not charged in the indictment, it's a statutory provision that where a person is charged with murder, the jury may determine a verdict of manslaughter. Not guilty of murder but guilty of manslaughter. And it has even been said by the highest courts in the land that even though the case is one of murder or nothing, sometimes you get that with an accident type claim that the death was accidental and the Crown case is that it wasn't accidental at all, it was quite deliberate. Sometimes you do get cases which are murder or nothing. And even in those cases, the law is that the jury is entitled to bring in a verdict of manslaughter if they wish.
>
> Its perverse, it's sometimes capricious for juries to do that, it's sometimes wrongly motivated. Sympathy for the accused, fear of the consequences for the accused, that sometimes happens. So there's always this alternative of manslaughter and you will particularly come to it if the Crown has proven the killing and the killing is unlawful but has failed to satisfy you beyond reasonable doubt that the accused had the necessary intent."

[13] The impression one gets from this direction was that the learned trial Judge was focusing on whether or not the Crown had proven beyond reasonable doubt that the accused had killed i.e. caused the death of the deceased and was explaining to the jury that notwithstanding that this may be a "murder

or nothing" case, they could still enter a verdict of manslaughter even though that verdict might well be perverse or capricious.

[14] To make matters worse, the learned trial Judge was asked to redirect the jury by the appellant's counsel at trial and did so which had the effect, in our opinion, of entirely distracting the jury from what was the real question in the case. His Honour redirected the jury along the following lines:

> "I also mentioned to you that there are some situations which arise from time to time where juries bring in a verdict of manslaughter in circumstances which are hard to justify having regard to the circumstances of the case. … [His Honour then proceeded to give the jury a "good example" of a case where such a verdict was returned]. … You might think "murder or nothing, its not an accident but clearly a case of murder." The jury came in with manslaughter. That sort of thing happens and it's the perfect right of the jury to return the verdict of manslaughter in any given situation, even when lawyers and a jury properly instructed can't justify in the legal way the verdict. So I emphasise that the verdict of manslaughter is open to you here even though you may be satisfied of the intent which the Crown has to prove. Now you shouldn't do that, you shouldn't bring in a merciful verdict as it has sometimes been called, but I, at Mr Tippett's request, seeing as I opened it, I reiterate that there's nothing that a court can do about that if you are so inclined to bring in a verdict of manslaughter in circumstances where the crime of murder has been made out to your satisfaction. I don't want to say any more about that. It's probably an unnecessary diversion anyway."

[15] We do not think that the jury ought to have been directed along these lines at all. It is not appropriate to tell juries that they may enter verdicts of manslaughter notwithstanding that they are satisfied the Crown has proven its case for murder. The difficulty in this case is that although in one sense what the learned trial Judge did was give a direction which was favourable to the accused, it was done in circumstances where having regard to the rest

of the charge which his Honour gave to the jury, the jury must have thought that his Honour was telling them that manslaughter was not really open on the evidence.

[16] There is a further aspect of his Honour's summing up that we feel is also incorrect. During the course of his final address, counsel for the appellant told the jury that the appellant was at a disadvantage as he had no memory of what actually happened. He said:

> "So, what happened that night? Did something happen like it happened to Mr McKenna? Did Mr Martin provoke Loader? Was there a fight between the two men? Did Mr Loader act in self defence? Were the injuries to his arm that he attributed to falling off the bike, but he couldn't remember – remember that, in the record of interview, you will see it – did those injuries occur in the fight or did they – occur when he fell off the bike and just couldn't remember how he got them?"

[17] There was no evidence of a fight nor was there any evidence that the deceased had provoked the appellant or that the appellant was acting in self-defence. The learned trial Judge said:

> "I have also to deal with the speculative assertion by counsel for the accused there may have been a fight and that if there was a fight and one man died that doesn't mean that the accused had an intent to kill. And it was put to you that questions of self defence and provocation arise. We have never heard about any of this before, except in counsel's address to you. You must not speculate. You must look at the evidence which is – you may find proved before you, and draw only the proper deduction and there is absolutely no basis for saying, "there may have been a fight, giving rise to a defence of self defence and therefore its not murder, its manslaughter or even nothing at all." There's just no basis for that. Likewise to raise a question of provocation, George Martin provoked the accused into the position where his blood was hot and the passions were running and that's how he came to kill old George. There is nothing in this case to that

> effect and its quite wrong for you to be asked to speculate about those things."

[18] With respect to the learned trial Judge, counsel for the accused at trial was not asking the jury to speculate about any of those matters. These were merely matters by way of illustration to point out to the jury that there was a gap in the Crown case caused by the fact that the Crown was unable to establish the precise cause of death and therefore was unable to establish what the accused's mental state was at the time of the death. We consider this was a legitimate forensic argument by counsel for the accused at trial. Although his Honour was perfectly correct in pointing out to the jury that there was no evidence that the accused acted in self defence or was acting under a state of provocation and that they should not speculate about those matters, the point of the argument was not that these defences had been proved or that there was evidence to support them, but rather that they were illustrative of the submission of counsel for the accused at trial that no one really knew exactly what had happened. In those circumstances his Honour was wrong to require counsel to withdraw those remarks from the jury, see *Barca v The Queen* (1975) 133 CLR 82 at 105 and at 109. As Priestley J put it in *Druett v The Queen* (1994) 123 FLR 249 at 307 it was an error for the Judge to:

> "tell the jury not to speculate about possible explanations of the evidence suggested by counsel when there was no evidence to support the possibilities. In doing this, the judge was preventing any use by the accused of a well-established rule, that it is legitimate for an argument to be put to the jury, in final address, that the evidence before them is susceptible of a reasonable explanation other than that

the accused committed the crime. This argument may be put whether or not the jury could conclude that the reasonable explanation was in fact the explanation. It is not necessary that the accused establish the explanation; what is necessary is that the explanation is, as a matter of reason, *consistent* with a version of the facts which it is open to the jury to find, upon the whole of the evidence."

[19] It was for these reasons we allowed the appeal and ordered a retrial.
