Warford v The Queen [2009] NTCCA 9

PARTIES:	WARFORD, Matthew James 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:	CCA 4 of 2008 (20718579)
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JUDGMENT OF:	MARTIN (BR) CJ, SOUTHWOOD J AND OLSSON AJ

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – PRIOR INCONSISTENT STATEMENTS

Application for extension of time within which to seek leave to appeal – nature of prior inconsistent statements – whether trial judge should have directed jury as to use of the prior inconsistent statements – whether there was a danger that the jury would misuse – application for extension of time refused.

Driscoll v The Queen (1977) 137 CLR 517; *Morris v The Queen* (1987) 163 CLR 454; *R v Salih* (2005) 160 A Crim R 310; *Sams v The Queen* (1990) 46 A Crim R 468, discussed.

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	R Wild QC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

Warford v The Queen [2009] NTCCA 9
No. CCA 4 of 2008 (20718579)

BETWEEN:

MATTHEW JAMES WARFORD
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, SOUTHWOOD J AND OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 10 July 2009)

Martin CJ:

Introduction

[1] On 28 May 2008 the applicant was found guilty by a jury of deprivation of liberty and two offences of assault accompanied by circumstances of aggravation. Sentence was imposed on 6 June 2008. Subsequently a deficient application for leave to appeal against both conviction and sentence was refused.

[2] By application dated 21 January 2009 the applicant applied to the Court of Criminal Appeal for an extension of time within which to apply for leave to appeal against his convictions. The sole ground argued on the hearing of the

application concerned the failure of the learned trial Judge to instruct the jury adequately as to "the nature of prior inconsistent statements and the use to which such statements could be put in the course of the jury's deliberations". The inconsistent statements were statements made by the alleged victim, Mr Alain Robaye ("the complainant"), and the applicant.

[3] During the hearing of the application, it became apparent that counsel was unable to identify the individual inconsistencies about which it was contended the learned trial Judge should have given a direction. In addition, counsel raised for the first time the possibility that in the absence of an appropriate direction the jury might have misused previous statements by the applicant which were said to be inconsistent with his evidence. However, counsel was not in a position to identify the particular statements which might have been misused. In these circumstances the hearing was adjourned to enable counsel to provide a schedule of the relevant prior statements.

[4] A schedule was subsequently filed together with further written submissions that narrowed the issues for determination by this Court. First, the written submissions conceded that the prior inconsistent statements found in the evidence of the complainant "[did] not go to the pith and substance of the defence" and, therefore, it was not contended that a direction was required concerning the use of the inconsistent statements made by the complainant. That concession was appropriate and it is unnecessary to consider further the prior statements of the complainant.

[5] The written submissions identified the question for determination by this Court in the following terms:

> "The real issue in this appeal is whether by not directing the jury as to the use the jury could put the prior inconsistent statements found in the evidence of the applicant that there was a danger that the jury might misuse the material in the course of their deliberations."

[6] For the reasons that follow, in my opinion the application for an extension of time within which to seek leave to appeal should be refused.

Facts

[7] On 2 July 2007 the applicant and a witness, Mr Kyle Tyler, met the complainant at Casuarina Square. The applicant was armed with a baton and Tyler with a bowie knife and knuckledusters. The jury, and the Judge for the purposes of sentencing, found that the applicant required the complainant to accompany him to the applicant's home where he was to work off the value of a hard drive that the applicant blamed the complainant for stealing. Under threat and afraid, the complainant accompanied the applicant and Kyle to the applicant's home where the applicant threatened to cut off the complainant's fingers and feet or handcuff him if the complainant attempted to leave the house.

[8] The applicant's house was surrounded by a high fence and a locked gate. The complainant was told to clean up the yard and did the work required of him. He did not leave the house except in the company of the applicant or on request by the applicant to go to a nearby shop to buy food and alcohol.

For this purpose the complainant left the premises for approximately 20 minutes.

[9] The unlawful deprivation of liberty came to an end in the early hours of the morning of 4 July 2007 when police took the complainant to hospital. The offences of assault of which the applicant was convicted by the jury occurred during the period of deprivation of liberty. The applicant also committed an additional offence of assault to which he pleaded guilty.

