Rowbottam v Manicaros [2004] NTCA 7

PARTIES:	HELEN MAREE ROWBOTTAM
	v
	ASHLEY MANICAROS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 26 of 2003 (20102088)
DELIVERED:	3 June 2004
HEARING DATES:	10 May 2004
JUDGMENT OF:	MILDREN, THOMAS AND RILEY JJ

CATCHWORDS:

CRIMINAL LAW – Appeal – Crown appeal – Evidence – Whether respondent author of threatening communications – Whether there was a miscarriage of justice – Whether the learned magistrate's verdict of guilty was unsafe and unsatisfactory.

EVIDENCE – Expert evidence – Whether magistrate correctly applied evidence of expert.

LEGISLATION:

Criminal Code s 166
Justices Act s 177(2)(f)

REPRESENTATION:

Counsel:

Appellant:	J. Adams
Respondent:	A. Manicaros in person

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	In person

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rowbottam v Manicaros [2004] NTCA 7
No AP 26 of 2003 (20102088)

BETWEEN:

HELEN MAREE ROWBOTTAM
Appellant

AND:

ASHLEY MANICAROS
Respondent

CORAM: MILDREN, THOMAS AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 June 2004)

THE COURT:

[1] On 23 May 2003 the respondent was found guilty in the Court of Summary Jurisdiction of three counts of having, with intent to cause fear, made a threat to kill a person contrary to s 166 of the Criminal Code. The respondent appealed against his conviction and the sentence imposed in relation to each count and, on 27 November 2003, the appeal was allowed. The verdicts of guilty and the sentences were set aside and a retrial ordered. The Crown has now appealed from the decision of the Supreme Court and the respondent has cross-appealed.

[2] The prosecutions arose out of events that occurred in 1999 and 2000. In February 1999 three serving police officers, Matt Sodoli, John Daulby and Bertram Hofer, each received through the mail an envelope. Each envelope was addressed to the recipient in handwriting and contained two A4 sheets of paper. One sheet of paper was identical in all three instances and consisted of the words "One by one your gang are going to die". The words were in capitals in bold type and set out in landscape format across the A4 sheets of paper.

[3] The accompanying sheet of paper was different for each of the recipients. In the case of Mr Sodoli it read:

> "**DETECTIVE**
> **MATT SODOLI**
>
> If I ever stick a gun in your mouth I'll pull the trigger. You keep stealing my drugs and Rowena won't make it home from work at the Casino one night. You and your friends can't be protected from us. Faggot!"

[4] In relation to Mr Daulby the accompanying sheet read:

> **"ASSISTANT COMMISIONER**
> **JOHN DAULBY**
>
> So you're the brains. You keep stealing my drugs and none of your friends will protect you from us. We've been around a lot longer than you. Some of your people just talk too much"

[5] In relation to Mr Hofer the accompanying sheet read:

"SUPERINTENDENT
BERT HOFER

> You can shut down as many of my plants as you like, but none of it will protect you from us. We've been around for too long. Make sure the one's you love are protected, because you're never going to know when they won't be."

[6] An investigation into the communications was commenced in February 1999. On 5 May 2000 the respondent approached Superintendent Quade of the Australian Federal Police in Canberra and made allegations that Sodoli, Daulby and Hofer along with others were involved in importing drugs from Papua New Guinea into Cairns in 1998. He told Superintendent Quade that the source of his information was "dreams and visions". At the time of his discussions with Superintendent Quade the respondent produced two typewritten documents set out in landscape format across A4 sheets of paper. Each was headed "The Untouchables". On one page the respondent referred to John Daulby as "The Boss", Bert Hofer (incorrectly spelt Hoeffer) as being of "Sup Div 4", Matt Sodoli and another officer who was said to be retired and living in Papua New Guinea. The second sheet, also headed "The Untouchables", included a list of "key players" which list included Daulby, Hofer (again spelt incorrectly), Sodoli and the police officer in Papua New Guinea.

[7] As a consequence of the interview in May 2000 the respondent was interviewed in relation to the communications of 1999. He participated in a

record of interview in which he denied knowledge of the correspondence and at which time he provided a sample for the purposes of DNA testing.

[8] The respondent was subsequently charged with the three offences contrary to s 166 of the Criminal Code and convicted on each. At the hearing before the Court of Summary Jurisdiction he was legally represented. When the matter came on for appeal before the Supreme Court he was self-represented. He was self-represented in this Court where he presented his argument in a clear and concise way and demonstrated an understanding of the relevant issues.

