CITATION:	*AE v Rigby* [2024] NTSC 21
PARTIES:	AE
	v
	RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 7 of 2023 (22128329)
DELIVERED:	2 April 2024
HEARING DATE:	25 May 2023
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Appellant:	J Bourke with E Henke
Respondent:	T Grealy

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Gra2405
Number of pages:	8

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

AE v Rigby [2024] NTSC 21
LCA 7 of 2023 (22128329)

BETWEEN:

AE
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT
(Delivered 2 April 2024)

[1] This is an appeal against a finding of guilt on the basis that the verdict is unreasonable or cannot be supported having regard to the evidence.

Procedural history

[2] The appellant was charged with and pleaded not guilty to the offence of assaulting a worker, aggravated by the fact that the worker suffered harm, which was alleged to have been committed on 30 August 2021.

[3] Following a contested hearing before the Youth Justice Court, the appellant was found guilty of that offence on 10 February 2023. On

that same day, the appellant was sentenced and placed on a good behaviour bond for that and a number of other offences.

Verdict unreasonable or not supported by the evidence

[4] The principles governing appeals on the ground that the verdict is unreasonable or not supported by the evidence are well-settled. The question for an appellate court is whether it was open to the tribunal of fact to be satisfied of guilt beyond reasonable doubt. That finding is not open where the tribunal of fact must, as distinct from might, have entertained a doubt about the appellant's guilt.[1] An appeal of this kind requires an appellate court to make its own independent assessment of the whole of the evidence, weighing any competing evidence that might tend against the verdict reached by the tribunal of fact. The appellate court must determine whether, paying due regard to any advantages enjoyed by the tribunal of fact in the assessment of that evidence, it holds a reasonable doubt about the guilt of the appellant.[2]

[5] In making that determination, the appellate court must proceed on the basis that the Youth Justice Court was the body entrusted with responsibility for determining guilt or innocence. The trial judge constituting that court had the benefit of seeing and hearing the witnesses and, as is particularly relevant in this case for reasons which

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1 *Libke v The Queen* (2007) 230 CLR 599 at [113] per Hayne J, approved in *Pell v The Queen* (2020) 268 CLR 123 at [44]-[45] and *M v The Queen* (1994) 181 CLR 487 at 494.

2 *Lynch v The Queen* [2020] NTCCA 6 and the authorities there cited.

will become apparent, the trial judge had the benefit of observing the appellant during the course of the hearing.

[6] There will be cases in which the trial judge's advantage in seeing the evidence and observing the course of proceedings will be capable of resolving a doubt which otherwise might be experienced by an appellate court, such that it may conclude no miscarriage of justice occurred.[3] The conclusion that the tribunal of fact must have entertained a doubt about the appellant's guilt will follow only where the appellate court concludes that the evidence is so inadequate, tainted or otherwise lacking in probative force as to require that conclusion notwithstanding the advantages enjoyed by the tribunal of fact.

The conduct of the trial

[7] The allegation made against the appellant at trial was that he had walked into the self-service checkout area of a supermarket and punched a security guard once to the face. The hearing ran over the course of five days between 14 September 2022 and 10 February 2023. The sole issue was the identification of the appellant. The victim of the assault gave evidence to the effect that although he had seen the appellant on a number of occasions both before and after the assault, he did not know him by name. However, the description given by the victim of the person who had committed the assault was generally consistent with the person depicted in the CCTV footage.

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3 *M v The Queen* (1994) 181 CLR 487 at 494-495.

[8] At the close of the prosecution case the defence made a 'no case' submission. The trial judge ruled that as a matter of law the victim's evidence and the CCTV footage constituted sufficient evidence on which the appellant could lawfully be convicted. No evidence was called in the defence case. In arriving at his ultimate verdict, the trial judge acknowledged the inherent infirmity of identification evidence, warned himself against the dangers of the identification process and proceeded on the basis that the court was required to approach the question of identification with significant caution. The trial judge was also alert to the fact that more than 12 months had elapsed between the commission of the offence and the commencement of the trial. Taking those matters into account, the trial judge concluded that there was 'no reasonable doubt whatsoever' that the appellant was the person depicted in the CCTV footage.

The question of identification

[9] A similar question concerning the identification of an accused as the person depicted in security photographs was considered by the High Court in *Smith v R*.[4] The prosecution case was that the accused was the person depicted in photographs taken by the bank security cameras standing near the back of the automatic teller machine apparently keeping a lookout while his co-offenders stole money. Two police officers gave evidence that they had had previous dealings with the

4 *Smith v R* (2001) 206 CLR 650.

accused and recognised him as the person depicted in the photographs. The question on appeal was whether that evidence was properly received.

