Stocker v Perry [2002] NTSC 55

PARTIES:	STOCKER, Stuart v PERRY, Russell Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 27 of 2001
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JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Solicitors:

Applicant:	Self represented
Respondent:	Office of the Director of Public Prosecutions

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Mar0226

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Stocker v Perry [2002] NTSC 55
No. JA 27 of 2001

BETWEEN:

STUART STOCKER
Appellant

AND:

RUSSELL LAURENCE PERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 26 September 2002)

[1] Appeal against conviction and sentence.

[2] On 3 April 2001 the appellant was found guilty after trial upon two charges related to conduct on 10 October 1999. The first was that on that date he did steal a black NEC brand television set 805745-A valued at $500 the property of the Mirambeena Tourist Resort, contrary to s 210 of the Criminal Code 1983 (NT) and second, that on the same day he, by deception, obtained $100 cash for himself, contrary to s 227 of the Criminal Code.

[3] The trial was conducted over a number of days, the appellant being represented by counsel throughout and he gave evidence.

[4] The prosecution evidence fell into three classes. Eye witnesses, identification of the television set and investigating police.

[5] The eye witnesses were three teenage girls (sometimes referred to as "children"), Coco Hughes, Amanda Henderson and Amanda Laughton, and a mini bus driver, Darren Papalii. The girls and three young men, including the appellant, were in a room at the Mirambeena Tourist Resort on the night of 9 October 1998. There was a television set in the motel room when they arrived. The girls gave evidence that they heard the appellant and one or other, or both of the other men, talking about stealing the television set. Ms Henderson said that the next morning she saw the appellant unplug the television set and place cushions covered with a towel where it had been and that she had then left. Ms Laughton said that she had gone for a swim and when she returned she saw the cleaning lady there and discovered that the TV was gone. Ms Hughes said she saw the appellant take the TV from the bench in the room, place it on a luggage trolley he had obtained, surround it with other belongings and cover it all with a blue tarpaulin. The other two men had apparently departed earlier.

[6] Mr Papalii said that at 10.38 the appellant was picked up by him at the motel. The appellant had a TV set covered in a sheet or tarpaulin on the motel trolley and there were other goods packed around it. The goods were transferred into the mini bus. The appellant told him he wished to sell the TV and after unsuccessful attempts to dispose of it at second hand dealers, the mini bus driver bought it for $150 cash. The police later seized the TV

from Mr Papalii. Sometime later he saw the appellant working with the same employer and demanded that he return the $150. That was done, the appellant maintaining, however, that the television set was his.

[7] A cleaner, Ms McAsey went to the motel room at 10am, the normal check out time, but was asked by an unidentified male to come back a little later. She kept an eye on the room as she wanted to get on with her job and clean it as soon as it was vacated. She saw people come and go from it. At a time she put at about 10.20am, but certainly prior to her morning tea break at 11am, she noticed a man going down in the lift and found the room vacated. The TV usually in the room was not there, the place where it was kept being disguised with pillows and a towel. She reported it to her supervisor.

[8] The supervisor, Sarah Henderson said she was advised about the missing TV by Ms McAsey at 11.45am.

[9] After a hurried, but unsuccessful, search for a man with a TV, Sarah Henderson returned to the reception area. Two girls, who were identified to her by Ms McAsey as having been in the room, were there and Ms Henderson spoke to them. They remained until the police arrived and questioned them. In her cross-examination Sarah Henderson confirmed what she had told police that:

> "The girl who worked in the tour shop at the time had been watching the goings on and came to me and said she may be able to help me. She said the children had pushed a luggage trolley out, with a computer box on it and that the teenage girl with the baby was her niece, named Coco. And that she would give us her address if it

> would help, although she was very embarrassed about it. She gave us the niece's number and address. She also told us she found the trolley out at the front gate."

[10] There was no record held by the motel from which the TV could be identified by make or serial number. A check was made of other rooms and a list compiled after the event showing those details. The TV recovered by police from the mini bus driver was of the same make as the bulk of the other TVs and its serial number fell within the range of serial numbers for those TVs. However, there was no direct connection between it and the others.

[11] The police took a long time to investigate the matter and take witness statements. Most of them were prepared after the appellant had been charged. Alterations to statements were explained and confirmed by the witness concerned. The signature on one of the statements was not that of the witness by whom it was given to police and it was unexplained. The witness, however, gave evidence in accordance with what was recorded in the statement which she said had been conveyed to police by telephone. On these and other grounds the appellant suggested that the police conduct amounted to abuse of process and that they were persecuting him.