[9] The case against the respondent was circumstantial. By the time it reached this Court a number of the matters that had previously been in dispute had been resolved or, at least, were no longer in issue. There was no challenge to the findings of his Worship that each communication constituted a threat to kill for the purposes of s 166 of the Criminal Code. The principal issue at the trial had been, and continued to be before both the Supreme Court and this Court, whether the respondent was the author of the threatening communications.

[10] As was acknowledged in the reasons for decision of the Supreme Court, the learned magistrate provided comprehensive reasons for reaching his conclusions. He systematically set out the nature of the charges and what the prosecution was required to prove in order to sustain a conviction. He

then dealt in great detail with the evidence and the relevant law. He made clear findings of fact.

[11] The case against the respondent was circumstantial. In reaching his conclusion that each offence had been established beyond reasonable doubt, the learned magistrate relied upon three classes of evidence. That evidence consisted of (a) expert evidence that DNA found on the seals of the envelopes sent to the individual police officers matched the DNA of the appellant; (b) expert evidence that the handwriting on the envelope in each instance matched the handwriting of the appellant; and (c) the evidence of Superintendent Quade of the Australian Federal Police relating to the allegations made by the respondent against various people including Sodoli, Daulby and Hofer.

[12] The DNA evidence was largely unchallenged. That evidence, which was reviewed in detail by his Worship, demonstrated that DNA taken from each of the three envelopes produced a DNA profile matching the DNA profile of the respondent. The probability of that DNA profile was rarer than 1 in 200 million of the population. On the basis of the DNA evidence the respondent could not be excluded as the person who sealed the envelopes in each case.

[13] Expert evidence was also called in relation to a comparison between the handwriting which appeared on each of the three envelopes and writing which, it is not disputed, was of the respondent. The expert called in this regard was Christopher Anderson who, his Worship accepted, was qualified

to give expert evidence in relation to comparisons of handwriting. The learned magistrate reviewed the evidence of the microscopic and macroscopic examination of the handwriting conducted by Mr Anderson. Part of that comparison involved the use of the software program "Write-On". The processes employed by Mr Anderson were discussed in detail by his Worship. Having performed his examination the expert expressed the conclusion that "there was conclusive evidence that the writer of the handwritten notes on the specimen documents wrote the handwritten entries on the questioned documents being the three envelopes". The use of the expression "conclusive evidence" may be unfortunate in the circumstances, however, what was meant by that expression was explained in the course of the evidence of Mr Anderson. He described varying levels of confidence in the opinion that could be expressed from the results of any investigation conducted by an expert such as himself. He indicated that the highest of these was expressed to be "conclusive evidence" and other opinions ranged down to there being "weak support for the proposition that A wrote B compared to the alternative proposition that A didn't write B".

[14] The learned magistrate did not simply adopt the evidence of Mr Anderson or his conclusions. He reviewed the whole process in detail and reminded himself that he was not bound to act on the expert opinion even where that opinion was unchallenged. Having conducted a review of the whole of the evidence, his Worship reached the conclusion that he was satisfied beyond

reasonable doubt that the respondent was the author of the writing which appeared upon each of the relevant envelopes.

[15] Further evidence in support of the conclusion that the respondent was responsible for the envelopes and their contents being delivered to each of the recipients was found by his Worship in the evidence of Superintendent Quade of the Australian Federal Police. She told the court that she spoke with the respondent on 5 May 2000 when he made allegations alleging that Daulby, Sodoli, Hofer and others were involved in importing drugs from New Guinea to Cairns in 1998. He produced to her the documents entitled "The Untouchables" which referred to Daulby, Hofer and Sodoli among others.

[16] His Worship gave detailed consideration to the information provided to Superintendent Quade and found similarities between that material and the written communications made to each of the officers. The layout of the documents contained in the envelopes was similar to that in the documents headed "The Untouchables". There were also similarities in content. For example, Daulby was referred to as "the brains" in the correspondence received by him and as "the boss" of the group in the material provided to Superintendent Quade. Similarly the letter addressed to Hofer referred to him being the Superintendent of "Division 4" (a division which then no longer existed) and a similar description appeared in the document entitled "The Untouchables". There were other similarities identified by the learned magistrate. As was noted by the learned judge on appeal, his Worship found

that the similarities between the layout, the names and the drug theme in the documents provided to Superintendent Quade and those forwarded to Hofer, Daulby and Sodoli indicated all of the documents had the same source. He concluded that the respondent was the source or origin of each of the documents sent to Daulby, Hofer and Sodoli. There was a sound evidential basis for the conclusions reached by his Worship.

