Rinaldi v Trenerry [1999] NTSC 19

PARTIES:	**DION HENRY RINALDI**
	v
	ROBIN TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising TERRITORY JURISDICTION
FILE NO:	9711483
DELIVERED:	10 March 1999
HEARING DATES:	27 January 1999
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Appeal – Justices – Appeal against conviction – Drive whilst disqualified – Drive whilst under the influence – Drive without due care– Unlawful use of motor vehicle – unrepresented accused – Whether failure by magistrate to provide a fair hearing.

Justices Act (NT), s 177

MacPherson v The Queen (1981) 147 CLR 512, applied

REPRESENTATION:

Counsel:

Appellant:	Mr O'Loughlin
Respondent:	Ms Fraser

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	tho99003
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rinaldi v Trenerry [1999] NTSC 19
No. 9711483

BETWEEN:

DION HENRY RINALDI
Appellant

AND:

ROBIN TRENERRY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 10 March 1999)

THOMAS J*:*

[1] This is an appeal from a decision of a stipendiary magistrate in the Court of Summary Jurisdiction on 3 June 1998 to convict the appellant of the following four offences:

> "On the 15th day of February 1997 at Darwin in the Northern Territory of Australia.
>
> 1. being a person who was disqualified from holding a driver's licence, drove a motor vehicle, namely Taxi 110, on a public street, namely Mitchell Street:
>
> Contrary to Section 31(1) of the Traffic Act
>
> AND FURTHER
>
> On the 15th day of February 1997 at Darwin in the Northern Territory of Australia

2. drove a motor vehicle, namely Taxi 110, on a public street, namely Mitchell Street, whilst under the influence of intoxicating liquor or a drug or a psychotropic substance to such an extent as to be incapable of having proper control of that motor vehicle:

Contrary to Section 19(1) of the Traffic Act.

AND FURTHER

On the 15th day of February 1997 at Darwin in the Northern Territory of Australia.

3. drove a vehicle, namely Taxi 110, on a public street, namely Mitchell Street, without due care:

Contrary to Regulation 95 of the Traffic Regulations.

AND FURTHER

On the 15th day of February 1997 at Darwin in the Northern Territory of Australia.

4. unlawfully used a motor vehicle, namely, Taxi 110. Contrary to Section 218(1) of the Criminal Code."

[2] A Notice of Appeal filed 15 June 1998 included an appeal against an order for forfeiture of bail and also appealed against sentence on the grounds that it was:

"1. manifestly excessive

2. double jeopardy."

[3] At the hearing of this appeal on 27 January 1999, the appellant, through his counsel Mr O'Loughlin, filed an Amended Grounds of Appeal. The appeal against sentence was withdrawn and the appeal against order for forfeiture of bail was not argued. The amended appeal proceeded as an appeal only

against conviction for the four offences. The Amended Grounds of Appeal are as follows:

1. The Magistrate erred in law in receiving the record of interview into evidence, due to:-

    1.1 Cross examination of the appellant by the police during the interview;

    1.2 The failure to properly exercise his discretion to exclude the interview.

2. The Magistrate erred in law, and failed to provide a fair hearing, in failing to properly advise the unrepresented appellant of:

    2.1 The procedures involved in the hearing of the voir dire;

    2.2 The right to object to admission of the record of interview on grounds of cross examination;

    2.3 Of the matters to be taken into account when determining the admissibility of the record of interview;

    2.4 The right not to give evidence, and his right to cross-examine witnesses;

3. The Magistrate erred in law, and failed to provide a fair hearing in:

    3.1 Failing to hold the voir dire at the beginning of the hearing;

    3.2 Hurrying of the appellant during his submissions and cross-examination;

    3.3 Stopping the appellant during his ‘no case’ submissions;

    3.4 Allowing police opinion evidence of the appellant’s intoxication;

    3.5 Allowing the appellant to make his voir dire submission in the presence of, and prior to, the evidence of the prosecution witness;

3.(sic) The magistrate erred in law in applying the elements of the charge of unlawful use of a motor vehicle when determining the charge of driving without due care.