[12] The appellant exercised his right to silence when questioned by police. However, he gave evidence at the trial. He said the TV was his, he had bought it from a man in Darwin who could not be found. The appellant went to Adelaide to undertake university studies and his father came to Darwin

from Cairns, packed up the appellant's belongings including the TV and took them to Adelaide. The appellant said his father was too ill to travel to Darwin to give evidence. The appellant said that when he returned to Darwin by car he packed all his belongings including the TV into it. The TV was wrapped in a tarpaulin behind the driver's seat with other belongings packed around it and on top of it. He was travelling with another man, Luke Groves, and picked up Ms Laughton and another man, Clinton Bilston, near Port Augusta. Those two men were with the appellant in the motel on the evening of 9 October. They left the next morning. Neither was called to give evidence.

[13] The appellant told the learned Magistrate that he had stayed in various places in Darwin prior to 9 October, in a motel room, at Amanda Laughton's mother's house and Coco Hughes' mother's house. He said that he had the TV at all times wrapped in the tarpaulin and took it with him to the Mirambeena Tourist Resort. He took it into the room and placed it on the floor for a short while and then into a cupboard. When he left the motel room he took the TV with him on a mobile trolley, wrapped in the tarpaulin with his other belongings packed around it. He had sold his car shortly before for $400, was running out of money, wanted to go to Cairns and decided to sell the TV. The mini bus driver bought it for $150, but repaid it when he was confronted by Mr Papalii in a threatening manner. He continued to maintain the TV was his. He denied discussing stealing the TV from the motel, saying that he may have been talking about selling his own.

[14] In the course of his evidence the appellant raised matters that had not been put to prosecution witnesses in cross-examination. His Worship allowed the prosecutor to recall Ms Amanda Henderson and Ms Laughton as to whether they had seen a bundle wrapped in the tarpaulin and they denied that they had.

[15] In cross-examination, Ms Laughton made an unsolicited assertion that she had told investigating police that the appellant had talked about taking a TV from another motel where they had stayed shortly after arriving in Darwin from Adelaide.

[16] Cross-examined about his failure to follow up the information conveyed to police by Sarah Henderson, Detective Senior Constable Hodge said that he had produced the statements he had obtained, and he would not neglect to get a statement from anyone if he thought he was going to take it any further. Certainly, he would not fail to get such a statement so as to point the finger at any one person. He confirmed that when he spoke to the three girls he did not put to them Ms Henderson's report to the effect that they were involved in wheeling the television out, but that he had just let the witnesses tell their story. He denied having any discussion with them to the effect that they had better help him in the case against the appellant or else they would be in trouble themselves. It was suggested to him that he had information that he could have pursued which pointed to the involvement of one or more of the children in the offence. In reply, he noted that the information conveyed by Ms Sarah Henderson was hearsay, that he had

interviewed the children the same way he would interview anybody else and got them to tell their story. There was no pressure put on anyone at all to get them to tell a story that was not true. He said he was sure that he had made some attempt to follow up with the person who conveyed the information to Ms Henderson. Ms Henderson's statement was dated 22 April 2000. Although apparently not canvassed in detail before his Worship, I note that the evidence of Ms Hughes was that she had left the motel with a four or five year old girl whom she was looking after and went elsewhere in Darwin. The other girls had also left the room before the appellant departed and were spoken to by the hotel staff and police in the reception area.

[17] One of the many suggestions of impropriety on the part of police put by the appellant went to an incident involving Ms Hughes and a man called Harley Leach at a bar when the appellant was present. She denied that she spoke to Leach on that occasion.

[18] In cross-examination the appellant said that Leach had told him that Hughes had told Leach that Mr Hodge had made her change her story three times. That conversation was said to have taken place some two months prior to the date upon which the appellant gave his evidence, 22 March 2001. The cross-examiner obviously knew that Mr Leach was then in custody in the courthouse. The appellant was asked whether Mr Leach was going to be called to give evidence and the appellant responded that he would rely upon the advice of his counsel. He denied that he knew that Mr Leach was then in the cells. During an adjournment counsel and the solicitor for the appellant

went to see Mr Leach in the cells, and after their return the solicitor gave evidence as to what passed between Mr Leach and counsel. Obviously what Mr Leach told counsel was hearsay and inadmissible through the solicitor and it could not be relied upon either by the prosecution or the defence as representing the truth of what was said. However, the solicitor gave evidence as to the reason advanced by Mr Leach as to why he would not give evidence in the defence case.

[19] His Worship adjourned to consider the matter and after a few days delivered his reasons. He recounted the charges that had been made and the case that the defendant had put forward on his own account.