[10] The offence to which the applicant pleaded guilty occurred during the evening of 3 July 2007 when the applicant punched the complainant.

[11] The second offence of assault occurred while the complainant was in the bathroom tending to his injury. The applicant grabbed the complainant by the back of his hair and smashed the complainant's face into the mirror. The mirror was shattered and the complainant suffered a cut to his forehead that bled heavily.

[12] In respect of the assault in the bathroom, the jury also found the applicant guilty of the aggravating circumstance that the complainant suffered harm. However, the jury acquitted the applicant of a second circumstance of aggravation that the complainant was threatened with an offensive weapon, namely, an extendable baton.

[13] The third offence of assault occurred after the complainant moved from the bathroom to the front bedroom of the house. The applicant entered the

bedroom and struck the complainant about his body and arms with an extendable baton. The applicant then threatened to sexually assault the complainant, pulled down his own shorts so that he was naked and attempted to remove the complainant's pants. The complainant resisted and the applicant struck the complainant on the wrist and ankle with the blunt edge of a meat cleaver.

[14] The jury found the applicant guilty of assault in the following circumstances of aggravation:

(i) that the complainant suffered harm;

(ii) that the complainant was threatened with an offensive weapon, namely an extendable baton;

(iii) that the complainant was threatened with an offensive weapon, namely a meat cleaver; and

(iv) that the complainant was indecently assaulted.

[15] Following the assaults, Tyler telephoned for an ambulance. The complainant climbed the perimeter fence and waited for the ambulance to arrive. The applicant threatened the complainant if he spoke to the police.

[16] The police arrived and decided the complainant should be taken to hospital without waiting for the ambulance. The applicant told the complainant to tell the police he had been beaten up by a bunch of locals at the Nightcliff shops. While in the vicinity of the applicant's home, the applicant told

police that the complainant had been bashed by a "bunch of full bloods". When police enquired as to where that incident had taken place, the applicant said he thought it was near Woolworths. The officer involved noticed that the applicant had blood on his feet.

[17] When the complainant was placed into the police van he told police that "full bloods got me". The applicant approached the back of the van and said to the complainant, "Make sure you tell them who did this, they shouldn't get away with it".

[18] The Crown led evidence of a record of interview between police and the applicant. That interview contained statements which were adverse to the applicant's case at trial and contrary to the evidence he gave before the jury. In his evidence the applicant admitted making the statements to the police, but denied that they were true. He said he had been a "smart arse" during the interview.

[19] The applicant gave evidence that he met the complainant by chance at the Casuarina Shopping Centre. The complainant told the applicant he had been living on the streets and the applicant offered him accommodation. They discussed how the complainant would pay rent and agreed that the complainant would clean up the house and later purchase a hard drive for the applicant.

[20] The applicant said he was carrying a baton for protection. Tyler had a knuckleduster and a bowie knife on his person.

[21] According to the applicant, the complainant stayed overnight and the next day the applicant, Tyler and the complainant returned to the Casuarina Shopping Centre. While at the Centre the complainant "jumped up and went and punched a bloke in the face", but the applicant and Tyler were not involved. After returning to the applicant's home, the complainant cleaned up the yard while others consumed drugs. Later that evening the complainant went to the shops alone to purchase alcohol and chips and repeated that trip on at least one other occasion.

[22] The applicant said that the three men travelled to the Casuarina Shopping Centre the following day where DVDs and a bottle of vodka were stolen. The three men returned to the house where more drugs were consumed. Later the applicant's girlfriend visited the house and alcohol and drugs were consumed by everyone present.

[23] The applicant gave evidence that later in the evening he and the complainant had a dispute. During the confrontation the applicant saw that the complainant had stolen his wallet and struck the complainant. That blow was the subject of the assault to which the applicant pleaded guilty.

[24] A further incident occurred in the lounge room. According to the applicant money given to the complainant by Tyler was found on a chair where the complainant had been sitting and Tyler flew into a rage. Tyler struck the kitchen table with a meat cleaver and used the applicant's baton to strike the table.