[17] Taking all of these matters together it can be seen that the Crown case against the respondent was a very strong one. Notwithstanding the strength of that case, the learned judge on appeal concluded that the verdicts could not stand and set aside the verdicts and ordered a retrial.

[18] The concerns of his Honour were focused upon three matters. The first was the evidence regarding the handwriting. In the course of his reasons for decision the learned magistrate referred to the three classes of evidence upon which he relied and then observed:

> "However, if only one part of the evidence (DNA, handwriting or of Quade and the items tendered through her) was before me then I would not have found it sufficient by itself to prove any of the charges beyond all reasonable doubt".

His Honour referred to that observation and said:

> "His Worship said he was satisfied beyond reasonable doubt that the writing on the envelopes forming part of Exhibits P4, P5 and P9 was that of the appellant (respondent). He did so having agreed with and accepted Anderson's evidence. This conclusion is inconsistent with His Worship's statement that the handwriting expert's evidence alone was not sufficient to found a finding of guilt beyond reasonable doubt. Mr Anderson, the handwriting expert, gave evidence that

> there was "conclusive evidence" that the specimen handwriting of the appellant was the same as the author of the handwriting on the exhibits comprising the threats. The learned magistrate appears to have accepted that evidence as such. In the circumstances it was not open to His Worship to so conclude for Mr Anderson's evidence after all was opinion evidence and not "conclusive" proof that the handwriting on the envelopes was that of the appellant."

[19] In our view the conclusion that the writing on the envelopes was that of the respondent was not inconsistent with the conclusion, reached by his Worship, that the handwriting expert's evidence alone was not sufficient to found a finding of guilt beyond reasonable doubt. It is one thing to conclude that the respondent addressed the envelopes and quite another to conclude that the respondent placed the threatening material within the envelopes and forwarded them to each recipient. The learned magistrate was quite correct in the observation he made.

[20] In relation to the observation of the handwriting expert that there was "conclusive evidence" that the handwriting of the appellant was the same as that of the author of the handwriting on the envelopes, a reading of the evidence of Mr Anderson confirms that, despite the unfortunate expression, he was expressing an opinion. The learned magistrate did not treat the evidence of Mr Anderson in any other way. He noted that the object in calling an expert is to allow him to express an opinion and noted that "a court ought not to act on an opinion, the basis for which is not explained by the witness expressing it". He went on to say that the opinion of the expert must be expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to the reliability of those conclusions.

The court will not blindly follow an expert as to do so would be to abrogate its responsibility. It is clear that Mr Anderson was expressing an opinion and that his Worship treated it as such. His Worship only agreed with that opinion after subjecting it to close analysis. There was no evidence to the contrary and his Worship was justified in reaching the conclusion that the respondent addressed each envelope.

[21] The second basis upon which his Honour acted to set aside the convictions was "His Worship's wrongful confinement of the cross-examination of Superintendent Quade as regards Police investigations into the appellant's complaints in May 2000".

[22] During the course of her evidence Superintendent Quade advised the court that the respondent made four allegations in the interview in May 2000. He alleged the importation of drugs from Papua New Guinea to Cairns in 1998 by a named police officer and, in the course of making that allegation, referred to the involvement of Daulby, Hofer and Sodoli. He made three other allegations, being two allegations of bribery in relation to a senior politician and a further allegation of insider trading against the same politician. Counsel for the defendant sought to cross-examine Superintendent Quade as to whether or not "she believed there was any merit in these complaints". His Worship intervened indicating that he would not be "involved in looking at the allegations" and observed that the belief of Superintendent Quade was "neither here nor there". Defence counsel then withdrew the question. The learned magistrate indicated that defence

counsel could, if he wished, inquire whether any proceedings had been taken or charges laid as a result of inquiries but would not permit any cross-examination regarding the personal opinion of Superintendent Quade or of her superiors. The matter was not pursued by defence counsel. In our view the position taken by his Worship was correct. The belief of Superintendent Quade or any of her superiors as to the merit or otherwise of the complaints made by the respondent to Superintendent Quade could have no bearing on the case being presented in relation to the respondent.

[23] The third and final basis upon which his Honour relied in setting aside the verdicts was that, in the course of his reasons for decision, the learned magistrate expressed the view that the respondent "had a motive, the ability and the opportunity to prepare and send" each envelope. His Honour expressed the view that "there was simply no basis for the learned magistrate's finding of motive". He added: "The finding of malevolent motive in February 1999 is also inconsistent, I think, with the gap in time between the posting of the threats in February 1999 and the appellant's complaints to the Federal authorities in May 2000". His Honour went on to express the view that "the learned magistrate's finding of motive is wrong and against the evidence".