[20] He dealt with the numbers on the television sets disclosed in the list saying that there was no inescapable coincidence to be derived from that information. It was open to consider that Jai had bought a TV from the same batch which had gone to Mirambeena, he noted there were no antecedent records of what televisions had been received by the motel. His Worship concluded his review of that matter by saying it was possible that Jai, if he exists, bought the TV, "which might be remarkable, but, "it's not so remarkable as to be unbelievable". His Worship noted there were people using the room after the defendant had left at about 10.38am up until the stage when staff discovered that the TV set was missing. He referred to the evidence of the female witnesses who had denied seeing any television belonging to the defendant in the room, but instead said that they saw him

take the hotel set. His Worship asked himself rhetorically why they would say such a thing.

[21] Referring to the trip from Port Augusta to Darwin, he noted the evidence of the passenger who said that she did not see any TV in the car, although it was possible that a TV was wrapped up and would not have been seen by her. His Worship's view was that a TV wrapped up as the defendant says it was would probably still look much like a TV wrapped up, but he accepted that that may not be necessarily so.

[22] His Worship does not seem to have drawn any adverse inference against the appellant for his having taken responsibility for the booking of the room in a false name. His Worship cautioned himself about the evidence of Coco Hughes as to whether she remained at the motel overnight, observing that there may have been mistakes. His Worship reminded himself that he must be cautious about the girls' evidence, firstly because they were, as his Worship described them, children at the time of the offending and because on their evidence they knew that the appellant intended to take the television set and therefore they could be regarded as accomplices. His Worship therefore reminded himself of what he called "their evidence needs to be corroborated".

[23] Dealing with the time difference between the report by the housemaid and the noting of the time by the manager of that report, his Worship chose to accept the evidence of those who inspected the room as to when it had been

finally vacated. He accepted the evidence of Mr Papalii that he picked up the appellant at 10.38 with a TV which he sold to Mr Papalii. His Worship observed that on the appellant's case those who remained behind must have removed the hotel TV if the appellant had his own. His Worship noted the evidence that Mr Papalii said that Mr Stocker was leaving Darwin that afternoon to fly to Cairns, and that that could account for his selling the TV cheaply and noted the return of the money by the appellant to Mr Papalii when he was approached by him about it.

[24] His Worship referred to part of the evidence in "rebuttal" from Amanda Laughton that on the first night they had spent in Darwin the appellant had proposed to steal a television set from another hotel, as to which his Worship said, "One might think that the evidence ... was an absolute clincher", but observed that it must be received with a great deal of caution and went on to say that he could see no reason why that girl should not have been telling the truth, but even without it:

> "the evidence of the children marries up so well with the evidence of the hotel staff and the mini cab driver that I find myself able to, by and large, believe these children. It seems to me that we have a good, clear chain of evidence ... back from what the policeman seized and put in his exhibit book right back to the television taken from its mountings in the hotel and put on the trolley by or under the general supervision of Mr Stocker."

[25] With reference to the numbering of the television sets and its relationship to that sold to Mr Papalii, his Worship said that, "It supports that thesis. But only supports it". Finally, his Worship expressed himself as having no

doubt about it, being satisfied that the appellant did steal the hotel's television and that not long after he sold it by making it out to be his own.

[26] Doing the best I can with them, they tended to vary from time to time, it is alleged:

1. that his Worship erred in:

   - admitting into evidence the list of the televisions on the question of ownership;
   - in allowing rebuttal evidence;
   - finding evidence to corroborate the evidence of the persons who could be regarded as accomplices.

2. His Worship was biased.

3. The conviction was unsafe and unsatisfactory, which was developed along the following lines:

   - reference to the evidence designed to show that the evidence of all the witnesses was open to doubt on grounds of credibility and inconsistencies;
   - a substantial number of particulars were provided in relation to what was urged as the unsatisfactory nature of the evidence;
   - abuse of process by investigating police.

[27] As to the evidence about the identification of the television set, the appellant says that the admission of it was more prejudicial than probative and thus ought not to have been admitted. No objection was taken by counsel at trial on those grounds. Objection was raised on the grounds of relevance, but it seems to me in his ruling admitting the evidence, his Worship did so, reserving his position as to the weight that should be attached to the document, observing, in the mixed metaphor, "if the chain isn't complete at the end of it, or if the bundle of strings is a very weak bundle of strings, then you're not going to have much help from it."