[4] I will deal firstly with the following ground of appeal:

"2. The Magistrate erred in law, and failed to provide a fair hearing, in failing to properly advise the unrepresented appellant of:

2.1 The procedures involved in the hearing of the voir dire

2.4 The right not to give evidence, and his right to cross-examine witnesses."

[5] The background to these charges is as follows:

At approximately 6.00am on 15 February 1997, Constable Baillie was called to an incident in Mitchell Street, Darwin. A taxi No. 110 had collided with one of the post office boxes. The taxi was on the wrong side of the road pointing towards Bennett Street. The vehicle was wedged up against the red post box. There was minor damage to the front right hand panel of the vehicle. The driver of the taxi was there and three persons sitting on a garden bed just beside the taxi. Constable Lloyd spoke to the driver of the taxi. Constable Baillie had a conversation with Mr Rinaldi who was seated on the planter box beside the café. According to the observation and evidence given by Constable Baillie to the learned stipendiary magistrate, Mr Rinaldi was extremely intoxicated. He was sitting with his head between his hands and with his hands on his knees. Constable Baillie gave evidence in the Court of Summary Jurisdiction that he had a short conversation with Mr Rinaldi and asked him what had happened. Mr Rinaldi replied "I'm so pissed. I just want to go home. I'll pay for the damage." He kept repeating this. Mr Rinaldi was arrested under s128 of the *Police Administration Act* and conveyed to the sobering up shelter.

In the hearing before the Court of Summary Jurisdiction Mr Rinaldi represented himself.

[6] The principles to be exercised by the Court which is dealing with an unrepresented accused have been set out in *MacPherson v The Queen* (1981) 147 CLR 512 Brennan J @ 545-547:

> "…The Court of Criminal Appeal resolved the appeal against the applicant. The reasons of the majority (Street CJ agreeing with Nagle CJ at CL) advanced three propositions. First, that a judge cannot advise an unrepresented accused as to whether he should ask for a voir dire. Next, an accused's omission to challenge the admission of a confession avoids the necessity for a voir dire for, as their Honours held:
>
> "There certainly is no requirement on a trial judge, before admitting confessional material into evidence, of his own volition to hold an inquiry on the voir dire."
>
> And finally, the circumstances giving rise to the appeal were thought to be of the applicant's own making because he had not heeded judicial advice to obtain or accept legal representation.
>
> With all respect, I find it necessary to depart from each of these propositions. As to the first proposition, their Honours cited the remark of Lawton LJ in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at 724:
>
> "In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."
>
> But there is, of course, a distinction between telling the players how to play and telling them the rules of the game. If the distinction is not observed, and an unrepresented accused is kept in ignorance of the rules, the procedural rules which are designed to protect an accused and to ensure a fair trial become a trap, for an unwitting failure to make objection would avoid the judicial duty to control the admission of evidence. The true role of the judge was stated by Wills J in *Reg v Gibson* (1887) 18 QBD 537 at 543:

> "It is sometimes said – erroneously as I think – that the judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence."
>
> In taking care, it may well be necessary for a trial judge of his own volition to hold an inquiry on voir dire in order to rule upon the admission of a confession in evidence. And therefore I would disagree with the second proposition. Finally, an accused who elects to defend himself forfeits none of his rights thereby. If he has not had a trial according to law, his intransigent refusal to accept legal representation is no ground for dismissing his appeal either under the proviso or otherwise. The absence of legal representation imposes a heavier burden upon the trial judge and denies an accused the assistance of an advocate who can usually present an accused's case more effectively than the accused himself; but it is a circumstance which is entirely neutral on appeal except in so far as it is relevant to the fairness of the trial. In this connexion, with respect, I should not accept the view of Roden J the third member of the Court of Criminal Appeal, that the categories of advice which a trial judge should give to an unrepresented accused are limited to his rights to challenge jurors, to give evidence, to make an unsworn statement or to remain silent. Whether any and what advice should be given to an accused depends upon the circumstances of the particular case and of the particular accused. What can be said is that if it is necessary to give any advice, the necessity arises from the judge's duty to ensure that the trial is fair. That duty does not require, indeed it is inconsistent with, advising an accused how to conduct his case; but it may require advice to an accused as to his rights in order that he may determine how to conduct his case."