[24] His Worship did not identify the motive to which he referred although he did draw the conclusion that "a motive" existed based upon the evidence of Superintendent Quade and the exhibits tendered through her. He did not expand upon what he meant by referring to "a motive". The evidence

established to the satisfaction of his Worship a link between the respondent and the recipients of the envelopes. The link arose out of the fact that the matters of which the respondent complained to Superintendent Quade, being the involvement of the identified officers with drugs, was similar in nature to those that exercised the mind of the person responsible for issuing the threats to the same officers. The evidence of Superintendent Quade provided an indication of how the respondent viewed the individual officers and his belief that they were each involved in unlawful drug related conduct. However the evidence does not go higher than that insofar as identifying any motive held by the respondent.

[25] The absence of an identified motive is something to be taken into account in the deliberative process but evidence of motive does not of itself constitute evidence of involvement in a crime. It is, of course, not necessary for the Crown to prove motive. In our view his Honour was correct in concluding that this evidence does not establish a motive for the respondent to threaten the lives of the recipients of the threats. However it is clear that his Worship mentioned motive only in passing and did not treat it as a significant matter in reaching his conclusions. He did not elaborate on what the motive may have been and, when he came to summarise his conclusions and identify the basis upon which he reached those conclusions, he made no reference to motive being a factor.

[26] If his Worship did err in referring to the existence of "a motive" in the circumstances of this case, this does not, in our view, call for the verdicts of

guilty to be set aside. This is an appropriate case for the application of the proviso found in s 177(2)(f) of the Justices Act. The case against the respondent, although circumstantial, was very strong. The absence of an identified motive, in the circumstances of the case, does not detract from that situation. Here the Crown established beyond reasonable doubt that the handwriting on the envelopes was that of the respondent. The DNA evidence leant strong support to the conclusion that he sealed the envelopes. By reference to the evidence of Superintendent Quade and the documents provided to her by the respondent it was confirmed that the contents of the envelopes were so similar in "layout, names and the drug theme" as to lead to a conclusion that the respondent was the author of both sets of documents. In those circumstances the finding of guilt on each count was to be expected. No substantial miscarriage of justice has occurred.

The cross-appeal

[27] The respondent lodged a cross-appeal. The first issue raised by that cross-appeal was whether his Honour was correct in determining that the verdicts could not be said to be unsafe and unsatisfactory and, further, erred in finding that there was no substantial miscarriage of justice. Leaving aside the issue of whether the respondent has correctly characterised the findings of his Honour it cannot, in our view, be said that the verdicts were unsafe or unsatisfactory or that any substantial miscarriage of justice occurred and in that regard reference is made to the reasons set out above.

[28] In a further ground of cross-appeal the respondent contended that his Honour erred in finding that the learned magistrate did not have to expressly reject the respondent's record of interview in order to find the respondent guilty of the alleged offences. In the record of interview the respondent denied involvement in the matter. As the respondent conceded in the course of discussions with the Court, the findings of his Worship made it quite clear that the explanation provided by the respondent in the record of interview had been rejected. There is no merit in this ground of cross-appeal.

[29] The final ground of cross-appeal related to the DNA testing. Evidence was given that two samples of DNA were taken from the respondent. They were designated sample A and sample B. Sample A was the subject of detailed evidence accounting for its location and use in the testing process. There was no evidence in relation to sample B. The submission of the respondent was that in those circumstances there was a possibility of contamination of samples and also of deliberate falsification of test results. The difficulty with his submission is that there was simply no evidence regarding sample B and no questions were asked of any witness regarding that sample. There was no suggestion put to any witness that anyone had deliberately contaminated the samples or falsified the test results. As the learned judge on appeal concluded, there is no substance in these complaints.

[30] The appeal is allowed and the verdict of guilty in each case is reinstated. The cross-appeal is dismissed.

[31] Although the reasons for judgment published by his Honour record that the appeal was against conviction and sentence, reference to the Notice of Appeal and the Amended Notice of Appeal contained in the Appeal Books does not reveal any ground of appeal related to sentence. The grounds of appeal were related solely to conviction. However a review of the transcript of the submissions made to the Supreme Court reveals reference to a challenge to the sentences imposed in the Court of Summary Jurisdiction. The matter will be remitted to the Supreme Court to deal with this outstanding issue.

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