Yunupingu v The Queen [2002] NTCCA 9

PARTIES:	YUNUPINGU, GAVIN MAKUMA
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 11 of 2002 (20013733)
DELIVERED:	18 SEPTEMBER 2002
HEARING DATES:	10 SEPTEMBER 2002
JUDGMENT OF:	ANGEL & RILEY JJ; PRIESTLEY AJ

CATCHWORDS:

CRIMINAL LAW – APPEAL – appeal on conviction – whether autopsy report wrongly admitted into evidence - pathologist who undertook autopsy unable to give evidence at trial due to ill health – autopsy report admitted into evidence as a business record – statement made was in connection with investigation leading to criminal legal proceeding – report inadmissible pursuant to *Evidence (Business Records) Interim Arrangements Act* – purpose of report to gather evidence relevant to charge against appellant – miscarriage of justice – appeal allowed – retrial ordered

EVIDENCE – ADMISSIBILITY – business records – criminal trial - whether statement made in document was admissible as a business record – statement made in connection with investigation leading to criminal legal proceedings – statement not admissible

CRIMINAL LAW – APPEAL – appeal against conviction – whether Crown case was so overwhelming that 'proviso' should be applied – Crown relied heavily on inadmissible evidence – Crown case not so overwhelming that the error was swamped by other evidence

CRIMINAL LAW – RE TRIAL – discretionary test for re trial – Crown evidence at trial sufficiently cogent to support retrial – not unjust that appellant stand trial again – in the interest of justice re trial ordered

Justices Act NT s 152
Criminal Code NT s 154, s 162, s 411
Evidence (Business Records) Interim Arrangements Act NT s 5, s 7, s 16, s 17, s 19
Coroners Act NT s 20

Director of Public Prosecutions (Nauru) v Fowler (1984) 154 CLR 627, followed.

REPRESENTATION:

Counsel:

Appellant:	N Williams SC & J Lawrence
Respondent:	R Wild QC

Solicitors:

Appellant:	Woodcock Solicitors
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ang200208
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yunupingu v The Queen [2002] NTCCA 9
No. CA11 of 2002 (20013733)

BETWEEN:

GAVIN MAKUMA YUNUPINGU
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL & RILEY JJ; PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 18 September 2002)

THE COURT*:*

[1] The appellant pleaded not guilty and stood his trial on a charge that on or about 9 August 2000 at Nhulunbuy he murdered Betsy Murrupu Yunupingu contrary to s 162 *Criminal Code NT*. At the conclusion of the five day trial the jury returned a verdict of not guilty to the charge of murder, not guilty to the alternative charge of manslaughter by provocation, not guilty to the further alternative charge of manslaughter, guilty to the further alternative charge pursuant to s 154 *Criminal Code NT* of dangerous act, guilty to the aggravating circumstance that he thereby caused the death of the deceased and finally not guilty to the aggravating circumstance that at the time of doing the dangerous act he was under the influence of alcohol.

[2] The two principal issues at the trial were the cause of death of the deceased and the mental element of the appellant relating to his intention and foresight at the time of his acts. It was common ground that on the evening of Tuesday 8 August 2000 at Ski Beach Nhulunbuy on the back concrete verandah of the accused's house, the accused, barefoot, walked up quickly and kicked the deceased once to the face whilst she was sitting on the verandah. She was knocked on to her back and lost consciousness.

[3] It was also common ground that at 2.20 am on 9 August 2000 the appellant and others arrived at Nhulunbuy Hospital with the victim, that at 7.45 pm on 9 August 2000, the appellant was charged, arrested and taken into custody, that at 10.55 am on 10 August 2000, the victim died in the Darwin Hospital, and that at 10.45 am on 11 August 2000, a Dr Zillman, commenced an autopsy on the deceased in the presence of a Detective Sergeant of the Berrimah CIB, an officer of Police Forensic and two mortuary technicians.

[4] Dr Zillman signed a written post mortem report on 5 December 2000. His four page post mortem report of 5 December 2000 contained his observations and toxicology and histology results and his opinion as to the cause of death and the manner in which death occurred. Dr Zillman said the cause of death was subarachnoid haemorrhage. He also expressed the view that in the absence of a demonstrably natural cause the most likely cause of the haemorrhage was blunt trauma involving the head and neck region, the same blunt trauma which produced certain fractures of the lower jaw.

[5] At the trial cause of death was in issue. The Crown tendered Dr Zillman's report and called Professor Green who was Acting Forensic Pathologist for the Northern Territory Department of Health. Dr Zillman, through ill health, was unavailable to give evidence. Professor Green gave expert opinion evidence on the cause of death and the mechanism of death based on his own experience, his reading of Dr Zillman's post mortem report and a number of autopsy photographs, two of which were tendered in evidence and comprised Exhibits P3 and P4.

[6] Counsel for the appellant at trial objected to that portion of Dr Zillman's post mortem report containing his opinion as to the cause of death and the manner in which death occurred. The Crown argued Dr Zillman's opinion was admissible pursuant to s 5 of the *Evidence Business Records (Interim Arrangements) Act*.