[7] Immediately after the pleas of not guilty had been entered the Prosecutor advised His Worship that Mr. Rinaldi wished to contest the admissibility of the Record of Interview and suggested it might be suitable to do the voir dire first. At the commencement of the hearing the learned stipendiary magistrate explained the procedure to Mr. Rinaldi in the following terms t/p 2 & 3:

> "Mr. Rinaldi, you're representing yourself and I'll just explain certain things to you. The prosecution have to prove these charges

against you, beyond reasonable doubt. In this court you're entitled to the right to silence. You don't have to say anything, you don't have to do anything. It's entirely a matter for yourself whether you say or do anything. The prosecution, I anticipate, will endeavour to prove these charges by calling witnesses and asking questions of the witnesses.

In relation to each witness you will have the opportunity to cross-examine, that is ask questions of a witness. Whether or not you cross-examine is entirely a matter for yourself. You're entitled to the right to silence. Nobody can make you cross-examine. It is entirely a matter for you. Cross-examination can be a very difficult task. Nobody can advise you how to cross-examine if you decide not to exercise your right to silence.

At the end of the prosecution case I then work out in my mind whether or not you have what is called 'a case to answer'. That's not the same as finding you guilty. All I'm doing is looking at the prosecution case to work out whether there is sufficient evidence to justify each element of each charge. If I'm satisfied that there's sufficient evidence to justify each element of each charge, I will be satisfied that there's a case to answer. You then have the opportunity, if you wish, to answer the case or put your case to the court. Whether or not you do that is entirely a matter for you because you are entitled to the right to silence.

If you do decide to give evidence yourself, nobody can make you give evidence. It's entirely a matter for you, because you're entitled to the right to silence. If you give evidence, you should anticipate that you would be cross-examined. If you call witnesses on your behalf, you should anticipate that they'll be cross-examined. At the conclusion of your case if you go into evidence, if you present a case, I then decide if the prosecution can prove the case beyond reasonable doubt. You have nothing to prove, it's all up to the prosecution to prove the case.

Now do you have any questions about that procedure?

Mr Rinaldi: No, Your worship".

[8] I agree with the submission made by Mr. O'Loughlin that the second paragraph of this explanation to the accused confused two distinct concepts,

that is the accused's right to silence in choosing whether or not to give evidence and the procedure for cross examination of the crown witnesses. I agree that the explanation by the learned stipendiary magistrate could have confused the appellant and affected the way he went about his cross-examination of the prosecution witnesses. The learned stipendiary magistrate did not explain to the defendant the distinction between a hearing on the voir dire and the substantive hearing. Neither did he make it clear to the parties before the prosecution called their first witness whether he was commencing a hearing on the voir dire or whether he would deal with that application at a later time. He asked the Crown to call their first witness. The Crown called Constable Baillie who had attended the scene of the vehicle collision on the night of the 15th February, 1997. At the conclusion of this evidence in chief the learned stipendiary stated as follows t/p6:

> His Worship: "Mr Rinaldi, we're now at that stage where I have to remind you that you're entitled to exercise your right to silence. Do you wish to ask Constable Baillie any questions?"
>
> Mr Rinaldi: "Yes, I do, Your Worship."
>
> His Worship: "If you do so, you must do so realising that you cannot be compelled to ask questions and you are entitled to the right to silence."

[9] Again this statement confuses the two distinct concepts and is perpetuating the previous explanation which, as Ms. Fraser who appeared for the

Respondent in these proceedings said in her submissions to this Court, is a "complete and utter misstatement of the law."