[28] Whatever might be attributed to the TV list, if the TV which the appellant removed from the motel room was not his property, then strict proof of ownership of the TV is not necessary. The word "steals" is defined in s 209 of the Criminal Code as, inter alia, "unlawfully appropriates property of another with the intention of depriving that person of it ... ". The word "appropriates" means "assumes the right of the owner of the property ...". By definition in s 3, "owner" includes "... any person having possession or control of ... the property in question". Thus a person who unlawfully assumes the rights of the possessor of the property with the intention of depriving that person of it, steals it. There is ample evidence that there was a TV in the motel room on and prior to 10 October. There is no suggestion that if the TV removed was not the appellant's property, it was not in the possession of the Mirambeena Tourist Resort prior to it being removed from the room.

[29] As to allowing "rebuttal" evidence, this was permitted by his Worship after being referred to the rule in *Browne v Dunn*. The prosecutor referred to the appellant's evidence in relation to his having a TV wrapped in a tarpaulin at Amanda Henderson's house, after the car had been sold, and that there was a TV wrapped in a tarpaulin in the motel room. In her earlier evidence Amanda Henderson had said that she did not remember a big bundle or a box wrapped up in a blue tarpaulin in the car on the way from Port Augusta, but she did remember a tarpaulin because the boys had slept on it. She conceded that it could have been wrapped around something at some stage. As to the motel room, she had said she had not seen any of the gear that had previously been in the car and she said that she could not recall, but thinks there were cupboards where things could have been put.

[30] When recalled, Ms Henderson could not remember the appellant having come to her place just after he had sold the car with his luggage, but did remember him going to a friend's place and having all his stuff there. He had arrived in a mini bus and she did not see him take his belongings out of it, but did see it on the ground. She said she could not remember seeing anything the size of the TV, an exhibit on the floor of the court, wrapped in tarpaulin on that occasion. When cross-examined she said it was probably after the night at the Mirambeena that she had seen that property.

[31] Amanda Laughton, when recalled, said she had not seen the television in the back seat of the car, but there were bags there, nor had she seen one at the Mirambeena motel room. She did not recall any occasion where everything

that the appellant had was out of the car in somebody's yard. In cross-examination, however, she said that on the first night they were in Darwin the appellant pulled all the stuff out of the car, refolded it and put it back in neatly. She said she was standing there when he was doing that. She denied that there was a big blue bundle taken out of the car. She had seen a tarpaulin which had been in the boot and the boys had pulled it out and slept on it when they were passing through Alice Springs.

[32] Mr Papalii was recalled in relation to evidence given by the appellant that he had been shown the TV immediately outside the motel reception area in view of a security camera. Mr Papalii's evidence in examination-in-chief and cross-examination was confusing.

[33] The recall of those witnesses was sought to be justified on the basis of a breach of the rule in *Browne v Dunn*. Counsel for the appellant resisted the application on that basis, but indicated, in the course of argument, that he was not strenuously opposed to the calling of any of them since there were other matters which he had now thought of which he would not mind asking them.

[34] I have already noted that the accused exercised his right to silence when questioned by police, and there is nothing to suggest that the prosecutor was aware that he proposed to give evidence and certainly not of the nature of that evidence. That is, that the TV was his, that it had been with him for some time, that he kept it wrapped up in a tarpaulin, both in the car and after

he had sold the car and because of that nobody would have recognised it. In my view the course adopted by the appellant at trial could not reasonably have been foreseen by the prosecutor. The evidence which he sought to call was to rebut matters raised for the first time by the defence (*R v Chin* (1985) 157 CLR 671). The prosecution case was that the television which was sold by the appellant to Mr Papalii and seized by police was stolen from the motel room. The defence case was that the TV belonged to the appellant. In my view it was within the discretion of the learned Magistrate to permit the two girls to be recalled on the question of their knowledge of the possession of the TV by the appellant prior to the night at the motel. As it turned out their evidence on that point was of no assistance one way or the other. It was defendant's case that the TV which he said he owned had always been wrapped up in a tarpaulin and surrounded by other goods such that an observer would not recognise that there was a TV there.

[35] Although his Worship warned himself to take caution in accepting the evidence of the girls because they might be regarded as accomplices, it seems to me it was not strictly necessary for him to do so. But, he can not be criticised for taking that precautionary step. There was no evidence which, in my view, would cast any of the girls into a position of aiding or abetting the taking of the television set from the room, nor of counselling or procuring the appellant to do so. Similarly, although not required by law to do so, I consider that his Worship acted correctly when he cautioned himself about the evidence of the children. There was evidence of material facts

which implicated the appellant and tended to confirm the appellant's guilt of the offence charged. That evidence comprised that of the motel staff about a television set being in the room and of its being found missing, together with the evidence of the mini bus driver of the appellant's possession of it.