[7] Following argument the Chief Justice made the following ruling:

> "By reason of the *Evidence Business Records (Interim Arrangements) Act* his (Zillman's) report which was tendered at committal upon which he was cross examined there and which it is proposed would be tendered in these proceedings through Professor Green, is admissible.
>
> I was asked to rule that under the Act the opinion is not admissible, that is what Dr Zillman in his report calls his 'Comments' which include opinion as to cause of death and its relationship to observed

> trauma, injury on the body of the deceased. It was admissible, in my view and I have already ruled under section 5 of that Act, expressions of opinion are expressly made admissible and I have not been pointed to anything in section 7 which places restrictions on admissibility under section 5 in criminal proceedings which can be applied in circumstances of this case."

And further

> "I am not satisfied any ground has been made out to exclude any part of Dr Zillman's report or anything that's known Professor Green will be saying about it."

[8] The first question on the appeal is whether Dr Zillman's opinion was admissible pursuant to the provisions of the *Evidence Business Records (Interim Arrangements) Act* over the objection of the appellant's counsel. Section 7(3) of the Act provides:

> "A statement made in connection with a criminal legal proceeding or with an investigation relating to or leading to a criminal legal proceeding is not admissible under s 5".

No–one in the appeal was able to explain how it came about that no–one at the trial appears to have referred to s 7(3).

[9] In our view Dr Zillman's post mortem report and most particularly his opinion as to the cause and mechanism of death contained therein fell squarely within the provisions of s 7(3) of the Act and is not admissible

under s 5. It is sufficient to repeat that the autopsy took place following the charging and arrest of the appellant and in the presence of two Police officers. A purpose, if not the sole purpose, of the autopsy report was to gather evidence relevant to the charge against the appellant.

[10] We do not consider s 20 *Coroners Act* is any answer to this conclusion.

[11] Dr Zillman gave evidence at the committal hearing and his post mortem report became an exhibit. The depositions of Dr Zillman were never tendered at the appellant's trial pursuant to s 152 *Justices Act*. No ground other than that based on s 5 *Evidence Business Records (Interim Arrangements) Act* was pressed at trial to show Dr Zillman's opinions were admissible over the objection of counsel for the appellant.

[12] It was argued further that if admissible, there had in any event been a miscarriage of the trial judge's discretion in admitting Dr Zillman's opinion into evidence, and reference was made to ss 16, 17 and 19 of the *Evidence Business Records (Interim Arrangements) Act* as prohibiting receipt into evidence of Dr Zillman's post mortem report opinion as to the cause and mechanism of the deceased's death. It is unnecessary to consider those submissions further.

[13] The question then arises whether the appeal should nevertheless be dismissed because of the proviso, see s 411(2) *Criminal Code NT*.

[14] The respondent submitted that Dr Zillman's opinion was swamped or overtaken by that of Professor Green and that no actual miscarriage of justice had been demonstrated. We reject this argument. The submissions of the Crown before the jury demonstrate a heavy reliance on the opinion of Dr Zillman and in particular, of the combined opinions of Dr Zillman and Professor Green. In addition to the Crown prosecutor relying heavily upon the opinion of Dr Zillman in his address to the jury, the trial judge particularly emphasized the opinion of Dr Zillman, saying, amongst other things:

> "… it is a shame that it may be to some disadvantage to his client that Doctor Zillman was not here to be cross–examined on his report but it is admissible, it is before you, it is a matter of law you can have regard to it. That is why, rather than just put that in, the Crown called Professor Green so that it would be an opportunity for some expert evidence to be given to you both about the quality of Doctor Zillman's report and standing on its own two feet from the professor."

[15] In these circumstances it can not be said there was no miscarriage of justice and we think the appeal should be allowed and the conviction for the aggravating circumstance of causing death should be set aside together with the sentence and a retrial on that issue ordered. As the High Court said in *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630:

> "The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial to be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently

> cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case. In the present case, the admissible evidence given at the trial satisfies this test. Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused."

The admissible evidence given at the trial in the present case was sufficiently cogent to justify a conviction for causing death by a dangerous act. Here there are no circumstances which render it unjust that the appellant stand trial again on the issue of whether he caused the death of the deceased. We think it is in the interests of justice that a new trial on that issue take place. The aggravating circumstance of causing death doubles the maximum penalty for a breach of s 154 *Criminal Code NT* from five years imprisonment to ten years imprisonment. It was simply fortuitous that Dr Zillman was unable to give evidence at the trial because of ill health. This is not a case of giving the prosecution an opportunity to supplement a defective case as was argued, but rather it being in the public interest as well as the interest of the accused that Dr Zillman who carried out the post mortem examination on the body of the deceased be able to give evidence.

[16] The appeal is allowed, the conviction under s 154(1) *Criminal Code NT* (dangerous act) is affirmed; the conviction under s 154(3) and sentence of imprisonment therefor are set aside and a retrial ordered in respect of the issue of causing death.