[25] The applicant said he and Asta left the house and entered his bungalow. After they had been in the bungalow for about 15 minutes, they heard the sound of glass breaking and went back into the house. The applicant looked in the bathroom and saw the complainant lying on the floor of the bathroom with glass all over the floor. He asked him what had happened, but he did not get much of a response. He then walked into the lounge room where Tyler and his girlfriend ("Natalia") were sitting. He asked Tyler what had happened and Tyler shrugged his shoulders. Natalia did not say a word. The applicant started to get angry with Tyler and he and Asta went to the back of the house for about an hour. They had sex and then re-entered the house.

[26] According to the applicant, as he was coming back into the house he heard screaming coming from the front room. He ran to the room and saw that Tyler was three or four inches above the complainant's head. Tyler was jumping and landed on the side of the complainant's head. The applicant rushed at Tyler and put him into the wall. When the applicant let go, Tyler kicked the complainant in the face. The applicant unsuccessfully attempted to ring 000 and gave Tyler his telephone telling him to ring 000.

[27] The applicant said he heard the complainant tell police that he had been bashed by "full bloods". The applicant just went along with the story.

[28] Both Tyler and his girlfriend gave evidence. They implicated the applicant. It was the defence case that Tyler and his girlfriend had put their heads together to exonerate Tyler and falsely implicate the applicant.

Inconsistent Statements

[29] The written submissions of the applicant identify a number of passages of evidence in which the cross-examiner established that the applicant had made prior statements inconsistent with his evidence to the jury. Those passages were identified in the written submissions as follows:

> "1. XN (AB 324.4) Applicant said person named Mick arrived at the Progress Drive address and saw him punch Robaye.
>
> XXN (AB 379.4, 384.4 – 385) It was put to applicant that he had not told the police about the presence of Mick. [The applicant admitted deliberately omitting any reference to Mick because he did not wish to involve him].
>
> 2. XN (AB 321.3) Applicant said that his ex girlfriend Astra [sic] came to the house.
>
> XXN (AB 380.7, 384.2, 386.5) Applicant made prior statements to police that made no mention of Astra's [sic] presence at the house. Said he lied about that. [The applicant admitted deliberately omitting any reference to Asta because he did not wish to involve her].
>
> 3. XN (AB 320, 321) Drugs were consumed at the house on the night of the assault.
>
> XXN (AB 380.3) Applicant told police not under influence of drugs. [The applicant admitted deliberately lying to the police about this matter].

4. XN (AB 324.6) Applicant said only punched Robaye once to face

   XXN (AB 389.7 – 390.4) Applicant told police hit him a 'couple of times'. Lied to police when told them 'every time I knocked him down he got back up'. [The applicant also admitted lying when he told police he did not know how many times he hit the complainant].

5. XN (AB 319) Applicant said Kyle stole a bottle of vodka.

   XXN (AB 391.9 – 392.5) Applicant told police in EROI that he bought bottle of vodka. Agreed he had lied to police.

6. XN (AB 326.10 – 327.3) Applicant said he was out in the bungalow when he heard 'something break' entered house and saw broken mirror.

   XXN (AB 396.8 – 397.3) Applicant told police he was in the lounge room when he heard breaking glass. [The applicant admitted this statement to police was a lie].

7. XN (AB 331-10) Applicant told Court he rang a girl Jamie Russell to watch State of Origin with him and that she was present when he was arrested.

   XXN (AB 397.5) Applicant said he had been with Jamie overnight and that she was 'a girl and a friend'. But said he lied to police when he said she was his girlfriend."

Directions

[30] The trial was conducted on the basis that the critical issue was whether the Crown had proved that the applicant assaulted the complainant rather than Tyler. Both the complainant and the applicant had made a number of prior statements inconsistent with their evidence. Not surprisingly, the addresses by counsel emphasised the inconsistencies as demonstrating a lack of credit.

[31] The Crown sought a direction that the lies by the applicant to police could be used as evidence of consciousness of guilt. That applicant opposed such a direction and the trial Judge declined to give it.