[36] The next ground of appeal alleges that his Worship was biased, but no arguments were addressed to it and I take it to have been abandoned.

[37] As to the unsafe and unsatisfactory ground, I note that his Worship accepted the evidence of the prosecution witnesses in preference to that of the accused. That finding was undoubtedly based upon his Worship's view of the credibility of the witnesses. He took into account the age of the children at the time of the alleged stealing and the period of time elapsed from then until trial. He regarded the evidence of Coco Hughes as being possibly mistaken on the question of whether she stayed overnight or not. I also note, in respect of the evidence of that witness, that she was the only one who said that all six people gathered together at MacDonalds during the course of the afternoon of 9 October and went together from there to the motel, the appellant and the other boys carrying all the baggage. But in other respects, as to the discussions in the motel room and what the appellant was seen to do with the TV, what she says is broadly consistent with the other two girls.

[38] I have considered the particulars provided by the appellant both in writing and as expanded during the course of address, the fresh matters raised in the

course of argument and have read the whole of the transcript. I note the qualifications placed by his Worship as to the value of some of the evidence and that in the end he found that the evidence of the children married up well with the evidence of the hotel staff and mini cab driver and he was able to "by and large, believe these children".

[39] As to the alleged abuse of process by the investigating police, I have noted allegations made in the course of trial going to misconduct of the police who were investigating the matter. Attention was directed to alterations and additions to statements, but in each case evidence was given in accordance with the amended statement. Explanations were given going to those matters. Again, the witness whose statement had not been signed by her, but signed in her name by another person who has not been identified, also gave evidence in accordance with the statement. I do not consider it is for this Court to make findings concerning any of the allegations of misconduct. They were before his Worship as part of the defence case by way of cross-examination of witnesses including police. It is the evidence of the witnesses going to the events relating to the charges which is to be considered. The reliability of that evidence was tested at trial, amongst other things, in the light of the misconduct alleged. His Worship was not induced to reject any of the evidence upon that ground. The appellant has pursued the allegations regarding the false signature, in particular, with the Ombudsman and, I understand, elsewhere. He unsuccessfully sought to have the results of those endeavours brought into evidence on the hearing of the

appeal. He went so far as to issue subpoenas directed to the Ombudsman, Director of Public Prosecutions and others to produce documents relating to his complaints in regard to those matters. He was unable to comply with s 176A of the Justices Act 1928 (NT). It is doubtful whether evidence of the outcome of enquiries by third parties would be admissible at the trial or on appeal.

[40] The appellant has also submitted that he did not have a fair trial because of the delay between the date of the alleged offence, 10 October 1998 and trial March 2001. I have not been provided with complete information as to why it took that long. I do know that the police were still gathering statements in late 2001 and that a trial before a different Magistrate had not been completed. The appellant had disclosed that he had been cross-examining Coco Hughes on that occasion. In any event, no application was made to stay the proceedings. *Jago v The District Court of New South Wales* (1989) 168 CLR 23 demonstrates that there is no common law right to a speedy trial of criminal charge separate from a right to a fair trial and there is no general principle that even unreasonable delay in bringing a matter to trial itself means that there can be no trial or necessarily vitiates a conviction on a trial that has followed such a delay. No particular complaint was made to his Worship regarding any unfairness to the appellant on this account.

[41] The appellant referred to s 26F of the Evidence Act 1939 (NT) relating to the weight to be given to statements rendered admissible as evidence under that Act. It had no application to the evidence before his Worship.

[42] I am not satisfied that the unsolicited evidence given by Ms Laughton as to the appellant saying he intended to steal a TV from the first motel they stayed at in Darwin bore any weight in the outcome of his Worship's consideration. It was not likely to have been admissible. His Worship concentrated on the evidence relating to the events at the Mirambeena Tourist Resort.

[43] The learned Magistrate had ample evidence before him which warranted the findings he made. In my opinion, it was open to his Worship to be satisfied beyond reasonable doubt that the accused was guilty. In doing so, I bear in mind that his Worship was entrusted with the primary responsibility of determining guilt or innocence and that he has had the benefit of having seen and heard the witnesses. In this case I consider that to have been a significant advantage. However, as already indicated I have made my own assessment of the evidence for the purpose of determining whether the learned Magistrate must have entertained a reasonable doubt as to guilt (*M v The Queen* (1994) 181 CLR 487).

[44] The grounds of appeal also raised the question of the sentence, it being said to have been manifestly excessive. No submissions were advanced in that regard.

[45] In having found the stealing charge proved it was inevitable that his Worship should find that the second charge also proved, based upon the evidence of Mr Papalii.

[46] The appeal is dismissed.

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