[10] Mr. Rinaldi did in fact ask Constable Baillie a number of questions in cross-examination. The prosecutor then called the second witness for the Crown, Acting Sergeant Heath. Acting Sergeant Heath was the officer who had arrested Mr. Rinaldi on the 17th May,1997 and subsequently conducted a Record of Interview with Mr. Rinaldi at the Peter McAulay Centre. Mr. Rinaldi then objected to the playing of the tape of the Record of Interview and the admissibility of the conversation he had with Acting Sergeant Heath. The essential reason for the objection was that on the night of the incident, being the 15th February,1997 he had been taken to a sobering up shelter. He was subsequently told by Police officers that there would be no further investigation of the incident and no charges would be laid. The submission made to the learned stipendiary magistrate by Mr. Rinaldi was that although Acting Sergeant Heath did caution him as to his right to remain silent, he should in the circumstance have gone further and clearly told Mr. Rinaldi that the earlier assurances he had been given by Police that he would not be charged no longer applied. Mr Rinaldi asked two questions in cross-examination of Acting Sergeant Heath. Acting Sergeant Heath gave evidence in cross-examination that he had no reason for not advising Mr Rinaldi that the earlier police assurances that he would not be charged no longer applied.

[11] It is not in dispute that Acting Sergeant Heath was aware that Mr. Rinaldi had been told by Police officers that he would not be charged. Neither is it in dispute that Mr. Rinaldi had previously paid an amount of $666 to the owner of the taxi for damage caused to the taxi as the result of the collision. At the time of arresting Mr. Rinaldi Acting Sergeant Heath told Mr. Rinaldi the reason for the arrest and prior to conducting the Record of Interview cautioned him as to his rights. Mr. Rinaldi made admissions in the Record of Interview. His reason for objecting to the admissibility of the Record of Interview is that he would not have participated in the Record of Interview if Acting Sergeant Heath had told him the earlier assurances that he would not be charged no longer applied. Acting Sergeant Heath and Constable Sexton gave evidence on the voir dire for the prosecution.

[12] Mr. Rinaldi gave evidence on the voir dire relating to the admissibility of the record of interview. Mr. Rinaldi made submissions as to the admissibility of the Record of Interview as did the prosecutor.

[13] The learned stipendiary magistrate then gave reasons for admitting the record of interview into evidence. His reasons for allowing the record of interview to be tendered indicate he clearly understood the objection raised by Mr. Rinaldi. His reasons also indicate that he correctly stated the principles which govern the admission into evidence of a record of interview.

[14] The prosecution then called Mr Graeme Muir, the owner of taxi 110, to give evidence. Mr Rinaldi made submissions as to whether he had a case to answer, as did the prosecutor. His Worship then found that Mr. Rinaldi had a case to answer. Mr. Rinaldi did not give evidence or call any evidence. Both Mr. Rinaldi and the Prosecutor made submissions to the learned stipendiary magistrate as to whether he could find the offences proved beyond reasonable doubt. His Worship was satisfied the offences were proved beyond reasonable doubt, imposed convictions and penalties for the offences.

[15] There were no eye witnesses called by the prosecution in respect of the alleged incident. The basis for finding the offences proved beyond reasonable doubt were the admissions made by Mr. Rinaldi in the Record of Interview with Acting Sergeant Heath. In his reasons for decision the learned stipendiary magistrate makes it clear that he relies on the admissions made in the record of interview to find the offences proved beyond reasonable doubt. The admissibility of the Record of Interview was crucial to the Respondent's case.

[16] I have already referred to the incorrect statements as to the law made by the learned stipendiary magistrate in his explanation of the procedures to Mr. Rinaldi. I accept that this explanation could have confused Mr. Rinaldi and affected the way in which he went about his cross-examination on the voir

dire and the evidence he gave himself on the voir dire. To this extent I consider that Mr. Rinaldi did not have a fair trial.

[17] Mr O'Loughlin on behalf of the appellant submits that this Court should quash the conviction. Ms. Fraser on behalf of the Respondent submits that if I do find there were procedural errors which prevented the appellant from receiving a fair trial then this Court should remit the matter for rehearing before the Court of Summary Jurisdiction.

[18] I have come to the conclusion that the matter should be remitted for rehearing before the Court of Summary Jurisdiction and I will hear from the parties as to the appropriate wording of the order in accordance with s.177 of the *Justices Act.*

[19] Appeal allowed and pursuant to s177 *Justices Act* the matter is remitted for hearing before the Court of Summary Jurisdiction.

[20] Matter listed for mention only at 10.00 am on 24 March 1999 before the Court of Summary Jurisdiction.

[21] The undertaking by the Crown to give notice to the appellant in accordance with the *Bail Act* is noted.

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