[32] Counsel for the applicant sought a direction that Tyler be treated as if he was a "co-accused" who had a purpose to serve by falsely implicating the applicant. The trial Judge determined that Tyler was not in the category of an "accomplice", but decided that she should give a direction as to possible unreliability on the basis that Tyler had his own interests to serve.

[33] Against this background, and against the background of addresses by counsel as to the impact of inconsistencies upon the reliability of the evidence of the accused and Crown witnesses, the trial Judge warned the jury that Tyler could be "seen as a witness who has his own interests to serve and could have a reason to give false evidence against Matthew Warford". Her Honour warned the jury they should scrutinise the evidence of Tyler very carefully and look to other evidence. Her Honour identified four pieces of evidence that were capable of amounting to corroboration of the evidence of Tyler and there is no complaint about her directions in that regard.

[34] As to the evidence of the applicant, having advised the jury that the applicant was not obliged to give evidence and the jury was entitled, if it saw fit, to give him credit for having given evidence, the trial Judge reminded the jury that it was the Crown case that "essentially Matthew

Warford has fabricated his version of the events and fabricated an alibi".

The trial Judge then gave the following directions about the lies told by the applicant to the police:

> "There is a direction that I must give you relating to the lies which Matthew Warford admitted that he made to police in his record of interview. You have heard that when he was under cross-examination Matthew Warford admitted he had told a number of lies to police when he gave his record of interview. For example, he stated he told a lie when, at the commencement of the record of interview, he told police he was not under the influence of drugs and had not had drugs the night before.
>
> He said he lied when he said Mick was not there on the night of the assault and that he failed to tell police that Aster [sic] was there on the night of the assault. He said the reason he lied about that was because he did not want to involve either of them in this. He agreed that he had told police a lie when he said there was no argument between Mick and Alain about the V8 supercars and that he lied to police when he told them he was in the lounge room when he heard breaking glass in the bathroom. He said he was coming down from drugs when he said this. He agreed he had told police a lie when he said Jamie was his girlfriend and that he wanted her to be contacted. He said he did this because he was worried about his property.
>
> He agreed he had exaggerated in saying he saw Kyle two feet in the air above Alain's head and … that what he saw was Kyle three to four inches in the air above Alain's head. He stated he lied when he told police that every time he punched Alain, Alain got up. He gave evidence he was being a 'smart arse' when he said that to police and that, in fact, he had only punched Alain once.
>
> It is for you, as members of the jury, to decide what significance those lies have in relation to the issues in this case. I give you this warning: do not follow a process of reasoning to the effect that just because Matthew has been shown to have told a lie or lies about matters, then that is evidence of his guilt. The fact he told lies is relevant to his credit, that is, whether or not you believe him. However, the fact that he has told lies about some matters does not necessarily mean his evidence about other matters must be rejected."

[35] The trial Judge did not give a specific direction that the prior inconsistent statements made by the applicant or any witness could not be used as evidence of the truth of those statements unless the statements were adopted by the witness as true. Nor was the trial Judge asked to give such a direction.

Principles

[36] Speaking generally, and subject to later observations concerning statements against interest, evidence of a prior statement by a witness inconsistent with the evidence of the witness is admissible as relevant to the credit and reliability of the witness. If the witness admits that the previous statement is true, that statement becomes the evidence of the witness, but only to the extent that the witness admits that the statement is true.

[37] In many circumstances, it will not be necessary for a trial Judge to explain to a jury that the existence of the previous inconsistent statement is relevant to an assessment of the credit and reliability of the witness. This much will be obvious both as a matter of commonsense and from the addresses of counsel.

[38] The same cannot be said of the limit of the proper use of a previous inconsistent statement. Unaided by a direction from the Judge, the jury cannot be expected to appreciate that unless the witness admits that the prior statement is true, that statement cannot be used as evidence of the truth of its contents. Whether a direction is required to this effect must depend upon

the content of the previous statement in the context of the issues to be determined by the jury and, in particular, whether the previous statement is adverse to the accused.

[39] In *Driscoll v The Queen*,[1] witnesses had been declared at trial to be adverse and were cross-examined as to prior statements inconsistent with the evidence given by the witnesses. In a judgment with which the other members of the Court agreed, Gibbs J observed that "the whole purpose of contradicting the witness by proof of the inconsistent statement is to show that the witness is unreliable".[2] His Honour continued:

> "In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make a warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he had made an earlier statement inconsistent with his testimony."

