Tatam v Svikart [1999] NTCA 147

PARTIES:	MATT ANTHONY TATAM
	and
	GOTTLIEB THOMAS SVIKART
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 12 of 1999
DELIVERED:	10 December 1999
HEARING DATES:	10 December 1999
JUDGMENT OF:	Mildren, Thomas and Bailey JJ

CATCHWORDS:

Appeal - criminal law - identification evidence

Appeal - criminal law - failure of magistrate to give himself appropriate warning of relevant weaknesses which needed to be taken into account

Appeal - criminal law - incorrect application of provisio by appeal judge after finding magistrate in error.

Cases:

1. *Domican v R* (1991-1992) 173 CLR 55, applied.
2. *Fleming v R* (1998) 73 ALJR 1, discussed.

REPRESENTATION:

Counsel:

Appellant:	C McDonald, QC and M Little
Respondent:	R Wild, QC and J Blokland

Solicitors:

Appellant:	Melanie Little
Respondent:	Director of Public Prosecutions

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

Tatam v Svikart [1999] NTCA 147
No. AP 12 of 1999

BETWEEN:

MATT ANTHONY TATAM
Appellant

AND:

GOTTLIEB THOMAS SVIKART
Respondent

CORAM: MILDREN, THOMAS AND BAILEY JJ

REASONS FOR JUDGMENT

(Delivered extempore 10 December 1999)

Mildren J

[1] On 7 September 1998 the appellant was convicted of assault in the Court of Summary Jurisdiction and was sentenced to imprisonment for a period of nine months, commencing on 7 September 1998. It was directed that this sentence be suspended after having served one month.

[2] From that conviction there was an appeal to the Supreme Court. It was heard before Riley J who, ultimately, dismissed the appeal and ordered the appellant to pay the respondent's costs.

[3] The appeal to this Court is an appeal from the findings of Riley J.

[4] The case as presented by the prosecutor in the Court of Summary Jurisdiction, raised the issue as to whether or not the evidence was sufficient

to identify the appellant as the perpetrator of the relevant assault. There was only one witness, whom the Crown called, who was able to positively identify the appellant as the perpetrator.

[5] Consequently, although the witness claimed to have seen the appellant on a number of previous occasions, the major issue in the case was one of identification. The appellant, in fact, gave evidence in which he denied that he was the perpetrator. There was no other evidence led by the Crown which bore on the question of identification. The learned Chief Magistrate preferred the evidence of the Crown against that of the appellant and, accordingly, convicted him.

[6] The appellant's submission in the Court below was that there had been no warning given by the learned Chief Magistrate to himself, and nor had his Worship identified the weaknesses in the Crown case relating to the issue of identification and dealt with them *seriatim*.

[7] That submission was, in effect, upheld by Riley J where his Honour said at paragraph 24 of his judgment:

> Although counsel raised with his Worship some of the relevant authorities, neither counsel nor his Worship specifically sought to identify the weaknesses in the identification evidence including the suggested weaknesses that have now been identified by Mr McDonald. There was no warning in relation to those potential weaknesses. Further, his Worship did not address the possibility of honest mistake. In the light of the authorities discussed above, error occurred.

[8] That part of his Honour's judgment is not in issue. Counsel for the respondent, Mr Wild QC, does not now suggest that his Honour was incorrect in that part of the judgment. Clearly, in the light of the decision of the High Court in *Domican v R* (1991-1992) 173 CLR 555, the decision of Riley J was correct. I should add that it is well established that the principles in *Domican v R (supra)* apply equally to any case where identification is in issue, and the court is constituted by a magistrate or a judge rather than by a judge and jury.

[9] However, Riley J then proceeded to decide whether or not there was any miscarriage of justice. In other words, he applied the proviso. It was submitted that, in doing so, his Honour erred. His Honour's ultimate conclusion was that, having reviewed the evidence and taken into account the suggested weaknesses and dangers, the quality of the identification evidence in the case was such as to exclude any reasonable possibility of mistake. His Honour said that the evidence of identification was clear and strong and came from a witness who was truthful and reliable and that he therefore considered there had been no miscarriage of justice arising out of the matters addressed above.

[10] It is clear from the judgment of the High Court in *Domican v R (supra)*, as well as other authorities to which we were referred, that once error has been established by the failure of the learned trial judge or the magistrate to give himself the appropriate warning and to identify relevant weaknesses that need to be considered and taken into account, that amounts to a miscarriage

of justice and, therefore, there can be no application of the proviso. So much was conceded by Mr Wild QC and we think rightly so. In those circumstances, the order that should have been made by Riley J was that the appeal ought to have been allowed and a new trial ordered.

[11] In this case the appellant has served one month of the term of imprisonment which he had been ordered to serve by the learned Chief Magistrate and the Director of Public Prosecutions intends to take that matter into account in deciding whether or not there should in fact be further prosecution of this appellant. This Court notes those matters. The orders that I think should be made are that the appeal should be allowed; the conviction and sentence should be quashed. There should be an order for a new trial in the Court of Summary Jurisdiction and the respondent should pay the appellant's costs of the appeal in this Court, and of the hearing before Riley J to be taxed, and I would certify for two counsel.

[12] There is one further matter that I think needs to be briefly mentioned and that relates to a matter raised in paragraph 23 of Riley J's reasons for judgment where his Honour says:

> It will not always be necessary for a court to enunciate the fact that it has provided itself with an appropriate warning in relation to matters of identification evidence.

Mr McDonald QC has submitted to us that this is in error and contrary to the decision of the High Court in *Domican v R.* We have also been referred to

recent statements by the High Court in the case of *Fleming v R* (1998) 73 ALJR 1, and in particular at page 9 in paragraph 36.

[13] It is not necessary for this Court, in my opinion, to rule on this matter. For my part, I would not necessarily want to be thought as having agreed with everything that is said in paragraph 23 of Riley J's judgment, but I say no more about that.

Thomas J

[14] I agree that the appeal should be allowed for the reasons stated by Mildren J and I would agree with the orders he proposes.

Bailey J

[15] I also agree with the orders proposed by Mildren J and further agree with the reasons he has given. In particular, I would endorse the observation about paragraph 23 of Riley J's judgment; that I would not wish to be taken as agreeing with everything that is set out in that paragraph.

Mildren J

[16] The orders are that the appeal is allowed; the conviction and sentence are quashed. There is an order for a new trial in the Court of Summary Jurisdiction. The respondent is to pay the appellant's costs of the appeal in this Court and of the appeal before Riley J to be taxed. The Court certifies for two counsel.