[10] The plurality of the High Court held that there was nothing to suggest that the police witnesses were at some advantage over the tribunal of fact (which in that case was a jury) in recognising the person in the photographs. By the time the evidence at trial had concluded, the tribunal of fact was in possession of the same data on which to make a comparison between the appellant and the person depicted in the photographs, by combining its observation of the appellant's appearance during the course of the trial with its observation of the person depicted in the photographs. The appeal was allowed on the basis that the police officers' identification evidence was therefore not relevant, and the question of identification was one of comparison for the tribunal of fact.

[11] This appeal involves a case in which the court did not purport to determine the matter on the basis of evidence given by any witness to the effect that the offender depicted in the CCTV footage was the appellant.[5] The evidence given by the victim of the assault and the two eyewitnesses was not to the effect that the appellant was the person depicted in the CCTV evidence. The limited probative value of that

5 Accordingly, there was no call for a warning in terms of s 116 of the *Evidence (National Uniform Legislation) Act 2011* (NT). There was also no jury which required a direction under s 165 of that legislation.

evidence was to provide a description of the person who committed the assault, which value was largely displaced by the availability of the CCTV evidence. Rather, and in conformity with the decision in *Smith*, the operative question was whether the tribunal of fact was able to conclude from its own observations of the appellant's appearance and its own observations of the CCTV footage that the appellant was the person depicted in that footage.

[12] The essence of the appellant's complaint is that the CCTV footage was the only evidence available to the tribunal of fact upon which the appellant could have been identified as the assailant, and that evidence should have left the trial judge with a reasonable doubt about the identity of the assailant. In its written submissions, the appellant criticised the trial judge's comparison between the CCTV footage and his observations of the appellant at the trial as 'inferential or circumstantial'. However, that process of reasoning was precisely what the circumstances of the case required. So far as the quality of the CCTV footage was concerned, the appellant contended on appeal that it was grainy and pixelated, it was taken from an elevated position, and its detail made it impossible to identify the perpetrator's hair colour, skin tone, ethnicity and facial features.

[13] As already described, the trial judge had adequately warned himself of the particular dangers that attend the determination of guilt in circumstances where identification is at issue, and of the effluxion of

time between the incident in question and the determination of guilt. The trial judge had also expressly acknowledged and taken into account: (a) that the CCTV footage depicted a dynamic event running at speed while his observations of the appellant had been made in the rather more static context of the court room environment; and (b) that the quality of the footage was indifferent. However, the trial judge had the facility to slow, pause and zoom in on the depiction of the offender in the CCTV footage, and to take two still images from that focused consideration. It is clear from the circumstances and record of trial that the trial judge had viewed the CCTV footage on multiple occasions and at varying speeds. No objection was taken to the trial judge's examinations in that respect.

[14] By the time the trial judge came to determine the question of the appellant's guilt, the appellant had spent two full days in the courtroom in the presence of the trial judge, and had been physically present before the court over the course of four separate days. On some occasions the appellant had entered the courtroom and taken his place under the gaze of the trial judge, and on other occasions the trial judge had spoken directly with the appellant. As a comparator, the CCTV footage was sufficient to depict the offender's relative height and stature, gait, body movements, complexion, hair colour and hair style.[6]

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6 Although not a matter relied upon by the trial judge, it is instructive that the police officer who first spoke to the appellant gave evidence that he knew the appellant was involved in the assault because he had seen him on the CCTV footage: see T39.

Given that the matter turned exclusively upon the trial judge's reasoning that the depiction of the person in the CCTV footage was the accused, the appellant's submission that the trial judge's reasons were 'regrettably short' is entirely misconceived. Taken in context, and together with the considerations and warnings which the trial judge had already traversed, the conclusory part of the trial judge's findings were clearly adequate.

[15] The sole question which presented to the trial judge was whether he was satisfied to the requisite standard that the appellant appearing before him in the course of the trial was the person depicted in the CCTV footage. Just as the High Court concluded in *Smith*, I am unable to conclude that the quality of the CCTV footage itself was such that the tribunal of fact in this case could not have compared the person depicted in that footage with the appellant. I am also unable to conclude that, having made that comparison, the trial judge must have entertained a doubt about the appellant's guilt. Moreover, this is one of those cases in which the trial judge's advantage in seeing the evidence and observing the course of proceedings at first instance obviates any doubt which might otherwise have been experienced by the appellate court.

Disposition

[16] The appeal is dismissed.