[40] As to impermissible use of the prior inconsistent statement, Gibbs J observed that "it is clearly settled that the previous statement is admitted merely on the issue of credibility, and is not evidence of the truth of the matter stated in it …". In the particular circumstances under consideration where the witnesses had been declared adverse, his Honour later noted that

[1] (1977) 137 CLR 517.
[2] *Driscoll v The Queen* (1977) 137 CLR 517 at 536.

it was "of course necessary to warn the jury that they could not treat [the witnesses'] previous statement as evidence."

[41] Reference was also made by counsel to the decision of the High Court in *Morris v The Queen*.[3] In particular, counsel sought to rely upon a statement in the joint judgment of Deane, Toohey and Gaudron JJ that if a prior inconsistent statement is admitted, "it will usually be necessary for the trial judge to give very careful and very precise instructions to a jury as to the weight the evidence should be given".[4] However, in making those observations, their Honours were speaking of a prior inconsistent statement admitted as evidence of the facts contained in the statement. In respect of prior inconsistent statements not admitted as evidence of their truth, their Honours cited the passage from the judgment of Gibbs J in *Driscoll* to which I have referred.

[42] In *Sams v The Queen*,[5] Hunt J recognised that in many cases the failure to give a direction that a prior statement is not evidence of its truth "will not produce a miscarriage of justice".[6] His Honour observed, however, that in respect of some of the statements in question it was "essential" that the limited use be explained to the jury.

[3] (1987) 163 CLR 454.
[4] *Morris v The Queen* (1987) 163 CLR 454 at 469.
[5] (1990) 46 A Crim R 468.
[6] *Sams v The Queen* (1990) 46 A Crim R 468 at 471.

[43] In *R v Salih*,[7] a number of inconsistencies in the evidence of a complainant were relied upon as demonstrating unreliability. Only very brief and general directions were given. The Victorian Court of Appeal was of the view that the Judge was required to identify each prior inconsistent statement upon which the accused relied and it was necessary to inform the jury that the previous statements were not evidence unless adopted in evidence by the complainant. It must be said, however, that the circumstances of the inconsistencies about which the Court was of the view that the Judge should have given specific directions were far removed from the inconsistencies with which this Court is concerned.

Discussion

[44] The oral and written submissions proceeded on the assumption that the prior statements of the applicant were not admissible as evidence of the truth of the statements. This assumption was not well founded. The statements inconsistent with the evidence of the applicant were statements against interest. They were admitted as an exception to the hearsay rule and could be used as evidence of the truth of the facts stated. For example, the applicant's statement to police that "[e]very time I knocked him down---he got back up" could have been used by the jury as evidence of the truth of that statement. Similarly, the statement by the applicant that he was in the lounge room when he heard breaking glass could also be used as evidence that the applicant was in the lounge room at that time. To the extent that the

[7] (2005) 160 A Crim R 310.

applicant made statements against interest which were inconsistent with his evidence, it was open to the jury to use those statements as evidence of the truth of their content.

[45] Other inconsistencies were more in the nature of a failure to mention matters than positive statements of fact. In these instances, there was no risk of the jury misusing such statements. For example, the applicant's failure to mention the presence of Mick or Asta could only be used by the jury as reflecting adversely upon the credibility of the applicant's evidence that those persons were present at the house.

Conclusion

[46] For these reasons, in my opinion there was no occasion for the trial Judge to give directions to the jury about the use of the applicant's prior statements to police that were inconsistent with his testimony. There was no danger of misuse and such directions would only have served to emphasise the inconsistencies to the detriment of the applicant's credit. No doubt counsel for the applicant took the same view and, for this reason, did not seek the directions that the applicant now contends should have been given.

[47] The application for leave to extend time within which to seek leave to appeal should be refused.

Southwood J:

[48] I agree with the Reasons of the Chief Justice.

Olsson AJ:

[49] I agree both with the conclusion of Martin CJ and the reasoning expressed by him.